No. A22-____

IN THE SUPREME COURT OF THE UNITED STATES

This is a capital case
Execution scheduled November 29, 2022 at 6 p.m. CT

KEVIN JOHNSON,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

Appendix In Support of Application for Stay of Execution Pending Appeal in the Supreme Court of Missouri Directed to the Honorable Brett M. Kavanaugh as Circuit Justice for the Eighth Circuit

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APPENDIX CONTENTS

SUPREME COURT OF MISSOURI

en banc

STATE OF MISSOURI, Respondent, v. KEVIN JOHNSON, Appellant.	)	No. SC89168
and STATE OF MISSOURI, Plaintiff/Appellant, v. KEVIN JOHNSON, Defendant/Appellant.	)	No. SC99873

MOTIONS FOR STAY OF EXECUTION

PER CURIAM

Kevin Johnson was found guilty of first-degree murder and sentenced to death. His execution is scheduled for November 29, 2022. This matter comes before the Court on two motions – one by Johnson and one by the Special Prosecutor – to stay Johnson's execution. Neither Johnson nor the Special Prosecutor claims Johnson is actually

innocent. Instead, Johnson relies on the claims of "constitutional error" asserted by the Special Prosecutor in his motion to vacate Johnson's conviction under section 547.031.[1] This Court has heard and rejected those claims before, however, and nothing asserted by the Special Prosecutor materially alters those claims or establishes any likelihood he would succeed on them if that case were to be remanded for a hearing as he claims it should be. Accordingly, both motions to stay Johnson's execution are overruled.

Background

I. Facts of Underlying Crime and Procedural History

A St. Louis County jury unanimously found Johnson guilty of first-degree murder and recommended the death penalty for the shooting of Kirkwood Police Sergeant William McEntee. On direct appeal this Court summarized the factual and procedural background as follows:

> [Johnson] had an outstanding warrant for a probation violation resulting from a misdemeanor assault. Around 5:20 in the evening of July 5, 2005, Kirkwood police, with knowledge of the warrant, began to investigate a vehicle believed to be [Johnson]'s at his residence in the Meacham Park neighborhood. The investigation was interrupted at 5:30 when [Johnson]'s younger brother had a seizure in the house next door to [Johnson]'s residence. The family sought help from the police, who provided assistance until an ambulance and additional police, including Sgt. McEntee, arrived. [Johnson]'s brother was taken to the hospital, where he passed away from a preexisting heart condition. [Johnson] was next door during this time, and the police suspended their search for [Johnson] and never saw [Johnson].
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> After the police left, [Johnson] retrieved his black, nine millimeter handgun from his vehicle. When talking with friends that evening, [Johnson] explained his brother's death as, "that's f____ up, man. They wasn't trying to help him, that he was too busy looking for me." Around 7:30, two hours after [Johnson]'s brother had the seizure, Sgt. McEntee responded to a report of

[1] All statutory references are to RSMo Supp. 2021 unless otherwise noted.

fireworks in the neighborhood and [Johnson] was nearby. As Sgt. McEntee spoke with three juveniles, [Johnson] approached Sgt. McEntee's patrol car and squatted down to see into the passenger window. [Johnson] said "you killed my brother" before firing his black handgun approximately five times. Sgt. McEntee was shot in the head and upper torso, and one of the juveniles was hit in the leg. [Johnson] reached into the patrol car and took Sgt. McEntee's silver .40 caliber handgun.

[Johnson] proceeded to walk down the street with the black and silver handguns. He then saw his mother and her boyfriend. [Johnson] told his mother, "that m____ f_____ let my brother die, he needs to see what it feel[s] like to die." His mother replied, "that's not true." [Johnson] left his mother and continued to walk away.

Meanwhile, Sgt. McEntee's patrol car rolled down the street, hit a parked car, and then hit a tree before coming to rest. Sgt. McEntee, alive but bleeding and unable to talk, got out of the patrol car and sat on his knees. [Johnson] reappeared, shot Sgt. McEntee approximately two times in the head, and Sgt. McEntee collapsed onto the ground. [Johnson] also went through Sgt. McEntee's pockets.

Sgt. McEntee was shot a total of seven times in the head and upper torso. Six of the wounds were serious but did not render Sgt. McEntee unconscious or immediately incapacitated. One wound was a lethal injury that caused Sgt. McEntee's death. All seven wounds were from a nine millimeter handgun.

[Johnson] left the scene cursing and drove to his father's house. [Johnson] spent three days at a family member's apartment before arrangements were made for [Johnson] to surrender to a family member who was a police officer.

[Johnson] was indicted on one count of first-degree murder, one count of first-degree robbery, one count of first-degree assault, and three counts of armed criminal action. The murder count was severed from the other counts. [Johnson]'s first trial ended with a hung jury in the guilt phase. In this trial, the jury deliberated for four hours before finding [Johnson] guilty of first-degree murder. In the penalty phase, the jury spent four hours deliberating and found the following aggravating factors present: (1) "the defendant by his act of murdering Sgt. William McEntee knowingly created a great risk of death to more than one person by means of a weapon that would normally be hazardous to the lives of more than one person;" (2) "the murder of Sgt. William McEntee 'DID' involve depravity of mind, as a result thereof, the

> murder was outrageously and wantonly vile, horrible, and inhuman;" and (3) "the murder of Sgt. William McEntee was committed against a peace officer while engaged in the performance of his official duty."

State v. Johnson, 284 S.W.3d 561, 567-68 (Mo. banc 2009).

This Court affirmed Johnson's conviction on direct appeal,[2] *id.* at 589, and the United States Supreme Court denied certiorari. *Johnson v. Missouri*, 558 U.S. 1054 (2009). Johnson filed a motion in state court for postconviction relief under Rule 29.15 and, after a hearing, this motion was overruled. *Johnson v. State*, No. 09SL-CC04252 (Jan. 12, 2012). This Court affirmed that denial,[3] *Johnson v. State*, 406 S.W.3d 892, 909 (Mo. banc 2013), and the Supreme Court denied certiorari. *Johnson v. Missouri*, 571 U.S. 1240 (2014). Johnson thereafter sought relief in this Court on multiple occasions. Each time, this Court rejected his claims and denied relief. *State v. Johnson*, No. SC89168 (Nov. 7, 2022) (overruling the motion for stay of execution); *State v. Johnson*, No. SC89168 (Aug. 30, 2022) (overruling the motion to recall the mandate and, alternatively, petition for writ of habeas corpus); *State v. Johnson*, No. SC89168 (Oct. 26, 2021) (overruling the motion for an order directing transportation of appellant for brain imaging and, alternatively, petition for writ of habeas corpus); *State v. Johnson*, No. SC89168 (Feb. 28, 2017) (overruling the motion to recall the mandate and, in the

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[2] Johnson asserted 11 points on direct appeal, all of which were denied. Relevant here, Johnson argued the circuit court erred in overruling a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), by accepting the state's race-neutral explanation regarding its strike of Juror Debra Cottman. *Johnson*, 284 S.W.3d at 570-71. Johnson also argued his sentence was disproportionate and that his sentence should be set aside due to the prosecutor's discretion in seeking the death penalty. *Id.* at 577

[3] Johnson made another 11 claims in his state post-conviction relief proceedings, all of which were denied. *Johnson*, 406 S.W.3d at 909. Relevant here, he argued counsel ineffectively argued the *Batson* challenge regarding Juror Cottman. *Id.* at 906-07.

alternative, petition for writ of habeas corpus);[4] *State v. Johnson*, No. SC89168 (Oct. 27, 2015) (overruling the motion to recall the mandate and, in the alternative, petition for writ of habeas corpus).

Johnson also sought habeas relief in the federal courts, which rejected each of his claims and denied relief.[5] *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).

After Johnson exhausted all legal avenues for relief, including direct appeal and various postconviction relief proceedings in state and federal courts, this Court sustained the state's motion and set Johnson's execution date for November 29, 2022.

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[4] Johnson raised eight claims or groups of claims in this petition, all of which were rejected. Relevant here, he argued Prosecutor Robert McCulloch engaged in selective prosecution in violation of the Eighth and Fourteenth Amendment, citing *McCleskey v. Kemp*, 481 U.S. 279 (1987). *See* Motion to Recall the Mandate, and Alternatively, Petition for Writ of Habeas Corpus at 6, *State v. Johnson*, No. SC89168 (Oct. 28, 2016). ("Just as the white Sgt. William McEntee was killed by an African American defendant who was sentenced to death, McCulloch's father was a police officer who was killed in the line of duty by an African-American man who was sentenced to death."); *Id.* at 7 (citing studies showing "troubling racial and geographic disparities in Missouri's death penalty" that concluded "that African-Americans who killed whites were '33% more likely than whites [who killed] whites to be charged/convicted of [a] capital murder for the same type of homicide" and "blacks accused of killing white victims five times more likely to be charged with capital murder than blacks accused of killing black victims"); *see also Id.* at 69-80 (arguing Johnson was deprived of an unbiased prosecutor because of McCulloch's racial bias and, in particular, bias against black defendants accused of killing white police officers); *Id.* at 80-89 (arguing at length that statistical evidence showing a disparity in McCulloch's charging, jury selection, and convictions in death penalty and death penalty eligible cases establishes constitutional error under *McCleskey* and its progeny). This Court denied each of these arguments and all the others asserted in this petition.

[5] In the federal courts, Johnson again pursued his claim that McCulloch's decision to strike venireperson Cottman was racially motivated in violation of *Batson*. The federal courts rejected all of Johnson's claims relating to the decision to strike this venireperson.

II. Special Prosecutor's Motion to Vacate Pursuant to § 547.031

In 2021, the legislature passed section 547.031, which empowers a prosecuting or circuit attorney in the jurisdiction of conviction to file a motion to vacate or set aside the judgment at any time upon information that the convicted person may be actually innocent or there was constitutional error at the original trial that undermines confidence in the judgment. Section 547.031 provides in its entirety:

> 1. A prosecuting or circuit attorney, in the jurisdiction in which a person was convicted of an offense, may file a motion to vacate or set aside the judgment at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted. The circuit court in which the person was convicted shall have jurisdiction and authority to consider, hear, and decide the motion.
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> 2. Upon the filing of a motion to vacate or set aside the judgment, the court shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented. The attorney general shall be given notice of hearing of such a motion by the circuit clerk and shall be permitted to appear, question witnesses, and make arguments in a hearing of such a motion.
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> 3. The court shall grant the motion of the prosecuting or circuit attorney to vacate or set aside the judgment where the court finds that there is ***clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in the judgment.*** In considering the motion, the court shall take into consideration the evidence presented at the original trial or plea; the evidence presented at any direct appeal or post-conviction proceedings, including state or federal habeas actions; and the information and evidence presented at the hearing on the motion.
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> 4. The prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal of the denial or disposal of such a motion. The attorney general may file a motion to intervene and, in addition to such motion, file a motion to dismiss the motion to vacate or to set aside the judgment in any appeal filed by the prosecuting or circuit attorney.

(Emphasis added).

On December 1, 2021, Johnson filed an application with the Conviction and Incident Review Unit ("CIRU") in the office of the St. Louis County Prosecuting Attorney, asking that it review his allegations of racial discrimination by the former prosecuting attorney, Robert McCulloch. Johnson supplemented his application in April 21, 2022, providing a statistical study he asserts proves his claims.

On May 11, 2022, the attorney general moved this Court to set an execution date for Johnson noting he had exhausted his direct appeals and postconviction relief in both federal and state courts. While the Court was considering this motion, the CIRU notified this Court in July that it had conducted a "preliminary investigation" of Johnson's claims but had reached no conclusions. Instead, it had concluded the CIRU and, through it, the entire prosecutor's office had a "conflict of interest" because one of Johnson's original defense attorneys is presently employed in the prosecutor's office. The CIRU stated it was attempting to locate a special prosecutor to complete the investigation and determine what action, if any, to take but had been "unable to locate a prosecutor who is willing and able to serve." On August 24, 2022, this Court scheduled Johnson's execution for November 29, 2022.

On October 12, 2022, the St. Louis County Prosecutor's Office finally alerted the circuit court to its claimed "conflict of interest" and asked it to appoint a special prosecutor pursuant to section 56.110. The office selected E. E. Keenan to fill that role and recommended him to the circuit court, which complied with this request and appointed Keenan as Special Prosecutor.

On November 15, 2022, 14 days before Johnson's execution date, the Special Prosecutor filed in the circuit court a motion to vacate Johnson's conviction under section 547.031.[6] His motion claims: (1) that Johnson's prosecution violated equal protection because it was motivated in substantial part by discriminatory intent;[7] and (2) previously undisclosed work product from the prosecutor's office, together with newly available legal authority, support the *Batson* claim Johnson asserted on direct appeal (and repeatedly since then) and further show the pervasive racial bias underlying his conviction and sentence.[8]

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[6] On the same day, the Special Prosecutor attempted to file in this Court: (a) an entry of appearance in Case No. SC89168; (b) a "notice" in that same case that he had filed the section 547.031 motion in the circuit court; and (c) a motion in that same case to stay Johnson's execution. The case in which the Special Prosecutor sought to file these papers, Case No. SC89168, is the direct appeal of Johnson's conviction and sentence. The parties to that case are Johnson, represented by his counsel, and the state, represented by the attorney general. Though section 547.031 gives the Special Prosecutor the right to appeal the denial of his section 547.031 motion, he had not yet done so on November 15 and, when he did so (as he now has) that matter would be an appeal from a new action challenging Johnson's conviction and sentence and, therefore, it would be a new matter in this Court separate and apart from Johnson's original direct appeal. Accordingly, this Court struck the Special Prosecutor's pleadings from Case No. SC89168 because "there are no matters pending before this Court at the present time to which Mr. Keenan is a proper party or representative." *See State v. Johnson*, No. SC89168 (Nov. 17, 2022). Now that the Special Prosecutor has appealed the denial of his section 547.031 motion and that appeal is now before this Court, *see State v. Johnson*, No. SC99873, his motion for a stay of Johnson's execution is filed in – and will be heard as part of – that case.

[7] The Special Prosecutor does not offer, or even suggest that there may be, direct evidence that the decision to charge Johnson with capital murder was driven by the fact Johnson is African-American and/or that Sergeant McEntee was white. Instead, he principally relies on a statistical report he claims shows a charging disparity between defendants accused of killing white victims, especially white police officers, owing solely or in substantial part to the defendants' race.

[8] The Special Prosecutor claims that, in Johnson's first trial (which ended in a mistrial), McCulloch sought to manipulate the use of his peremptory strikes such that the circuit court would end up striking black venirepersons for whom McCulloch had no race-neutral reason to strike. The trial court, instead, applied McCulloch's unused strikes in a way that would not (and did not) strike any of the remaining African-American members of the venire. Before the re-trial, McCulloch's office researched caselaw to support their claim that the way the trial court used McCulloch's unused peremptory strikes in the first trial was error. The issue never re-

On November 16, the circuit court summarily overruled the Special Prosecutor's motion to vacate under section 547.031.2. The Special Prosecutor and Johnson moved to amend the circuit court's judgment or, alternatively, grant a new trial. The circuit court held a telephone conference on these motions on November 17 and, on November 19, entered an order and judgment overruling those motions. In that order, the circuit court acknowledged that the plain language of section 547.031 required it to hold a hearing on the Special Prosecutor's motion but stated it lacked sufficient time to do so with Johnson's execution date so close at hand. The circuit court found fault with the Prosecutor's Office for taking so long to assert its "conflict of interest" and to come to the court for the appointment of a special prosecutor under section 56.110, RSMo 2016. In addition, though it did not blame Johnson, the circuit court found it "inexplicable" that the motion to vacate under section 547.031 was not filed until 14 days before Johnson's execution. In the end, the circuit court stated it found itself on the horns of a dilemma. It recognized it had no authority to stay the execution but could not reasonably order the hearing that section 547.031 required and then issue findings and conclusions to dispose

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occurred, however, because, in the re-trial, the trial court applied McCulloch's unused peremptory strikes randomly to the entire venire. Johnson, throughout his years of direct appeal and other efforts to seek postconviction relief, has never challenged the method by which the trial court used McCulloch's unused peremptory strikes in the second trial, and it's not clear that the Special Prosecutor is doing so in his section 547.031 motion. Instead, he argues that McCulloch's failure to use all his peremptory strikes was merely an attempt to get the trial court to do what he could not, i.e., strike African-Americans from the venire, but does not explain what the supposed constitutional error was, who made it, or how it prejudiced Johnson. Much more clearly, however, the Special Prosecutor does claim that McCulloch's refusal to use all his peremptory strikes lends additional weight to Johnson's oft-rejected claim that McCulloch's peremptory strike of venireperson Cottman, an African-American, was racially motivated in violation of *Batson.*

of the merits of the Special Prosecutor's motion in the handful of days remaining before that execution.[9] Accordingly, the circuit court explained it had no choice but to deny the motion without further delay.

Both the Special Prosecutor and Johnson have appealed the denial of the Special Prosecutor's section 547.031 motion. Those appeals are pending before this Court in Case No. SC99873.[10] The Special Prosecutor has filed a motion for stay of Johnson's execution in Case No. SC99873, and Johnson has a filed a motion for stay of execution in Case No. SC89168, the direct appeal from his conviction and sentence. Neither the merits of the Special Prosecutor's appeal nor the ultimate resolution of his section 547.031 motion is before the Court at the present time. Instead, the only question before this Court is whether to sustain either of the motions for stay of execution.

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[9] The circuit court recognized that much of the Special Prosecutor's motion was a "rearticulation of previously litigated claims" in that the motion merely recycled "arguments and claims previously raised on behalf of Kevin Johnson and rejected in the various Courts of Appeal in the State and Federal systems." Order and Judgment, Nov. 19, 2022, at 4-5.

[10] Like a petition for habeas corpus or motions for postconviction relief under Rules 24.035 and 29.15, it seems clear that a motion under section 547.031 is a new, collateral attack on the conviction and sentence and not part of the original criminal case regardless of how it is docketed or referred to in the circuit court. *Cf. Staten v. State*, 624 S.W.3d 748, 751 (Mo. banc 2021) ("Though it was filed and adjudicated in the underlying criminal case, Staten's initial Rule 24.035 motion was, and clearly functioned as, an independent, post-conviction collateral attack of Staten's 2012 criminal judgment and sentence."). And, because section 547.031 is a new civil action, it is an open question whether an appeal from the denial of such a motion falls within this Court's exclusive appellate jurisdiction, i.e., whether this is a "case[] where the punishment imposed is death." Mo. Const. art. V, § 3. To remove any cloud over this Court's jurisdiction to hear and rule upon the pending motions for stay of execution, therefore, this Court will treat the matter as having been filed first in the court of appeals and transferred to this Court prior to opinion under Rule 83.01 and reserve for later the question of whether Johnson's and the Special Prosecutor's appeals from the denial of the section 547.031 motion was properly filed in this Court in the first instance.

Analysis

All parties suggest that Johnson's and the Special Prosecutor's motions for stay of execution should be analyzed under the rubric applicable when any injunctive relief is sought before the party seeking such relief has demonstrated a right to any relief at all. Typically, courts do not view such requests with favor and review them under a four-prong analysis in which the Court weighs and balances: (1) the movant's probability of success on the merits; (2) the threat of irreparable harm absent a stay; (3) the balance between harm to the movant absent the stay and the injury inflicted on other interested parties if the stay is granted; and (4) the public interest. *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839-40 (Mo. banc 1996) (preliminary injunction); *see Hill v. McDonough*, 547 U.S. 573, 584 (2006) (stay of execution).

Under this rubric, Johnson's motion for stay of execution raises questions of first impression. Specifically, Johnson cannot show a likelihood of success of *his* claims because he no longer has any substantive claims for relief pending in this Court or any other state or federal court. Instead, he argues that (a) he will prevail on his appeal from the denial of the Special Prosecutor's motion to vacate and (b) the Special Prosecutor on remand to the circuit court ultimately will prevail on the claims raised in that motion.

Plainly, if Johnson had filed a petition for writ of habeas corpus or some other action for relief in this Court raising the claims the Special Prosecutor now raises in his section 547.031 motion to vacate, and if Johnson sought a stay of execution based on his likelihood of success on those claims, this Court would deny the stay and deny those claims without further delay. This is not speculation; Johnson has already raised these

claims in this Court, and this Court has denied them. *See supra* notes 2, 4 and 5. To the extent Johnson claims these are not precisely the same claims this Court already has rejected, he offers no sufficient excuse why he should be allowed to assert "new" claims after a thorough, 17-year review of his conviction and sentence involving at least eight separate legal proceedings. No, there simply is nothing here that Johnson has not raised (and that this Court has not rejected) before and, even if there were, Johnson offers no basis for raising any new or re-packaged versions of these oft-rejected claims at this late date. Accordingly, were Johnson's motion to stay based on the likelihood he could succeed on the merits of the claims now being brought by the Special Prosecutor, that motion is overruled.

If, on the other hand, Johnson's motion to stay turns on whether the Special Prosecutor has a substantial likelihood of success on his section 547.031 motion to vacate, then the analysis must focus on the Special Prosecutor's motion for stay of execution, not Johnson's. The Special Prosecutor's motion for a stay of execution, like Johnson's, also raises questions of first impression because this is the first time the procedure set forth in section 547.031 has been triggered regarding a conviction involving a death sentence. Moreover, it is the first time in which the procedure set forth in section 547.031 has been triggered by a "special prosecutor" appointed under section 56.110, RSMo 2016.[11] And, even though section 547.031 expressly gives the prosecutor

[11] It is not self-evident that the prosecutor's office has a "conflict of interest" with respect to whether the current St. Louis County Prosecutor should seek to vacate Johnson's conviction under section 547.031 because one of Johnson's original defense counsel now works at the prosecutor's office, or why this "conflict" could not be addressed by means other than

or circuit attorney the right to appeal if the motion to vacate a defendant's conviction is overruled, nothing in section 547.031 even suggests that the prosecutor has any authority to seek to stay an execution where the execution warrant issued before – and, here, nearly three *months* before – the motion to vacate was ever filed. That a motion to vacate under section 547.031 would be filed under such circumstances is hardly surprising, and the statute's silence with respect to whether the prosecutor can seek a stay is, to say the least, troubling.

But, setting these issues of first impression aside, the Court is persuaded to overrule the Special Prosecutor's motion for stay of execution for much the same reasons as it overruled Johnson's motion above. Even assuming that it was error for the circuit court to overrule the Special Prosecutor's motion to vacate Johnson's conviction without the hearing and express findings of fact and conclusions of law to which section 547.031 refers, and further assuming that the Special Prosecutor's motion was remanded for that hearing and those findings and conclusions, this Court holds that the Special Prosecutor's motion falls far short of the showing required by section 547.031.3, i.e., that there be

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disqualifying the entire office. *See State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 386-89 (Mo. banc 2018) (finding a personal conflict possessed by an assistant prosecutor in a large prosecutor's office does not necessarily impute the conflict to an entire office). What is clear, however, is that – if the St. Louis County Prosecutor's Office suffered from such a pervasive and irreparable "conflict of interest" with respect to the decision whether to seek to vacate Johnson's conviction under section 547.031 that it had no option but to recuse the entire office and seek the appointment of a "special prosecutor" under section 56.110, RSMo 2016, then it had no business selecting (or even recommending) the individual for the circuit court to appoint. Nothing in section 56.110, RSMo 2016, gives the prosecutor such a role, and one can easily imagine that doing so would spread whatever taint afflicted the prosecutor's office to the attorney that office selected and recommended.

"clear and convincing evidence" demonstrating a "constitutional error at the original trial ... that undermines the confidence in the judgment."

As noted at the outset, neither the Special Prosecutor nor Johnson himself is claiming that Johnson is actually innocent, i.e., that he did not murder Sergeant McEntee exactly as the jury found he did. The only other ground for relief under section 547.031 requires that there be "clear and convincing evidence of . . . constitutional error at the original trial ... that undermines the confidence in the judgment." § 547.031.3. The Special Prosecutor contends his motion establishes two such constitutional errors. This Court disagrees and holds that, even if the Special Prosecutor had the hearing he contends he is entitled to under section 547.031.2, the grounds set forth in the Special Prosecutor's motion fall well short of demonstrating "constitutional error at the original trial ... that undermines confidence in the judgment." § 547.031.3. Because the Special Prosecutor's claims lack merit, the Court will not stay Johnson's execution to order a hearing on those claims because the outcome of that hearing cannot aid Johnson or result in his conviction and sentence being vacated.

The Special Prosecutor's first claim is based on a statistical study of charging decisions by then-prosecuting attorney McCulloch that the Special Prosecutor claims proves McCulloch sought the death penalty disproportionately against African-American defendants, especially when the murder victims were white and even more especially when those victims were white police officers. As noted above, Johnson has already brought – and this Court has already rejected – this claim more than five years ago. *See supra* note 4. The only thing "new" is the study on which the Special Prosecutor relies,

but this study could have been conducted years earlier, and neither the Special Prosecutor nor Johnson offers any excuse why it was not and could not have been obtained in time to be asserted in 2016 when Johnson first made his selective prosecution claim to this Court.

In addition to these defects, the Supreme Court has made it clear that attacks on the charging decisions in capital cases are not to be indulged lightly. "[T]he nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements [of discrimination] in the venire-selection or Title VII cases." *McCleskey v. Kemp*, 481 U.S. 279, 294 (1987). Prosecutors weigh many factors in deciding whether and when to seek the death penalty, and such broad discretion cannot be challenged by general attacks on a prosecutor's character or record. Instead, there must be "exceptionally clear proof" that the prosecutor has abused that discretion in the particular case at hand. *Id.* at 297.

Here, there is nothing in the Special Prosecutor's motion to vacate Johnson's conviction showing *directly* that any charging decision with respect to Johnson was motivated by racial animus. At most, the Special Prosecutor seeks to create an *inference* of racial animus from multiple cases over many years or from the differences between Johnson's case and one other carefully selected case. To boil decades of charging decisions down to one or two factors, i.e., the race of the defendant and the victim(s), oversimplifies a complex process. "Prosecutors must look at a variety of factors including statutory aggravating circumstances, the type of crime, the strength of the evidence and the defendant's involvement in the crime in deciding whether to seek the death penalty." *State v. Taylor*, 18 S.W.3d 366, 377 (Mo. banc 2000). Any one or more

of these factors may outweigh the others in a particular case, and each factor may be weighed differently at different times in the course of a given case. With no direct evidence, and no statistical evidence that clearly proves (and not merely suggests) that racial animus was a contributing factor in the charging decisions in Johnson's case rather than the many other obvious and plainly horrifying aspects of his crime, the Special Prosecutor's motion falls far short of the "exceptionally clear proof" *McCleskey* holds is required to lodge a selective prosecution attack on a conviction that is otherwise constitutionally sound, and it ignores the more nuanced analysis of these issues this Court held was required in *Taylor*. 481 U.S. at 279; 18 S.W.3d at 377.

Finally, even if this Court had not rejected this claim before (which it has), and even if there were some legitimate reason for this claim arising mere days before the execution date (which there is not), and even if the Special Prosecutor's statistics succeed in raising a clear and convincing inference that racial animus was a substantial factor in McCulloch's decision to seek the death penalty in Johnson's case (which they do not), the Special Prosecutor *still* fails to meet the standard for relief imposed by section 547.031, which is that he must establish "constitutional error at the original trial ... that *undermines the confidence* in the judgment." § 547.031.3 (emphasis added).

No matter what the basis for the original charging decision in Johnson's case, in the end it was the *jury* – not the prosecutor – that found Johnson guilty of murder in the first degree; it was the *jury* that found the three statutory aggravators; it was the *jury* that weighed the aggravating and mitigating factors; and it was the *jury* that found death to be the appropriate sentence. Nothing in the Special Prosecutor's motion succeeds in casting

any doubt over the fact that Johnson was judged by a constitutionally fair jury and that this jury fairly and independently fulfilled its constitutional role. Accordingly, even if this Court were to order a hearing on the Special Prosecutor's motion to vacate, there is no likelihood that the Special Prosecutor would succeed on his first claim because it fails to state an adequate ground for vacating Johnson's conviction in that it does not establish a constitutional error at the original trial that undermines the confidence in Johnson's conviction and sentence.

The Special Prosecutor's second claim is that McCulloch was so bound and determined to keep African-American's off the jury that – knowing *Batson* prohibited him from using his peremptory strikes to do so directly – McCulloch tried to manipulate the trial court into doing it for him. As noted above, the Special Prosecutor never explains with respect to this second claim who committed constitutional error or how any such error prejudiced Johnson. It cannot have been McCulloch, who did not even use all his peremptory strikes, and it cannot have been the circuit court because – in Johnson's second trial – the court ended up applying McCulloch's unused peremptory strikes randomly across the entire venire. In fact, never once in 17 years has Johnson claimed the circuit court's action in this regard was constitutional error, and it does not seem that the Special Prosecutor is doing so now.

Rather than rely on McCulloch's refusal to use all his peremptory strikes directly as a claim of constitutional error, the Special Prosecutor instead points to this as further support for the claim that McCulloch's decision to strike venireperson Cottman, an African-American, was motivated by her race in violation of *Batson*. At trial, McCulloch

justified his strike by noting Cottman had worked for the Annie Malone Children's Home, which had provided services to Johnson when he was a child. For 17 years, every single court – state and federal – that has looked at Johnson's *Batson* claim regarding Cottman has found this explanation to be sufficient, race-neutral, and not a pretext for a racially motivated strike. This Court has rejected this precise claim on multiple occasions, and nothing in the Special Prosecutor's section 547.031 changes the claim in any material way, let alone enhances what, so far, has been a complete absence of any success on the merits of this second claim. Moreover, the Special Prosecutor's motion to vacate Johnson conviction fails to establish that McCulloch's use of (or his failure to use all of) his peremptory strikes was (or in any way led to) constitutional error in Johnson's trial sufficient to undermine confidence in Johnson's conviction or sentence, and nothing in the Special Prosecutor's second claim supplies any legitimate basis for granting relief on a *Batson* claim regarding venireperson Cottman that Johnson has brought and had rejected so many times in the past.

Conclusion

Accordingly, for the reasons set forth above, both Johnson's and the Special Prosecutor's motions to stay Johnson's execution are overruled.[12] For Johnson's motion, he has no claims pending in any court and, therefore, cannot show a likelihood of success on such claims. Moreover, Johnson cannot rely on the Special Prosecutor's likelihood of success on the claims the Special Prosecutor has raised in his motion to vacate Johnson's

[12] No Rule 84.17 motions for rehearing shall be filed in this matter.

conviction under section 547.031 because the Special Prosecutor has no likelihood of succeeding on those claims. Even if Johnson's execution were stayed and the Special Prosecutor's motion to vacate Johnson's conviction under section 547.031 were to be remanded to the circuit court for the full hearing he claims he should have, the Special Prosecutor has shown no likelihood that he will succeed on either of the two claims asserted in that motion. Both claims the Special Prosecutor brings now are largely just re-packaged versions of claims Johnson has brought (and seen rejected) many times before. Nothing in the Special Prosecutor's motion materially changes these claims or offers any greater likelihood of success than those claims have had in the past.

Wilson, C.J., Russell, Powell, Fischer and Ransom, J.J., concur;
Breckenridge, J., dissents in separate opinion filed;
Draper, J., concurs in separate opinion of Breckenridge, J.

SUPREME COURT OF MISSOURI

en banc

STATE OF MISSOURI, Respondent, v. KEVIN JOHNSON, Appellant.	)	No. SC89168
and STATE OF MISSOURI, Plaintiff/Appellant, v. KEVIN JOHNSON, Defendant/Appellant.	)	No. SC99873

DISSENTING OPINION

I respectfully dissent from the principal opinion that declines to exercise the Court's equitable power to stay Kevin Johnson's execution to allow, as provided for in section 547.031,[1] adjudication of the motion filed by the special prosecutor of St. Louis County seeking to vacate Mr. Johnson's conviction for the racially biased decision-making of the

[1] All statutory citations are to RSMo Supp. 2021, unless otherwise indicated.

trial prosecuting attorney. A stay is warranted under the standard the United States Supreme Court employs, and granting a stay of execution is the only way to afford to the special prosecutor and Mr. Johnson the mandatory process section 547.031 requires in these circumstances. The proper application of legal principles to the circumstances presented by the special prosecutor's motion to stay Mr. Johnson's execution should lead to the issuance of a stay of execution.

Background

This opinion will not restate the full factual and procedural background reported in the principal opinion relating to the commission of the crime of which Mr. Johnson is convicted or the subsequent litigation seeking to overturn that conviction prior to the special prosecutor's motion in Case No. SC99873 and will, instead, start with a discussion of the statutory proceeding that is the grounds for the special prosecutor's motion for a stay of execution.

In 2021, the General Assembly enacted section 547.031, which empowers a prosecuting or circuit attorney in the jurisdiction of conviction to file a motion to vacate or set aside the judgment at any time upon information that the convicted person may be innocent or may have been erroneously convicted. In its entirety, section 547.031 provides:

> 1. A prosecuting or circuit attorney, in the jurisdiction in which a person was convicted of an offense, may file a motion to vacate or set aside the judgment *at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted.* The circuit court in which the person was convicted shall have jurisdiction and authority to consider, hear, and decide the motion.
>
> 2. Upon the filing of a motion to vacate or set aside the judgment, *the court shall order a hearing and shall issue findings of fact and conclusions of law*

on all issues presented. The attorney general shall be given notice of hearing of such a motion by the circuit clerk and shall be permitted to appear, question witnesses, and make arguments in a hearing of such a motion.

3. The court shall grant the motion of the prosecuting or circuit attorney to vacate or set aside the judgment where the court finds that there is clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in the judgment. In considering the motion, the court shall take into consideration the evidence presented at the original trial or plea; the evidence presented at any direct appeal or post-conviction proceedings, including state or federal habeas actions; and the information and evidence presented at the hearing on the motion.

4. The prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal of the denial or disposal of such a motion. The attorney general may file a motion to intervene and, in addition to such motion, file a motion to dismiss the motion to vacate or to set aside the judgment in any appeal filed by the prosecuting or circuit attorney.

(Emphasis added).

On December 1, 2021, slightly more than three months after section 547.031 took effect, Mr. Johnson filed an application with the Conviction and Incident Review Unit ("CIRU") in the office of the St. Louis County Prosecuting Attorney, asking that it review his allegations that his conviction is the product of racial bias. On May 11, 2022, the attorney general moved this Court to set an execution date for Mr. Johnson. While the motion was pending, the CIRU notified this Court in July that it had conducted a "preliminary investigation" of Mr. Johnson's claims but had reached no conclusions. Instead, it had determined the entire prosecutor's office had a conflict of interest because one of Mr. Johnson's original defense attorneys is now the office's chief trial counsel. The CIRU stated it was attempting to locate a special prosecutor to complete the investigation and determine what action to take but had been "unable to locate a prosecutor who is willing and

able to serve." On August 24, 2022, this Court scheduled Mr. Johnson's execution for November 29, 2022.

On October 12, 2022, the St. Louis County Prosecuting Attorney's Office filed a motion in the circuit court asserting the same conflict of interest it asserted in this Court in July. The prosecutor's office stated it had a conflict of interest because the office's chief trial counsel represented Mr. Johnson in the trial resulting in the conviction at issue and a previous trial that had resulted in a hung jury. As a result, the office requested that the court appoint a special prosecutor, pursuant to section 56.110, RSMo 2016. In its motion, the office stated the circuit court has authority to appoint a special prosecutor and E.E. Keenan consented to serve and requested he be appointed special prosecutor. The circuit court sustained the motion later the same day and appointed Mr. Keenan, with consent, as special prosecutor.

On November 15, 2022, 32 days after appointment (during which time the special prosecutor states he reviewed tens of thousands of pages of records related to Mr. Johnson's case, interviewed witnesses, and collected other evidence) and 14 days before Mr. Johnson's scheduled execution, the special prosecutor filed a motion in the circuit court to vacate Mr. Johnson's conviction pursuant to section 547.031. His motion claims that: (1) Mr. Johnson's right to equal protection was violated when the trial prosecuting attorney allegedly chose to charge him with capital murder and seek the death penalty because Mr. Johnson is black; and (2) previously undisclosed work product from the prosecutor's office, together with newly available legal authority, support the *Batson* claim that the trial

prosecuting attorney struck a black venireperson, Debra Cottman, on the basis of race and further show the pervasive racial bias underlying his conviction.

On November 16, the circuit court summarily overruled the special prosecutor's motion to vacate under section 547.031.2. The special prosecutor and Mr. Johnson moved to amend the circuit court's judgment or alternatively grant a new trial. The circuit court held a conference regarding those motions on November 17 and, on November 19, entered a judgment overruling them. In its judgment, the circuit court acknowledged the plain language of section 547.031 requires it to hold a hearing on the special prosecutor's motion but stated there was insufficient time "for a reasonable and adequate opportunity for the parties to prepare and present evidence, to conduct discovery, to subpoena witnesses nor for the court to consider the evidence at the hearing and to prepare appropriate findings of fact and conclusions of law" with only six business days before Mr. Johnson's execution. The circuit court recognized it had no authority to stay the execution, but it could not reasonably comply with the requirements of section 547.031 before the execution. Accordingly, the circuit court determined it had no choice but to overrule the motion.

Both the special prosecutor and Mr. Johnson appealed the denial of the special prosecutor's section 547.031 motion and both have filed motions for a stay of execution pending the resolution of those appeals. I dissent from the principal opinion's analysis of and ruling on the special prosecutor's motion to stay Mr. Johnson's execution, as well as all statements in the principal opinion that are not essential to the Court's decision.

Mr. Johnson's Execution Should Be Stayed

"[A] stay of execution is an equitable remedy." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). When considering a motion for a stay, the Court weighs and balances: (1) the movant's probability of success on the merits; (2) the threat of irreparable harm absent a stay; (3) the balance between harm to the movant absent the stay and the injury inflicted on other interested parties if the stay is granted; and (4) the public interest. *See id.* (stay of execution); *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996) (preliminary injunction). Accordingly, to meet the standard for a stay, the special prosecutor must first show a probability of success on the merits. To show a probability of success on the merits sufficient to justify preliminary injunctive relief, a party need only show a "fair ground for litigation," not "a greater than fifty per cent likelihood of success." *Sleep No. Corp. v. Young*, 33 F.4th 1012, 1017 (8th Cir. 2022).

In assessing the special prosecutor's success on the merits, it is essential to recognize the special prosecutor asserts his claims pursuant to section 547.031. Claims filed pursuant to section 547.031 are asserted by the state through "[a] prosecuting or circuit attorney" with "information that the convicted person may be innocent or may have been erroneously convicted." Section 547.031.1; *see also Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (recognizing a prosecutor's ethical obligation after conviction "to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction"). And though such claims may entail judicial inquiry into matters that, if raised by the convicted person, would be considered duplicative of prior claims, it is a very different matter for a prosecuting attorney, as a representative of the state, to present those

claims. *See State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 581 (Mo. banc 1994) (stating prosecuting attorneys represent the people of the state); *State v. Selle*, 367 S.W.2d 522, 530 (Mo. 1963) (holding a prosecuting attorney prosecutes on behalf of the state).

In addition, section 547.031.2 requires that the circuit court hold a hearing and consider "the evidence presented at the original trial or plea; the evidence presented at any direct appeal or post-conviction proceedings, including state or federal habeas actions; and the information and evidence presented at the hearing on the motion." Section 547.031.2. As a consequence, a prosecutor's claim asserted under section 547.031 entails a broad consideration of all the evidence previously presented and new evidence and information presented at the hearing that the convicted person may be innocent or may have been erroneously convicted. In this way, the General Assembly has equipped prosecutors with the power to fulfill their ethical obligations as "ministers of justice" and representatives of the people of the state to see that justice is done, even when that means not sustaining a conviction, and even when such claims would be duplicative of prior claims if asserted by the convicted person. *See State v. Terry*, 304 S.W.3d 105, 108 n.5 (Mo. banc 2010) (stating the "ethical norm" for state attorneys "is to see that justice is done—not necessarily to obtain or sustain a conviction"); *see also* Rule 4-3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

In this case, the special prosecutor's specific claims of constitutional error at Mr. Johnson's trial are that: (1) the trial prosecuting attorney's decision to charge Mr. Johnson with capital murder and seek the death penalty was motivated by racial prejudice in violation of Mr. Johnson's right to equal protection of the laws; and (2) the trial

prosecuting attorney used a peremptory strike to strike a black venireperson on the basis of race, again violating Mr. Johnson's right to equal protection of the laws.

Although Mr. Johnson previously asserted those claims, section 547.031 permits the special prosecutor to assert any and all claims, including those previously brought by the convicted person, to serve its purpose of vacating convictions of persons who are shown by clear and convincing evidence to be convicted when there was constitutional error that undermines confidence in the judgment. And it permits a prosecuting attorney to present all evidence relevant to such claims, regardless of whether the defendant is procedurally defaulted from raising such claims, including evidence no court has considered, such as the evidence the special prosecutor intends to present, here, in support of his claims.

In the first claim asserted in his section 547.031 motion, the special prosecutor alleges the trial prosecuting attorney's decision to charge Mr. Johnson with capital murder and seek the death penalty was based on Mr. Johnson's race in violation of Mr. Johnson's right to equal protection. Under longstanding Supreme Court decisions, the Equal Protection Clause prohibits selective prosecution "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979); *accord United States v. Armstrong*, 517 U.S. 456, 464 (1996). "A defendant may demonstrate that the administration of a criminal law is directed so exclusively against a particular class of persons with a mind so unequal and oppressive that the system of prosecution amounts to a practical denial of equal protection of the law." *Armstrong*, 517 U.S. at 464-65 (internal quotation marks and alterations omitted).

In support of the selective-prosecution claim, the special prosecutor alleges the trial prosecuting attorney tried five cases during his tenure as prosecutor where defendants were charged with killing police officers and the prosecutor sought the death penalty against all four black defendants but not the single white defendant. The trial prosecuting attorney invited only the white defendant to submit mitigating circumstances for consideration before the prosecutor decided whether to seek the death penalty and, thereafter, the prosecutor did not seek the death penalty against the white defendant. No similar invitations to submit mitigating evidence were extended to any of the four black defendants.

The special prosecutor further alleges that, although the trial prosecuting attorney stated publicly that the prosecuting attorney's office followed written policies and procedures in determining when to seek the death penalty, there were, in fact, no written policies and the trial prosecuting attorney made the decision on an ad hoc basis. In this vein, the special prosecutor alleges that, in his attempt to determine how the prosecutor's officer decided to seek the death penalty in Mr. Johnson's case, the special prosecutor attempted to contact the trial prosecuting attorney and the two assistant prosecuting attorneys who tried the case. The trial prosecuting attorney and one of the assistant prosecuting attorneys declined to speak with the special prosecutor at all. The remaining assistant prosecuting attorney spoke with the special prosecutor informally. When asked how the office decided to seek the death penalty, that attorney responded she was reluctant to divulge "family secrets, so to speak," but it was ultimately the trial prosecuting attorney's decision.

The special prosecutor also relies on a study unavailable during Mr. Johnson's postconviction litigation that analyzed charging decisions in the St. Louis County

Prosecuting Attorney's Office during the trial prosecuting attorney's tenure.[2] The study concludes the office was roughly three and half times more likely to seek the death penalty for murders involving white victims than for those involving black victims. As a result, the race of the victim effectively acted as a non-statutory aggravating factor. That study attributes the disparity to prosecutorial decision making, fairly imputed to the trial prosecuting attorney, not the juries or the courts.

As further evidence of trial prosecuting attorney's racial bias against black defendants, the special prosecutor submitted an affidavit from the district attorney of Deschutes County, Oregon. The district attorney states that, in 2018, the trial prosecuting attorney spoke at a conference for the Oregon district attorneys' association. During his talk, the trial prosecuting attorney displayed a photograph depicting several black males between the ages of 16 and 20.[3] While displaying the picture, the trial prosecuting attorney allegedly stated: "This is what we were dealing with" in a sharp and contemptuous tone of voice.

None of the foregoing examples of racial bias were previously considered in ruling on a claim that the trial prosecuting attorney's decision to charge Mr. Johnson with capital murder was motivated by racial bias. And, for that reason, Mr. Johnson's past failures to

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[2] A copy of the study was submitted as an exhibit in support of the special prosecutor's motion to vacate. The study was completed in September 2022 by Frank Baumgartner, a political science professor at the University of North Carolina, who states he is "experienced in the statistical study of public policy and criminal justice outcomes, including the death penalty in particular."

[3] The photograph did not depict the black males engaging in any unlawful activity, and the trial prosecuting attorney did not state they were engaging in any unlawful activity.

prevail on such a claim do not reasonably support the conclusion that the special prosecutor's claim will not prevail. I would find that, on this claim, the special prosecutor has shown a probability that he will succeed in establishing a constitutional error that undermines confidence in the judgment.

The special prosecutor's second claim of constitutional error is that the trial prosecuting attorney struck a black woman from the venire on the basis of race. Under *Batson*, a defendant's right to equal protection of the laws is violated when a prosecutor challenges a potential juror on the basis of race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). "Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019).

With respect to that claim, the special prosecutor shows that in Mr. Johnson's first trial, the trial prosecuting attorney decided not to exercise all the state's peremptory strikes with the expectation that the circuit court would follow its prior practice and, ultimately, strike black members of the venire. The trial transcript shows the circuit court's regular practice was to exercise the state's unused strikes and "going from the highest number or lowest number, take off the remaining jurors that equal – that make up the remainder of the nine strikes that the State does not take." It is apparent from the transcript, however, that the circuit court decided it would not strike venirepersons without considering whether they were members of a protected class. As the circuit court stated to the trial prosecuting attorney, if it exercised the state's unused peremptory challenges to strike venirepersons without any consideration of their membership in protected classes, then "in effect, [the state would] have stricken those people and [the state would] have given no race-neutral reason

for that strike." Accordingly, the circuit court exercised the state's remaining strikes but did not strike any venireperson who was a member of a protected class.

The trial prosecuting attorney argued strenuously against the circuit court's decision to ensure reducing the remaining juror pool to the final 12 jurors would not result in the arbitrary elimination of black members of the venire. He called the circuit court's practice "silly" and "bizarre" and objected that he was being penalized, suggesting the retention of black jurors would "penalize" the prosecution and that the circuit court was acting in a discriminatory manner toward white males.

After the trial resulted in a hung jury, the prosecutor's office circulated a memorandum gathering case law to convince the circuit court that refusing to use the unused strikes against black members of the venire was error. In the second trial, the trial prosecuting attorney again chose not to exercise all of the state's peremptory challenges. Instead, the trial prosecuting attorney used just four strikes – three to strike black members of the venire. The circuit court then used the state's remaining strikes to strike members of a random pool of venire members. The special prosecutor alleges that, although not as blatant an attempt to have black jurors struck from the venire, the trial prosecuting attorney still hoped to strike at least one additional black member by chance.

Because the primary panel of 30 venirepersons consisted of 24 white members and six black members and the trial prosecuting attorney struck three of those six, Mr. Johnson asserted the trial prosecuting attorney was purposefully excluding black venirepersons in violation of *Batson* and he particularly challenged the trial prosecuting attorney's use of a peremptory strike to strike Ms. Cottman, a black woman. The prosecutor's office stated it

struck Ms. Cottman from the venire because she was unwilling to answer questions about the death penalty and because she served as a "visiting foster parent" with the Annie Malone Children's Home, which provided services to Mr. Johnson as a youth.

The special prosecutor alleges the trial prosecuting attorney's explanation was pretextual because, in her role as visiting foster parent, Ms. Cottman only had children at her home on weekends; Mr. Johnson had stayed at Annie Malone's for only one week as a child through placement by the department of family services; and Ms. Cottman did not know Mr. Johnson or anyone associated with his case.

The special prosecutor further supports his claim that the trial prosecuting attorney's explanation for striking Ms. Cottman was pretextual because the trial prosecuting attorney chose not to strike similarly situated white members of the venire, four of whom who had worked within the department of family services, which took custody of Mr. Johnson for most of his childhood, or the foster care system. And with regard to her supposed unwillingness to answer questions about the death penalty, the special prosecutor alleges the record shows she was as willing as other members of the venire to answer such questions.

This Court denied the *Batson* claim in Mr. Johnson's direct appeal but it did not take into consideration all the circumstances of the four white venirepersons who worked within the department of family services or the foster care system and yet were not stricken. A stricken black juror and a non-stricken white juror need not be identical in all respects to support an inference of discrimination. *See Flowers*, 139 S. Ct. at 2243, 2245 (discrediting the state's explanation for striking a black juror who worked at Wal-Mart with defendant's father by comparing the stricken black juror with multiple non-stricken white jurors who

worked at a bank where the defendant's family members were customers). While the non-stricken white members of the venire may not have served as visiting foster parents at Annie Malone's Children's Home, they worked within the department of family services or the foster care system and are, for that reason, sufficiently similarly situated to permit an inference that the trial prosecuting attorney's discriminatory selection was based on race.

In addition, when the Court denied Mr. Johnson's *Batson* claim on direct appeal, it did not consider historical evidence of *Batson* violations by the St. Louis County Prosecuting Attorney's Office, stating "[a] previous *Batson* violation by the same prosecutor's office does not constitute evidence of a *Batson* violation in this case, absent allegations relating to this specific case." *State v. Johnson*, 284 S.W.3d 561, 571 (Mo. banc 2009). Since that time, the Supreme Court has made clear a court must consider "relevant history of the State's preemptory strikes in past cases." *Flowers*, 139 S. Ct. at 2243. Here, the relevant history of the St. Louis County Prosecuting Attorney's Office includes four *Batson* violations in the five years preceding Mr. Johnson's conviction – information that has never been considered in assessing Mr. Johnson's *Batson* claim. Based on the foregoing, I would find that, as with his selective-prosecution claim, the special prosecutor has shown evidence that, if believed, establishes constitutional error at trial that undermines confidence in the judgment in relation to his *Batson* claim.

The remaining factors for granting a stay all weigh in favor of staying Mr. Johnson's execution. The threat of irreparable harm absent a stay is obvious. The state will be deprived of the process section 547.031 requires, including the right to appeal, and Mr. Johnson will be executed while the lawfulness of his conviction has not been adjudicated under the statute.

With respect to the balance between harm to the movant absent the stay and the injury inflicted on other interested parties if the stay is granted, the injury inflicted on other interested parties is significant to be sure. Last-minute disruptions in death penalty cases impose costs on everyone involved, including the victim's family and friends, former jurors, court personnel, and counsel among others. Yet, the harm to the movant is irrevocable and jeopardizes the state's interest in ensuring the integrity of its convictions. On balance against the absolutely irrevocable harm to the state and Mr. Johnson, a stay is equitable. For the same reasons, the public interest in vacating convictions obtained in violation of a defendant's constitutional rights that are embodied in section 547.031 will be defeated unless a stay is granted. As a consequence I would sustain the special prosecutor's motion to stay Mr. Johnson's execution, finding all the factors articulated in *Hill* weigh in favor of staying execution.

Moreover, in addition to granting a stay under the general standard found in *Hill*, I would grant a stay because it is the only way not to infringe on the protections against wrongful convictions provided by section 547.031, particularly when a sentence of death has been imposed. Section 547.031 unambiguously provides that, once the appropriate prosecutor or circuit attorney brings a motion under section 547.031, the circuit court "*shall* order a hearing and *shall* issue findings of fact and conclusions of law on all issues presented" and that the "attorney general *shall* be given notice of hearing of such motion" and be permitted to appear, question witnesses, and present arguments. Section 547.031.2 (emphasis added). *None* of these requirements were met with respect to the special prosecutor's motion to vacate Mr. Johnson's conviction.

Nothing in section 547.031 says the circuit court "shall" order a hearing on the prosecutor's or circuit attorney's motion to vacate only if the prosecutor or circuit attorney shows a likelihood of success on the merits of the claims in their motion, or even that the circuit court "shall" order a hearing on the prosecutor's or circuit attorney's motion only if the motion alleges facts which, if believed, would justify relief. Instead, section 547.031 unequivocally requires notice to the attorney general, a hearing, and findings of fact and conclusions of law any time an authorized prosecutor or circuit attorney files a motion under section 547.031.

The circuit court properly noted the special prosecutor filed the motion to vacate so close to Mr. Johnson's execution date that there was insufficient time to give that motion all the process section 547.031.2 demands. And the circuit court noted it lacked authority to stay an execution set by warrant of this Court. This Court's warrant setting Mr. Johnson's execution for November 29, 2022, precludes giving effect to the General Assembly's plain and unambiguous requirement that every section 547.031 motion to vacate is entitled to a hearing and findings of fact and conclusions of law.

The language of Rule 30.30(a)-(c) regarding setting and staying an execution indicates the Court will not set an execution date until a defendant has completed direct appeal, postconviction proceedings, and had the opportunity to seek federal habeas relief. Rule 30.30 does not address proceedings under section 547.031 because the rule was adopted prior to the enactment of the statute, so it cannot be read to intend not to permit adjudication under section 547.031. In addition, because the statute permits a prosecuting or circuit attorney to file a motion to vacate a conviction in a criminal case upon obtaining information

of a defendant's innocence or of constitutional error at trial undermining confidence in the judgment, the Court would not be able to determine whether such litigation might be filed or when it would conclude when considering whether to set an execution date. Therefore, giving full effect to the General Assembly's purpose in enacting section 547.031 requires a stay to permit proceedings under that statute to be fully adjudicated through an appeal. Importantly, this Court's rules are procedural in nature and, contrary to the attorney general's argument, do not supersede the requirements of substantive law enacted by the General Assembly. Mo. Const. art. V, sec. 5. As a result, entirely apart from the general standard for granting a stay, the Court should issue a stay under the circumstances of this case in order to permit full adjudication of the special prosecutor's section 547.031 motion.

Conclusion

Under the analysis for the standard for a stay of execution, the factors weigh in favor issuing a stay. Likewise, the Court should grant a stay because only adjudication of the special prosecutor's allegations in his motion to vacate will give full effect to the General Assembly's purpose in enacting section 547.031. For these reasons, I dissent from the principal opinion's overruling of the special prosecutor's motion for a stay of execution.

PATRICIA BRECKENRIDGE, JUDGE

IN THE CIRCUIT COURT OF SAINT LOUIS COUNTY
STATE OF MISSOURI

State of Missouri	)	
	)	Case No. 2105R-02833-01
Vs	)	
	)	Division 7
Kevin Johnson	)	

ORDER AND JUDGEMENT

This Court has received a pleading entitled Motion to Vacate Judgement. The Court enters the following judgment: The Motion to Vacate Judgement is DENIED.

SO ORDERED:

Mary Elizabeth Ott Division 7
Presiding Judge
November 16, 2022

IN THE CIRCUIT COURT OF SAINT LOUIS COUNTY
STATE OF MISSOURI

State of Missouri	)	
	)	Cause No. 2105R-02833-01
Vs.	)	
	)	Division 7
Kevin Johnson	)	

ORDER AND JUDGEMENT

This matter comes before the Court upon the Special Prosecutor E.E. Keenen's and Defense Counsel Joseph Luby's Motions to Amend Judgment and Alternatively, for New Trial.

1. In October of 2022 the Prosecuting Attorney for Saint Louis County requested that a Special Prosecutor be appointed to review this case in light of the conflict of interest arising from the current employment of attorney Robert Steele by the Saint Louis County Prosecuting Attorney. Robert Steele had previously represented the Defendant Kevin Johnson in this matter.

2. On or about October 12, 2022 this Court entered an Order pursuant to the Provisions of §56.110 RsMo appointing by consent, E.E. Keenan and the law firm of Keenan and Bhatia to act as Special Prosecutor for all matters related to this investigation and prosecution. Section 56.110 reads as follows:

> **56.110. If interested in case, court to appoint substitute. —** If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his or her office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause. Such special prosecutor shall not otherwise represent a party other than the state of Missouri in any criminal case or proceeding in that circuit for the duration of that appointment and shall be considered an appointed prosecutor for purposes of section 56.360.

3. On November 7, 2022 the Supreme Court of Missouri entered an Order denying the Defendant's Motion to Stay the Execution Warrant in this matter.

4. On or about November 15, 2022 this Court received pleadings filed in cause no. 2105R-02833-01 entitled Motion to Vacate Judgement pursuant to the provisions of § 547.031 RsMo(2021) and signed by attorney E.E. Keenen who had been appointed as set out in paragraphs 2 above.

§547.031 states as follows:

> **547.031. Information of innocence of convicted person — prosecuting or circuit attorney may file to vacate or set aside judgment — procedure. —** 1. A prosecuting or circuit attorney, in the jurisdiction in which a person was convicted of an offense, may file a motion to vacate or set aside the judgment at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted. The circuit court in which the person was convicted shall have jurisdiction and authority to consider, hear, and decide the motion.
>
> 2. Upon the filing of a motion to vacate or set aside the judgment, the court shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented. The attorney general shall be given notice of hearing of such a motion by the circuit clerk and shall be permitted to appear, question witnesses, and make arguments in a hearing of such a motion.
>
> 3. The court shall grant the motion of the prosecuting or circuit attorney to vacate or set aside the judgment where the court finds that there is clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in the judgment. In considering the motion, the court shall take into consideration the evidence presented at the original trial or plea; the evidence presented at any direct appeal or post-conviction proceedings, including state or federal habeas actions; and the information and evidence presented at the hearing on the motion.
>
> 4. The prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal of the denial or disposal of such a motion. The attorney general may file a motion to intervene and, in addition to such motion, file a motion to dismiss the motion to vacate or to set aside the judgment in any appeal filed by the prosecuting or circuit attorney.

5 On or about November 16, 2022 this Court entered an Order denying the Motion to Vacate the Judgement.

6 No Writ of Mandamus or any other avenue of appellate review has been filed following the November 16, 2022 Order to clarify the authority of this court to act in the current procedural posture of the case.

7. On or about November 17, 2022 E.E. Keenen requested a phone conference with the Court and all parties. The same request was granted. A phone conference with the Court and all parties was conducted on November 18, 2022 at 10:30 a.m. Megan Granda, court reporter for Division 7 reporting. A transcription of that conference was ordered by Defense counsel Joseph Luby.

8. This Court recognizes that §547.031 RsMo. (2021) requires a hearing, and is also aware of the requirement that sufficient time for all parties to prepare and present evidence at such hearing is essential to its proper function. *See State ex rel Schmitt v. Harrell, 633 S.W.3d. 463, 468 (MO App. WD 2021)* (finding that three days was insufficient time to adequately prepare for a hearing pursuant to the provisions of §547.031).

9. The Missouri Court of Appeals Western District has held in reference to the provisions of §547.031 RsMo.(2021) that:

> This Court appreciates the significant public interests involved in this proceeding, and the Circuit Court's efforts to resolve this proceeding swiftly. Nevertheless, in order to permit the Attorney General to meaningfully participate in the hearing, he must be given notice sufficient to allow his office a reasonable opportunity to prepare for the hearing, given the extensiveness of the relevant record, and the complexity and gravity of the issues involved. Scheduling a merits hearing on three days' notice, on a motion to vacate a conviction of …[murder], fails to give the Attorney General a meaningful opportunity to prepare for, and participate in, the hearing. *Id. at 467*.

There is neither sufficient time between now and the date currently set for the execution of Mr. Johnson for a reasonable and adequate opportunity for the parties to prepare and present

evidence, to conduct discovery, to subpoena witnesses nor for the court to thoughtfully consider the evidence at such hearing and to prepare appropriate findings of fact and conclusions of law.

Of course, the Court will, in light of the exigent circumstances present in this case, continue to give it the highest priority that must always be given to cases involving the penalty of death. However, the question is not simply can a hearing be conducted but rather can the date of the hearing afford the parties adequate time to prepare and present the evidence, and the Court adequate time to thoughtfully consider the evidence admitted at hearing, keeping in mind the important public interests at issue. *Id.*

10. The date set for Mr. Johnson's execution is November 29, 2022, and this Court notes that between November 15, 2022 when the §547.031 motion was first filed, and that date there are six business days available for such a hearing. The initial Motion to Vacate having been filed so close in time to the date of execution adversely impacts the careful and thorough preparation and consideration of evidence that may be admitted at a hearing and included in the required findings and conclusions.

11. Many of the claims raised in the Motion at issue herein renew arguments and claims previously raised on behalf of Kevin Johnson and rejected in the various Courts of Appeal in the State and Federal systems. The failure to bring these claims to this Court's attention pursuant to §547.031 RsMo (2021) prior to November 15, 2022, or fourteen days prior to the date set for the execution of Kevin Johnson is inexplicable. Similarly, the failure of the Saint Louis County Office of Prosecuting Attorney to recognize the conflict of interest described in paragraph 1 above prior to October of 2022 is disconcerting.

12. This Court does not believe, and can not find authority to support the assertion by Defense Counsel that it has the authority to stay an Execution Warrant previously reviewed and

affirmed by the Missouri Supreme Court, even in the face of the provisions of § 547.031 RsMo (2021) requiring a hearing and allowing for adequate time for the parties to prepare.

13. This Court notes that both the Motion to Vacate Judgement filed on November 15, 2022, and the subsequent Motion to Amend Judgment and alternatively for New Trial are filed in Cause no. 2105R-02833-01, the criminal case number. The Supreme Court of Missouri has Ordered in the appeal, cause no. SC89168 that E.E. Keenen is not a party to the actions currently on appeal in cause no. SC89168 and derived from 2105R-02833-01. *See (SC89168 order of 11-17-2022)*

14. On November 18, 2022 Defense Counsel for Kevin Johnson, Joseph Luby filed a pleading adopting the Motion to Amend Judgment and alternatively for New Trial filed by E.E. Keenen.

15. There is no question that "Death is Different" it is different from all other punishments and in fact qualitatively different and requires particular care in its application in every case. *See Furman v. Georgia, 408 US 238(1972), Lockett v. Ohio, 438 US 586 ((1978).* The procedural and temporal posture of the instant motion places the court in an untenable position. To comply strictly with the plain language of § 547.031 is in conflict with current Missouri law analyzing its provisions and the appropriate administration of Due Process of Law and Equal Protection of the law as insufficient time remains to comply in a meaningful and appropriate manner given the grave punishment at issue herein. This weighs heavily upon this court.

16. The Defense acknowledges that they are not claiming actual innocence pursuant to §547.031(RsMo.2021), and certainly §547.031 requires something more than the rearticulation of previously litigated claims at the eleventh hour.

17. **Therefore it is the Order and Judgment of the Court** that the Motions to Amend Judgment and Alternatively for New Trial are DENIED.

SO ORDERED:

Mary Elizabeth Ott
Presiding Judge

Division 7

November 19, 2022

CIVIL PROCEDURE FORM NO. 8-A(1)

IN THE 21st **JUDICIAL CIRCUIT,** St. Louis **COUNTY, MISSOURI**

Judge or Division: Hon. Mary Elizabeth Ott, Div. 7	**Circuit Court Case Number:** 2105R-02833-01		
Plaintiff/Petitioner: State of Missouri vs.	Appellate Number:	☐ Filing as an Indigent	
	Date of Judgment/Decree/Order: **(ATTACH A COPY)** November _____, 2022	Court Reporter: Megan Granda, Court Reporter Division 7 megan.granda@courts.mo.gov	
	Date Post Trial Motion Filed: November 18, 2022	☐ Sound Recording Equipment	
Defendant/Respondent: Kevin Johnson	Date Ruled Upon:	The Record on Appeal will consist of: ____ Legal File only or __X__ Legal File and Transcript	(Date File Stamp)

Notice of Appeal to Supreme Court of Missouri

Notice is given that The State of MIssouri appeals from the judgment/decree/order entered in this action on November 18, 2022 (date).

Jurisdiction of the Supreme Court is based on the fact that this appeal involves:
(Check appropriate box)

- ☐ The validity of a treaty or statute of the United States
- ☐ The title to any state office in Missouri
- ☑ The punishment imposed is death
- ☐ The construction of the revenue laws of Missouri
- ☐ The validity of a statute or provision of the Constitution of Missouri

EXECUTION SCHEDULED NOVEMBER 29, 2022

Unless the basis of jurisdiction involves the death penalty, the appellant shall prepare a concise explanation, not to exceed six pages, of the basis for jurisdiction. This must be filed as part of or simultaneously with this notice of appeal. See Rule 81.08(a) and (b).

Appellant's Name (If multiple, list all or attach additional pages) State of Missouri	Respondent's Name (If multiple, list all or attach additional pages) Kevin Johnson
Address 100 SOUTH CENTRAL AVE CLAYTON, MO 63105	Address Department of Corrections No. #1117773 Potosi Correctional Center 111593 State Highway O, Mineral Point, MO 63660
Appellant's Attorney/Bar Number (If multiple, list all or attach additional pages) Edward Emmett Keeenan, Mo. #62993	Respondent's Attorney/Bar Number (If multiple, list all or attach additional pages) Joseph Luby
Address 4600 Madison Ave., Ste. 810 Kansas City, MO 64112	Address 601 Walnut St. Philadelphia, PA 19106
E-mail Address ee@keenanfirm.com	E-mail Address joseph_luby@fd.org
Telephone (816) 809-2100	Telephone (215) 928-0520
DOC Register Number (If applicable) #1117773	

Does this appeal involve a felony conviction? ☑ Yes ☐ No

Has the defendant been released on an appeal bond? ☐ Yes **(ATTACH BOND)** ☑ No

Bond Amount	Surety Name, Address, and Phone Number

Docket Fee Information

☑ The docket fee in the amount of $70.00 is being tendered with this notice of appeal.

☐ No docket fee is being tendered because:

☐ a docket fee is not required by law pursuant to _____ (cite specific statute or other authority).

☐ a motion to prosecute the appeal in forma pauperis has been or will be filed.

☐ a docket fee in the amount of $70.00 cannot be tendered at this time but will be submitted at a later date or this appeal will be subject to dismissal pursuant to Rule 84.08(a).

Signature of Attorney or Appellant	Date
/s/ Edward (E.E.) Keenan	11/18/2022

Certificate of Service on Persons other than Registered Users of the Missouri eFiling System

I certify that on November 18, 2022 (date), a copy of the foregoing was sent to the following by facsimile, hand-delivery, electronic mail or U.S. mail postage prepaid to their last known addresses.

Kevin Johnson, Department of Corrections No. #1117773

Pelosi Correctional Center

111593 State Highway O, Mineral Point, MO 63660

/s/ Edward (E.E.) Keenan
Appellant or Attorney for Appellant

Directions to Clerk

As required by Rule 30.01(c), a copy of the notice of appeal shall be sent by the clerk to the Attorney General when the appeal involves a felony. Transmit a copy of the notice of appeal and all attached documents to the clerk of the Supreme Court of Missouri and to any person other than registered users of the eFiling system in a manner prescribed by Rule 43.01. Clerk shall then fill in the memorandum below. See Rule 81.08(i). Forward the docket fee to the Department of Revenue as required by statute.

Memorandum of the Clerk

I have this day served a copy of this notice by ☐ regular mail ☐ registered mail ☐ certified mail ☐ facsimile transmission to each of the following persons at the address stated below. If served by facsimile, include the time and date of transmission and the telephone number to which the document was transmitted.

_____

_____

_____

_____

_____

I have transmitted a copy of the notice of appeal to the clerk of the Supreme Court.

☐ Docket fee in the amount of $70.00 was received by this clerk on _____ (date) which will be disbursed as required by statute.

☐ No docket fee was received.

_____ Date

_____ Clerk

Additional Parties and Attorneys

List every party involved in the case not listed on page 1, indicate the position of the party in the circuit court (e.g. plaintiff, defendant, intervenor) and in the Supreme Court of Missouri (e.g. appellant or respondent) and the name of the attorney of record, if any, for each party. Attach additional pages to identify all parties and attorneys if necessary.

Party Name	Attorney Name
Kevin Johnson, DOC No. #1117773	**Rebecca E. Woodman**
Address	Address
111593 State Highway O	**1263 W. 72nd Ter.**
City, State, Zip Code	City, State, Zip Code
Potosi Correctional Center	**Kansas City, MO 64114**
Mineral Point, MO 63660	E-mail Address
	rewlaw@outlook.com
	Telephone
	(785) 979-3672
Party Name	Attorney Name : **James R. Montgomery**
	Assistant to Special Prosecutor
Address	Address
	4600 Madison Ave. Ste. 810
City, State, Zip Code	City, State, Zip Code
	Kansas City, MO 64112
	E-mail Address
	jr@kclaborlaw.com
	Telephone
	(816) 809-2100
Party Name	Attorney Name
State of Missouri	**Eric Schmitt, Office of the Att. Gen.**
Address	Address
PO BOX 899	**PO BOX 899**
City, State, Zip Code	City, State, Zip Code
Office of the Attorney General	**Kansas City, MO 64114**
Jefferson City, MO 65102	E-mail Address
	eric.schmitt@ago.mo.gov
	Telephone
	(573) 751-3321
Party Name	Attorney Name
State of Missouri	**Stephen Hawke, Office of the Att. Gen.**
Address	Address
PO BOX 899	**PO BOX 899**
City, State, Zip Code	City, State, Zip Code
Office of the Attorney General	**Jefferson City, MO 65102**
Jefferson City, MO 65102	E-mail Address
	stephen.hawke@ago.mo.gov
	Telephone
	(573) 751-3321

Party Name	Attorney Name
State of Missouri	**Andrew Crane, Office of the Att. Gen.**
Address	Address
	PO BOX 899
City, State, Zip Code	City, State, Zip Code
Office of the Attorney General	**Jefferson City, MO 65102**
Jefferson City, MO 65102	E-mail Address
	andrew.crane@ago.mo.gov
	Telephone
	(573) 751-3321
Party Name	Attorney Name
State of Missouri	**Daniel McPherson, Office of the Att. Gen.**
Address	Address
	PO BOX 899
City, State, Zip Code	City, State, Zip Code
Office of the Attorney General	**Jefferson City, MO 65102**
Jefferson City, MO 65102	E-mail Address
	dan.mcpherson@ago.mo.gov
	Telephone
	(573) 751-3321
Party Name	Attorney Name
State of Missouri	**Michael G. Goodwin, Office of the Att. Gen.**
Address	Address
PO BOX 899	**PO BOX 899**
City, State, Zip Code	City, State, Zip Code
Office of the Attorney General	**Jefferson City, MO 65102**
Jefferson City, MO 65102	E-mail Address
	gregory.goodwin@ago.mo.gov
	Telephone
	(573) 751-3321
Party Name	Attorney Name
Address	Address
City, State, Zip Code	City, State, Zip Code
Office of the Attorney General	
	E-mail Address
	Telephone

CIVIL PROCEDURE FORM NO. 8-A(1)

IN THE 21st JUDICIAL CIRCUIT, St Louis_____ COUNTY, MISSOURI

Judge or Division: Hon. Mary Elizabeth Ott, Div. 7	**Circuit Court Case Number:** 2105R-02833-01	
Plaintiff/Petitioner: State of Missouri	Appellate Number:	☐XX Filing as an Indigent
	Date of Judgment/Decree/Order: **(ATTACH A COPY)** Nov. 16, 2022	Court Reporter: Megan Granda, Court Reporter Division 7 megan.granda@courts.mo.gov
vs.	Date Post Trial Motion Filed: Nov. 18, 2022	☐ Sound Recording Equipment
Defendant/Respondent: Kevin Johnson	Date Ruled Upon: Nov. 19, 2022	The Record on Appeal will consist of: ____ Legal File only or ___X_ Legal File and Transcript

(Date File Stamp)

Notice of Appeal to Supreme Court of Missouri

Notice is given that _____Kevin Johnson_____ appeals from the judgment/decree/order entered in this action on Nov. 16, 2022 and Nov. 19, 2022_____ (date).

Jurisdiction of the Supreme Court is based on the fact that this appeal involves:
(Check appropriate box)

- ☐ The validity of a treaty or statute of the United States
- ☐ The title to any state office in Missouri **EXECUTION SCHEDULED NOV. 29, 2022**
- ☐ XXThe punishment imposed is death
- ☐ The construction of the revenue laws of Missouri
- ☐ The validity of a statute or provision of the Constitution of Missouri

Unless the basis of jurisdiction involves the death penalty, the appellant shall prepare a concise explanation, not to exceed six pages, of the basis for jurisdiction. This must be filed as part of or simultaneously with this notice of appeal. See Rule 81.08(a) and (b).

Appellant's Name (If multiple, list all or attach additional pages) Kevin Johnson	Respondent's Name (If multiple, list all or attach additional pages) State of Missouri
Address Department of Corrections No. #1117773 Potosi Correctional Center 111593 State Highway O, Mineral Point, MO 63660	Address 100 SOUTH CENTRAL AVE CLAYTON, MO 63105
Appellant's Attorney/Bar Number (If multiple, list all or attach additional pages) Joseph W. Luby, Mo. #48951	Respondent's Attorney/Bar Number (If multiple, list all or attach additional pages) Edward Emmett Keenan, Mo. #62993
Address Federal Community Defender Office, E.D. Pa. 601 Walnut St., Suite 535 West Philadelphia, PA 19106	4600 Madison Ave., Ste. 810 Kansas City, MO 64112
E-mail Address joseph_luby@fd.org	E-mail Address ee@keenanfirm.com
Telephone (215) 928-0520	Telephone (816) 809-2100

DOC Register Number (If applicable) 1117773

Does this appeal involve a felony conviction? X☐ X Yes ☐ No

Has the defendant been released on an appeal bond? ☐ Yes **(ATTACH BOND)** ☐xx No

Bond Amount	Surety Name, Address, and Phone Number

Docket Fee Information

☐ The docket fee in the amount of $70.00 is being tendered with this notice of appeal.

☐ XX No docket fee is being tendered because:

☐ a docket fee is not required by law pursuant to _____ (cite specific statute or other authority).

XX☐ a motion to prosecute the appeal in forma pauperis has been or will be filed.

☐ a docket fee in the amount of $70.00 cannot be tendered at this time but will be submitted at a later date or this appeal will be subject to dismissal pursuant to Rule 84.08(a).

Signature of Attorney or Appellant	Date
/s/ Joseph W. Luby	Nov. 19, 2022

Certificate of Service on Persons other than Registered Users of the Missouri eFiling System

I certify that on _____Nov. 19, 2022_____ (date), a copy of the foregoing was sent to the following by facsimile, hand-delivery, electronic mail or U.S. mail postage prepaid to their last known addresses.

__Kevin Johnson, Doc. No. 1117773_____

__Potosi Correctional Center _____

___11593 State Highway O, Mineral Point, MO 63660_____ ___

/s/ Joseph W. Luby

_____

_

Appellant or Attorney for Appellant

Directions to Clerk

As required by Rule 30.01(c), a copy of the notice of appeal shall be sent by the clerk to the Attorney General when the appeal involves a felony. Transmit a copy of the notice of appeal and all attached documents to the clerk of the Supreme Court of Missouri and to any person other than registered users of the eFiling system in a manner prescribed by Rule 43.01. Clerk shall then fill in the memorandum below. See Rule 81.08(i). Forward the docket fee to the Department of Revenue as required by statute.

Memorandum of the Clerk

I have this day served a copy of this notice by ☐ regular mail ☐ registered mail ☐ certified mail ☐ facsimile transmission to each of the following persons at the address stated below. If served by facsimile, include the time and date of transmission and the telephone number to which the document was transmitted.

_____

_____

_____

_____

_____

I have transmitted a copy of the notice of appeal to the clerk of the Supreme Court.

☐ Docket fee in the amount of $70.00 was received by this clerk on _____ (date) which will be disbursed as required by statute.

☐ No docket fee was received.

_____ _____

Date Clerk

Additional Parties and Attorneys

List every party involved in the case not listed on page 1, indicate the position of the party in the circuit court (e.g. plaintiff, defendant, intervenor) and in the Supreme Court of Missouri (e.g. appellant or respondent) and the name of the attorney of record, if any, for each party. Attach additional pages to identify all parties and attorneys if necessary.

Party Name	Attorney Name
Kevin Johnson, DOC. No. 1117773	Rebecca E. Woodman
Address	Address
11593 State Highway O	**1263 W. 72nd Ter.**
City, State, Zip Code	City, State, Zip Code
Potosi Correctional Center	Kansas City, MO 64114
Mineral Point, MO 63660	E-mail Address
	rewlaw@outlook.com
	Telephone
	(785) 979-3672
Party Name	Attorney Name James R. Montgomery
State of Missouri	Assistant to Special Prosecutor
Address	Address
	4600 Madison Ave. Ste. 810
City, State, Zip Code	City, State, Zip Code
	Kansas City, MO 64112
	E-mail Address
	jr@kclaborlaw.com
	Telephone
	(816) 809-2100
Party Name	Attorney Name
State of Missouri	**Eric Schmitt, Office of the Att. Gen.**
Address	Address
PO BOX 899	**PO BOX 899**
City, State, Zip Code	City, State, Zip Code
Office of the Attorney General	**Jefferson City, MO 65102**
Jefferson City, MO 65102	E-mail Address
	eric.schmitt@ago.mo.gov
	Telephone
	(573) 751-3321
Party Name	Attorney Name
State of Missouri	**Stephen Hawke, Office of the Att. Gen.**
Address	Address
PO BOX 899	**PO BOX 899**
City, State, Zip Code	City, State, Zip Code
Office of the Attorney General	**Jefferson City, MO 65102**
Jefferson City, MO 65102	E-mail Address
	stephen.hawke@ago.mo.gov
	Telephone
	(573) 751-3321

Additional Parties and Attorneys

List every party involved in the case not listed on page 1, indicate the position of the party in the circuit court (e.g. plaintiff, defendant, intervenor) and in the Supreme Court of Missouri (e.g. appellant or respondent) and the name of the attorney of record, if any, for each party. Attach additional pages to identify all parties and attorneys if necessary.

Party Name	Attorney Name
State of Missouri	**Andrew Crane, Office of the Att. Gen.**
Address	Address
	PO BOX 899
City, State, Zip Code	City, State, Zip Code
Office of the Attorney General	**Jefferson City, MO 65102**
Jefferson City, MO 65102	E-mail Address
	andrew.crane@ago.mo.gov
	Telephone
	(573) 751-3321
Party Name	Attorney Name
State of Missouri	**Daniel McPherson, Office of the Att. Gen.**
Address	Address
	PO BOX 899
City, State, Zip Code	City, State, Zip Code
Office of the Attorney General	**Jefferson City, MO 65102**
Jefferson City, MO 65102	E-mail Address
	dan.mcpherson@ago.mo.gov
	Telephone
	(573) 751-3321
Party Name	Attorney Name
State of Missouri	**Michael G. Goodwin, Office of the Att. Gen.**
Address	Address
PO BOX 899	**PO BOX 899**
City, State, Zip Code	City, State, Zip Code
Office of the Attorney General	**Jefferson City, MO 65102**
Jefferson City, MO 65102	E-mail Address
	gregory.goodwin@ago.mo.gov
	Telephone
	(573) 751-3321
Party Name	Attorney Name
Address	Address
City, State, Zip Code	City, State, Zip Code
	E-mail Address
	Telephone

OFFICE OF PROSECUTING ATTORNEY

WESLEY BELL
Prosecuting Attorney

St. Louis County Justice Center
100 South Central Avenue
ST. LOUIS COUNTY, MISSOURI 63105

(314) 615-2600
TTY (314) 615-5267

Betsy AuBuchon, Clerk
Supreme Court of Missouri
P.O. Box 150
Jefferson City, MO 65102
Via email to: kathy.fletchall@courts mo.gov

Re: *State v. Kevin Johnson* SC89168

Dear Ms. AuBuchon:

I am writing in regard to the case of *State v. Kevin Johnson* (SC89168). Our office recently became aware that the Office of the Attorney General has filed a motion seeking to set an execution date for Mr. Johnson.

The purpose of this letter is to inform the Court that the Conviction and Incident Review Unit (CIRU) of the St. Louis County Prosecuting Attorney's Office has been reviewing Mr. Johnson's application that he submitted pursuant to Section 547.031, RSMo, alleging that his conviction and death sentence are unfairly and unconstitutionally tainted by racial bias.

The CIRU has conducted a preliminary investigation into Mr. Johnson's allegations, and believes further investigation may be warranted. But in the course of our review, we have determined our office has a conflict of interest that would preclude further work, due to one of Mr. Johnson's trial attorneys being currently employed as first assistant trial counsel in this office. Since that time, we have been attempting to locate a special prosecutor to complete the review of Mr. Johnson's application, but at this time have been unable to locate a special prosecutor who is willing and able to serve.

As such, this office respectfully requests that the Court refrain from scheduling an execution date for Mr. Johnson until we have a special prosecutor in place to take any further action he or she deems appropriate with respect to Mr. Johnson's case.

Sincerely,

Jessica Hathaway

Jessica Hathaway
Chief, Conviction and Incident Review Unit

IN THE CIRCUIT COURT OF SAINT LOUIS COUNTY
STATE OF MISSOURI

STATE OF MISSOURI	)	
	)	
Plaintiff,	)	
	)	Cause No. 2105R-02833-01
v.	)	
	)	
KEVIN JOHNSON,	)	
	)	
Defendant.	)	

MOTION TO APPOINT A SPECIAL PROSECUTOR PURSUANT TO SECTION 56.110, RSMO

Comes now the Prosecuting Attorney for the County of St. Louis, Wesley Bell, and respectfully requests this Court to appoint a Special Prosecutor in the above-referenced matter. In support of this motion, the State explains that:

1. Defendant Kevin Johnson was convicted on November 9, 2007 of first-degree murder for killing Sgt. William McEntee, and the jury recommended the death penalty. The trial court adopted the jury's recommendation and sentenced Appellant to death.
2. Defendant has exhausted his appellate remedies, and the Supreme Court of Missouri has set a date for his execution as November 29, 2022.
3. Robert Steele, current chief trial counsel in this office, represented Defendant in both this trial and a previous trial, which had resulted in a hung jury.
4. Section 547.031 empowers a prosecuting or circuit attorney in the jurisdiction in which a person was convicted to file a motion to vacate or set aside the judgment if he or she has information that the convicted person may be innocent or may have been erroneously convicted.

5. Defendant has filed an application with this office under Section 547.031 alleging he was erroneously convicted and sentenced to death, and requesting that a motion be filed by this office pursuant to Section 547.031.
6. Mr. Steele was lead counsel for the Defendant in this case at both his first and second trials.
7. Because Mr. Steele is now chief trial counsel in this office, and represented the Defendant, the Office of the Prosecuting Attorney requests to be disqualified. As this matter involves the application of the death penalty, this office believes a special prosecutor will ensure that the matter is reviewed without the appearance of a conflict of interest in a case in which the State of Missouri is seeking the ultimate penalty.
8. Pursuant to section 56.110, RSMo, this Court has jurisdiction to appoint a Special Prosecutor.
9. E.E. Keenan and his law firm Keenan & Bhatia has consented to act as Special Prosecutor.

Therefore, the Office of the Prosecuting Attorney asks to be removed from the above-referenced cause, and to have E.E. Keenan and his law firm Keenan & Bhatia appointed as Special Prosecutor.

Respectfully Submitted,

Wesley Bell
St. Louis County Prosecuting Attorney

By:

/s/ Jessica Hathaway

Jessica Hathaway, #49671
Office of the

St. Louis County Prosecuting Attorney
Wesley Bell, Prosecutor
100 South Central
Clayton, MO 63105
Ph: 314-615-2600

IN THE CIRCUIT COURT OF SAINT LOUIS COUNTY
STATE OF MISSOURI

FILED
OCT 12 2022
JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

STATE OF MISSOURI	)	
	)	
Plaintiff,	)	
	)	Cause No. 2105R-02833-01
v.	)	
	)	
KEVIN JOHNSON,	)	
	)	
Defendant.	)	

ORDER APPOINTING A SPECIAL PROSECUTOR PURSUANT TO SECTION 56.110, RSMO

Pursuant to the St. Louis County Prosecuting Attorney's Motion for Appointment of a Special Prosecutor pursuant to Section 56.110, RSMo, and for good cause shown, the Circuit Court of St. Louis County hereby appoints, with consent, E.E. Keenan and the law firm of Keenan & Bhatia to act as Special Prosecutor for all matters related to this investigation and prosecution.

So Ordered:

JUDGE Mary Elizabeth Ott 10/12/2022
Presiding Judge

IN THE 21ST JUDICIAL CIRCUIT COURT, ST. LOUIS COUNTY, MISSOURI

State Of Missouri
Plaintiff,

vs.

Kevin Johnson
Defendant.

Case Number: 2105R-02833-01

Entry of Appearance

Comes now undersigned counsel and enters his/her appearance as attorney of record for State Of Missouri, Plaintiff, in the above-styled cause.

/s/ E.E. Keenan
Edward Emmett Bhatia Keenan
Mo Bar Number: 62993
Attorney for Plaintiff
4600 Madison Ave.
Ste. 810
Kansas City, MO 64112
Phone Number: (816) 809-2100
ee@keenanfirm.com

Certificate of Service

I hereby certify that on October 12th, 2022, a copy of the foregoing was sent through the Missouri eFiling system to the registered attorneys of record and to all others by facsimile, hand delivery, electronic mail or U.S. mail postage prepaid to their last known address.

/s/ E.E. Keenan
Edward Emmett Bhatia Keenan

Case No. 2105R-02833-01

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

STATE OF MISSOURI
Plaintiff,

v.

KEVIN JOHNSON,
Defendant.

STATE OF MISSOURI'S MOTION TO VACATE JUDGMENT AND SUGGESTIONS IN SUPPORT

Edward (E.E.) Keenan
KEENAN & BHATIA, LLC
4600 Madison Ave., Ste. 810
Kansas City, MO 64112
(816) 809-2100
ee@keenanfirm.com

Special Prosecutor for Plaintiff
State of Missouri

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SECONDARY AUTHORITY

STATUTES

The Department of Corrections plans to execute Kevin Johnson on November 29, 2022. Just over a month ago, the Court appointed the undersigned Special Prosecutor to review allegations of constitutional error at trial.

Since then, the State has reviewed tens of thousands of pages of evidence, and has contacted every member of the prosecution team. The State has also reviewed extrinsic evidence bearing on the case.

This evidence clearly and convincingly shows that improper racial factors played a substantial role throughout the process - in the prosecutor's selection of defendants for first degree prosecution, the decision to seek a death sentence, and in the selection of jurors ultimately tasked with determining guilt and sentence. The evidence is equally clear and convincing that these improper factors substantially influenced prosecutorial decision-making in Mr. Johnson's case.

The crime here - the killing of Kirkwood Police Sergeant William McEntee - is horrific. Mr. McEntee's family, the law enforcement community, and the community deserve justice. Unfortunately, the original Prosecuting Attorney did not pursue that justice according to law. The law requires this Court to vacate the judgment, and order a new trial that adheres to constitutional standards. *See* RSMo 547.031.

INTRODUCTION

Kevin Johnson was 19 years old when he killed Kirkwood Police Sergeant William McEntee.[1] Mr. Johnson is Black; Sgt. McEntee was White. Mr. Johnson claims that he saw the police failing to intervene to help his dying 12-year-old brother the day of the killing. Out of anger, he claims he got a gun and killed Sgt. McEntee.

The St. Louis County Prosecuting Attorney charged Mr. Johnson with first degree murder and sought the death penalty. The first trial deadlocked 10-2 in favor of conviction on second degree murder. Following a retrial, the State secured a conviction on first degree murder and a death sentence.

In 2021, the Missouri General Assembly passed, and Governor Parson signed, a new law codified as RSMo 547.031. This statute allows a prosecutor to reopen a judgment for, among other reasons, constitutional error at trial.

Proof of discrimination "often depend[s] on inferences rather than on direct evidence," because those who discriminate are "shrewd enough not to leave a trail of direct evidence." *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 116 (Mo. banc 2015) (citation omitted). Analysis "generally must rely on circumstantial evidence." *Id.* "There will seldom be eyewitness

[1] These facts come generally from *State v. Johnson*, 284 S.W.3d 561, 567 (Mo. banc 2009), as well as other portions of the record, of which the Court may take judicial notice.

testimony as to the [decisionmaker]'s mental processes." *Id.*

Following a comprehensive review of the evidence, the undersigned Special Prosecutor has determined that unconstitutional racial discrimination infected this prosecution, and that this error requires the judgment to be set aside. Among other key facts:

- Five police-officer killings were prosecuted by the office during Mr. McCulloch's tenure. Mr. McCulloch pursued the death penalty against four Black defendants but not against the one White defendant, Trenton Forster. This was despite the fact that Forster's conduct was more aggravated: he had bragged on social media about wanting to kill police officers ("I want fuck the police carved into my grave"), and had also indicated an intent to "tak[e] out every single nigga in the city." (Ex. 13, Forster Messages.)
- In the White-defendant police-killing case, Mr. McCulloch's office issued a written invitation to defense counsel to submit mitigating evidence that might convince the prosecutor's office not to seek death. His office granted the defense nearly a year to provide arguments against death, and Mr. McCulloch ultimately decided not to seek death against the White defendant, Trenton Forster, without giving any specific explanation why. (Ex. 6, Corr. with Forster Counsel.)
- By contrast, Mr. McCulloch never issued a mitigation-invitation to Mr.

Johnson or any of the other three Black defendants accused of killing police officers. (Ex. 3, Bradford Aff.)

- Work product from the prosecution team shows the prosecutors' strategy to evade *Batson* by exercising fewer than their allotted nine peremptory challenges, in the hope that the trial court might eliminate Black jurors ranked high in the strike pool without those strikes counting against the prosecution. (Ex. 7, Work Product Memorandum re: Johnson Jury Selection.)
- Mr. McCulloch has refused to even acknowledge correspondence from the Special Prosecutor asking him about the case, despite his extensive statements to the news media about this and other cases. (Ex. 3, Bradford Aff.; Ex. 4, McCulloch Corr.)
- Former Assistant Prosecutor Sheila Whirley, who participated in Mr. Johnson's trial, when questioned about why the State pursued death, stated that she is reluctant to reveal "family secrets," and said the death decision was Robert McCulloch's. (Ex. 3, Bradford Aff.)
- Mr. McCulloch's office maintained no record of guidelines, practices, or procedures on whether to seek the death penalty, despite Mr. McCulloch's own statement that the existence of such procedures is the reason no bias exists in the death penalty. (Ex. 2, Alton Aff.)
- A comprehensive and rigorous statistical study of 408 St. Louis County

death-eligible homicide prosecutions during Mr. McCulloch's tenure as prosecuting attorney, shows that he largely reserved the death penalty for defendants whose victims were White when deciding whether to charge first degree murder and to seek the death. (Ex. 10, Baumgartner Report.)

- Later statements by Mr. McCulloch to other prosecutors show a particular animosity towards young Black males like Mr. Johnson, viewing them as a population that "we had to deal with." (Ex. 1, Hummel Aff.)

These facts and others leave no serious doubt that Mr. McCulloch's office discriminated. The judgment must be set aside so that a lawful trial and sentence may proceed.

STATEMENT OF FACTS

A. Capital charging and sentencing.

1. Dr. Frank Baumgartner of the University of North Carolina has submitted a report based on his investigation of the 408 death-eligible cases prosecuted under Mr. McCulloch. *See* Baumgartner, Frank, *Homicides, Capital Prosecutions, and Death Sentences in St. Louis County, Missouri, 1990-2021, Report*, Sept. 20, 2022. In an investigation conducted in two stages, Dr. Baumgartner found large race-of-victim effects at virtually every stage of St.

Louis County capital prosecutions (cases where the facts would support a first-degree homicide conviction and at least one aggravating circumstance), meaning that cases with White victims were highly favored to proceed to the next step toward an ultimate death sentence. Dr. Baumgartner summarized the unadjusted results: "The cleanest comparison is simply this: Black victim cases have a 4.0 percent chance of leading to a death sentence; White-victim cases see a 14.1 percent chance. The ratio of these two rates is 3.5. White-victim cases are 3.5 times as likely to lead to a death sentence than Black victim cases." (Ex. 10, Baumgartner Report at 6.)

2. Dr. Baumgartner conducted a further analysis to investigate whether the observed race effects could be a result of the level of aggravation present in the case. Dr. Baumgartner produced four separate models for the overall death result that controlled for statutory aggravating and mitigating circumstances that could plausibly influence the charging and sentencing decision. In each model the White race-of-victim effect strongly persisted even after controlling for other statutory factors. Baumgartner Report at 19, 22. Examining the overall likelihood of receiving death, the odds multiplier for White victim cases consistently ranged from 3.3 to 3.7. The study demonstrates a "very powerful White-victim effect, consistently leading to results suggesting 3 to 4 times the rate of use of the death penalty in such cases compared to those

with Black victims." (Ex. 10, Baumgartner Report at 20.)

3. Dr. Baumgartner concluded:

> . In the prosecution of death-eligible homicides in St. Louis County for the years studied there are strong race-of-victim effects at multiple key stages of the prosecution.
>
> . The effects are particularly pronounced at two decision-points attributable solely to the prosecutor, the decision to charge the case as a first-degree murder and the decision to give notice of intention to seek death.
>
> . The likelihood that the defendant will be charged with death-eligible first degree murder instead of second degree murder is approximately 2.2 times greater in White-victim cases than in Black-victim cases.
>
> . The ultimate likelihood of receiving a death sentence if the victim is White is approximately 3.5 times the likelihood of a death sentence in cases where the victim is Black.
>
> . These effects persist after the introduction of controls for aggravating and mitigating factors, meaning that these disparities cannot be explained by legitimate case characteristics.

(Ex. 10, Baumgartner Report at 22-24.)

4. In terms of predicting which case proceeds to the next stage, and to an ultimate death sentence, the presence of a White victim essentially functioned as an aggravating factor. *Id.* at 20-21.

B. Cases Most Similar to Mr. Johnson's

5. There were five St. Louis County defendants prosecuted to completion[2] for the intentional killing of a police officer for which Prosecuting Attorney Robert P. McCulloch considered death: Lacy L. Turner[3], Dennis Blackman, Todd L. Shepard, Kevin Johnson, and Trenton Forster[4]. Forster is White. Turner, Blackman, Shepard, and Johnson are Black. All five victims, Sergeant Kenneth Koeller, Officer JoAnn Liscombe, Sergeant Michael King, Sergeant William McEntee, and Officer Blake Snyder were White.

6. The State reproduces here non-exclusive summaries of the facts of these cases.

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[2] In another police officer killing, Sergeant Richard Eric Weinhold was shot to death by Thomas Russell Meek on October 31, 2000, while trying to evict Meek from an apartment. *See* William C. Lhotka, *Man held in officer's death tries to claim self-defense*, St. Louis Post-Dispatch, Nov. 3, 2000. Meek, who is White, was charged with first degree murder, but found to be mentally incompetent and committed. He was never tried.

[3] Although the murder occurred in 1987, Turner was not arrested until 1989 and was charged with first degree murder. The docket shows notice of aggravating circumstances was filed April 29, 1991 (amended July 2, 1991), during McCulloch's tenure. *State v. Turner*, 21CCR-604615.

[4] Forster's case was tried after Mr. McCulloch left office, but it was Mr. McCulloch who made the decision not to seek death. Joel Currier and Christine Byers, *Suspect in Killing of St. Louis County Officer Won't Face Death Penalty*, St. Louis Post-Dispatch (Dec. 9, 2017) ("After a complete examination and reexamination of all evidence in this case, I have determined that seeking a death sentence in this case is not appropriate.").

7. The facts were summarized in Respondent's brief on appeal:

At about 2:09 a.m. on January 28, 1987, a silent alarm went off at the Dandy Man's Store at Northland Shopping Center in Jennings in St. Louis County (Tr. 808, 871).

***

Officer Yarbrough arrived at the crime scene at about 2:13 a.m. (Tr . 808). As he drove towards the Dandy Man's Store, he saw that Sergeant [Kenneth] Koeller' s police car was parked in front of that store (Tr. 811). The victim's car was still running, and its headlights were on (Tr. 811-812). Officer Yarbrough noticed that the display window of the aforementioned store was broken and that several items were lying on the ground in front of the store (Tr. 812).

Officer Yarbrough stopped his patrol car, exited it, took cover on the passenger side of it, and radioed for assistance (Tr. 811-813). He saw a radio mike hanging out of the victim's car and two feet sticking out from behind the victim's car (Tr. 813). He ran to the back of that car and found the victim lying on his back (Tr. 814). There were no signs of life (Tr. 818). Officer Yarbrough radioed for an ambulance and additional assistance (Tr. 818, 823). The victim had been shot in the neck (Tr. 815, 817, 906-907). The entrance wound was a contact wound on front of the neck, while the exit wound was on the back of the neck (Tr. 1177-1183). The victim bled to death after the bullet transected the victim's right carotid artery (Tr. 912-913). There was evidence of blunt trauma to the victim's face (Tr. 910-913). Some of the abrasions and bruises were inflicted with a linear object, such as the barrel of a gun (Tr. 910-913). Some of the abrasions and bruises could have been made by a fist (Tr. 911-913). The victim's pistol was missing

(Tr. 826). The victim's pistol was a .357 magnum (Tr. 826).

Respondent's Brief, 3-7.

***State v. Dennis Blackman*, No. 2191R-01060-01**

8. According to the Missouri Court of Appeals:

> At 1:13 a.m., Officer [Joann] Liscombe reported to the dispatcher that she was on a "pedestrian check". Meanwhile, another driver, Steve Carter, saw the man at the corner of Old Halls Ferry and Patricia Ridge. As Carter turned the corner, the man gave him a "frightening" look, causing Carter to lock his car door. Carter saw Officer Liscombe pull up, stop in the intersection and turn her spotlight toward the man. The man initially tried to run away up a hill but was unsuccessful because of the amount of ice on the ground. He saw Officer Liscombe get out of her car and walk toward the man.
>
> After overhearing the report in the 7–Eleven store, Charles Myers decided to drive by the area. As he drove by, he saw Officer Liscombe standing face to face with the man. Officer Liscombe looked at Myers as he passed them, and then turned her head back toward the man. The man never took his eyes off Officer Liscombe.
>
> Meanwhile, the dispatcher tried to reach Officer Liscombe but received no response. The dispatcher called for another car to check on her. As another motorist approached the intersection of Old Halls Ferry Road and Patricia Ridge, he saw Officer Liscombe lying on the ground with blood on her hand and in her hair. Her flashlight and glasses were lying several feet away and her gun was missing from its holster. He and other motorists came to her assistance. The first police officer arrived at 1:23 a.m. All noticed

a massive head wound. She was eventually taken to a hospital.

Officer Liscombe was in shock upon arrival at the hospital and never regained consciousness. She had two bullet wounds in close proximity to the right side of her head, both of which were fatal. She also suffered a gunshot wound to her left hand which entered through her palm and would have immediately incapacitated her hand. She had a horizontal linear wound to the back of her head, caused by a blunt object, which split open her scalp and extended to her bone. This wound would have caused a momentary, stunning reaction sufficient to knock her to the ground, but not to lose consciousness. She also suffered a linear bruise to her thigh and numerous contusions to her legs. Several fingernails had broken off and the fragments were found at the scene, indicating a struggle. Blood patterns on her shirt indicated she was lying down when she was shot in the head. Officer Liscombe died on January 14, 1991.

State v. Blackman, 875 S.W.2d 122, 127-28 (Mo. Ct. App. 1994).

***State v. Todd Shepard,* No. 08SL-CR08802-01**

9. According to the Missouri Court of Appeals:

[Todd] Shepard testified that on the night of the murder he was driving around in the Loop area on what he called a "reco[n] mission" and that he considered the police to be the enemy. He further testified that after he saw Sergeant King in a parked police car, Shepard parked his car "kind of strategically," checked his gun, put the gun in his pocket and approached the officer's car, made eye contact with the officer, and then fired five shots at the officer through his open window.

Memorandum Supplementing Order Affirming Judgment Under Rule 30.25(B) at 3.

***State v. Kevin Johnson*, No. 05CR-2833**

10. According to the Supreme Court of Missouri:

> [Kevin Johnson] had an outstanding warrant for a probation violation resulting from a misdemeanor assault. Around 5:20 in the evening of July 5, 2005, Kirkwood police, with knowledge of the warrant, began to investigate a vehicle believed to be Appellant's at his residence in the Meacham Park neighborhood. The investigation was interrupted at 5:30 when Appellant's younger brother had a seizure in the house next door to Appellant's residence. The family sought help from the police, who provided assistance until an ambulance and additional police, including Sgt. McEntee, arrived. Appellant's brother was taken to the hospital, where he passed away from a preexisting heart condition. Appellant was next door during this time, and the police suspended their search for Appellant and never saw Appellant.
>
> After the police left, Appellant retrieved his black, nine millimeter handgun from his vehicle. When talking with friends that evening, Appellant explained his brother's death as, "that's f____ up, man. They wasn't trying to help him, that he was too busy looking for me." Around 7:30, two hours after Appellant's brother had the seizure, Sgt. McEntee responded to a report of fireworks in the neighborhood and Appellant was nearby. As Sgt. McEntee spoke with three juveniles, Appellant approached Sgt. McEntee's patrol car and squatted down to see into the passenger window. Appellant said "you killed my brother" before firing his black handgun approximately five times. Sgt. McEntee was shot in the head and upper torso, and one of the juveniles was hit in the leg. Appellant reached into the patrol car and took Sgt. McEntee's

silver .40 caliber handgun.

***

Meanwhile, Sgt. McEntee's patrol car rolled down the street, hit a parked car, and then hit a tree before coming to rest. Sgt. McEntee, alive but bleeding and unable to talk, got out of the patrol car and sat on his knees. Appellant reappeared, shot Sgt. McEntee approximately two times in the head, and Sgt. McEntee collapsed onto the ground.

State v. Johnson, 284 S.W.3d 561, 567-68 (Mo. banc 2009)

***State v. Trenton Forster*, No. 16SL-CR07513-01**

11. According to the Missouri Court of Appeals:

On October 6, 2016, St. Louis County Police Officers Snyder and John Becker ("Officer Becker") responded to a 9-1-1 call from a residential house. In uniform and in a marked police vehicle, Officer Snyder pulled behind Forster's car. Officer Snyder approached Forster's driver's side door and tried to talk to Forster. Officer Snyder stated "show me your hands" and repeated "police, show me your hands." Forster then shot Officer Snyder in the face.

Officer Becker took cover and told Forster to show his hands. Forster responded, "I have a f---ing gun, kill me." As Forster kept moving within his car, Officer Becker opened fire on him. Forster said, "F---ing shoot me, I have a gun," and pointed his gun at Officer Becker. Officer Becker reloaded and fired several more shots at Forster, who dropped his gun and was handcuffed.

> Officer Snyder died from his gunshot wound. In addition to the handgun used to shoot Officer Snyder, police recovered an AK-47, ammunition, and drug paraphernalia from Forster's car.

State v. Forster, No. ED107837, Memorandum Opinion, at 2.

12. According to the State's appellate brief in *Forster*, the defendant expressed his intent to kill a police officer on social media multiple times. *See* Respondent's Brief, *Forster*, at 9. In the months before the charged offenses, Forster made several Twitter posts regarding killing and his hostile attitude towards police, such as "**I want fuck the police carved into my grave**," "I'm going to kill people," and "**I'll pull that thing on an officer.**" *Id.* at 10-13. In addition to the fatal shot that Forster fired into Officer Snyder's face, Forster attempted to shoot a second officer but was unsuccessful only because the gun had "jammed, or 'stovepiped,' meaning that an empty cartridge case that had been fired had failed to eject and was protruding from the slide, which prevented another cartridge from being cycled into the firing chamber." Respondent's Brief, Forster, at 16. For the attempted second shooting, Forster was convicted of second degree assault of a law enforcement officer. *See State v. Forster*, 616 S.W.3d 436, 439 (Mo. App. E.D. 2020). (*See also* Ex. 13, Forster Messages.)

13. Forster also expressed his intent to kill Black St. Louisans, stating:

"I swear bruh **I'm takin [sic] out every single nigga in the city** with drugs." (See Ex. 13, Forster Messages.)

14. As to mitigation, all five defendants were afflicted with serious mental health disorders. Trenton Forster suffered from bipolar disorder, attention deficit hyperactivity disorder, generalized anxiety disorder, panic disorder, and polysubstance use disorder. *See Forster*, 616 S.W.3d at 440. Bipolar disorder is marked by "clear changes in mood, energy, and activity levels. These moods range from periods of extremely "up," elated, irritable, or energized behavior (known as manic episodes) to very "down," sad, indifferent, or hopeless periods (known as depressive episodes). Less severe manic periods are known as hypomanic episodes."[5] As early as age twelve, Forster expressed suicidal ideation, and was reported to have made attempts at that age. A second attempt was reported to have occurred at age sixteen. He continued to have suicidal thoughts throughout his adolescence, compounded by his drug addiction. *State v. Forster*, 16SL-CR07513-01 (Tr. 590, 919, 1206-16, 1425).

15. At age 17, Kevin Johnson was diagnosed under DSM-IV with three Axis I disorders; Dysthymia (masked) 300.4, Adjustment disorder with mixed disturbance of emotions and conduct. 309.4; and Child Neglect 995.5. *See* Levin Report. Each of these can be highly debilitating. At one of Mr. Johnson's

[5] https://www.nimh.nih.gov/health/topics/bipolar-disorder.

placements in a group home as a juvenile, St. Joseph Home for Boys, where he was being treated with Ritalin and imipramine for depression and attention deficit disorder, Mr. Johnson attempted to commit suicide by hanging himself with towels and a bedsheet. (Tr. 2259-60). He was thereafter admitted to a psychiatric facility. (Tr. 2260). Another examiner noted suicidal ideation at age fifteen. (Tr. 2264).

16. Some of the most common symptoms to be associated with Dysthymic Disorder are "feelings with inadequacy; social withdrawal; general loss of interest or pleasure; feelings of guilt or brooding about the past; excessive anger; decreased activity; productivity; or effectiveness."[6] Adjustment disorder with mixed disturbance of emotions and conduct may result from any stressful change that impacts family life. These include: "Distress caused by a stressful and life-changing event; behavioral patterns are impacted in a substantially negative way; enjoyable, healthy and fun activities no longer attract interest; sadness, helplessness, hopelessness or symptoms of clinical depression; anxiety, panic attacks, nervousness or problems with sleeping; behavioral issues, such as acting out in a negative way

[6]https://fscj.pressbooks.pub/abnormalpsychology/chapter/dysthymic-disorder-300-4/#:~:text=224%20Dysthymic%20Disorder%20%28300.4%29%20DSM-IV-TR%20criteria%20A.%20Depressed,observation%20by%20others%2C%20for%20at%20least%202%20years.

at home, at school at work or in public; potential arrest or school suspension for behavioral problems."[7] Child abuse typically results in "greater emotional than physical damage. An abused child may become depressed. He or she may withdraw, think of suicide or become violent. An older child may use drugs or alcohol, try to run away or abuse others."[8]

17. Later evaluators determined Johnson has a history of hearing voices, suicidality, and rendered additional diagnoses including dissociative identity disorder and depression, as well as a frontal lobe impairment that diminished his impulse control. Report of Neuropsychologist Daniel A. Martell, Ph.D., July 16, 2016, at 22; Report of Richard G. Dudley, Jr., M.D., Aug. 7, 2016, at 8-10.

18. In Todd Shepard's case, a defense psychiatrist found:

> Mr. Shepard presents with an equally longstanding and significant history of delusions and paranoid thinking consistent with a type of serious mental illness called a "psychosis" in which he cannot tell what is real from what is imagined. The main feature of this disorder is the presence of delusions, which are unshakable beliefs in something untrue. Mr. Shepard experiences non-bizarre delusions, which involve situations that could occur in real life, however, the situations are either not true at all or highly exaggerated. Mr. Shepard's delusions involve the belief that he is

[7]https://www.regionalcenter.org/mental-health/adjustment-disorder-with-mixed-disturbance-of-emotions-and-conduct

[8] https://fpnotebook.com/prevent/Abuse/ChldAbs.htm

> to be responsible for inciting a "racial/class revolution" and that his actions on the night of the incident offense were a part of his messianic mission. These misinterpretations and misperceptions or experiences of reality are a manifestation of his psychotic thinking which are hallmarks of a psychotic thought disorder.

Trial Court Report, Todd Shepard.

19. According to a psychiatrist (whose testimony was later excluded by the trial court), Dennis Blackman suffered a psychotic episode or dissociative episode while he was in police custody based on his statements to police that he had another personality named "Death." *See Blackman*, 875 S.W.2d at 133.

20. Turner was intellectually disabled, and suffered from depression and dependent personality disorder. (*State v. Turner*, Tr. 2199, 2216-17).

21. Both Forster and Johnson had very difficult upbringings.[9] Trenton Forster's family was dysfunctional. His father and sister suffered from depression. His father had an addiction to opioids and suffered from alcoholism early in Forster's life. At a young age Forster displayed odd behaviors (*e.g.* sleeping in closets) and experienced low resilience, anger, irritability and an

[9] As to Shepard, the presentence investigation related that his parents had divorced, both drank, and at least one source said the father was physically abusive toward the mother. Trial court report, Todd Shepard. Insufficient information was available on the social histories of Lacy and Blackman.

inability to regulate emotions. Forster's mother was extremely strict and this caused substantial tension between them. His parent's marriage was dissolving, resulting in much yelling, screaming, and profanity. His parents divorced in 2010 and there was a traumatizing, bitter custody battle. Forster later developed a drug addiction and experienced suicidal ideation. Appellant's Brief, *State v. Forster*, 2020 WL 2514845 (Mo. App. E.D. 2020).

22. Kevin Johnson suffered parental abandonment at a young age. Johnson's father was imprisoned for murder when defendant was two years old. His mother was addicted to crack cocaine and prostituted herself to support her habit—oftentimes in front of her children. At Mr. Johnson's trial, a defense witness, Dr. Daniel Levin, testified that records from the Department of Family Services (DFS) showed his mother's inability to care for her children, and noted that twelve hotline calls were made on her. There was no food in the house because the mother sold food stamps in order to get money to buy drugs, workers found the children alone with roaches and unsanitary living conditions, a social worker observed the mother yelling at and threatening her children even in their presence. (Tr. 2240-41). The resulting trauma to Mr. Johnson was profound.

> This is something we see in children who, first of all, have suffered terrible losses. He's already suffered the loss of his father, but now he has a mother who's very troubled. She's barely

> functioning. She has serious drug problems, she's abandoned the children at night, there's no food in the house. So what happens is that any child of Kevin's age, any child in that situation is going to become traumatized. It's going to be extremely traumatic for them. And they're going to be scared to death. They are going to be crying out for help and wondering where their parents are.

(Tr. 2241-42).

23. DFS removed Mr. Johnson and his younger sister from their mother's home when he was four-years-old, and Mr. Johnson went to live with his aunt, Edythe Richey. (Tr. 2243-45). DFS did nothing to help Mr. Johnson cope with the severe neglect, loss, and trauma that he had experienced. (Tr. 2246). Mr. Johnson began wetting the bed and acting aggressively with other children when he was seven years old, which confirmed that he had not been receiving the help that he needed. (Tr. 2248). His aunt responded to the bedwetting by hitting him with a switch every night, and continued to do that into his teenage years. (Tr. 2250).

24. The remainder of Mr. Johnson's childhood was spent in group homes. (See Trial Record.)

C. The Decision to Seek Death

25. During the course of the investigation, the Special Prosecutor sought information about whether the Prosecuting Attorney's Office under Mr.

McCulloch maintained any written procedures or guidelines on making the decision to seek the death penalty. (See Ex. 2, Alton Aff.)

26. Procedures are key in making the death decision. According to comments in Mr. McCulloch's own personnel file, he "disputes claims of bias" in the death penalty because of "**the process and procedure that is employed by prosecutors** in making the determination of whether or not to seek death." (*See* Ex. 8, McCulloch Personnel Records.)

27. Contrary to his own representations, Mr. McCulloch did not maintain any such process or procedure. (*See* Ex. 2, Alton Aff.)

28. Instead, he made the decision of whether to seek death on his own. (*See* Ex. 3, Bradford Aff.)

29. The available case records show that, as a practical matter, Mr. McCulloch employed two separate processes for the death determination in police officer killings: one for a White defendant, and another for Black defendants. (*See* Ex. 3, Bradford Aff.)

30. When prosecuting White police killer Trenton Forster, McCulloch directed a letter to Forster's counsel requesting information on why the State should not seek death. (Ex. 6, Corr. with Forster Counsel (letter of Oct. 24, 2016, containing bottom notation of RPMc, the initials of Robert P.

McCulloch).)

31. Forster's counsel wrote back, requesting a nine-month extension of time to provide mitigation evidence. (Ex. 6, Corr.with Forster Counsel t (Letter of Feb. 28, 2017).)

32. Mr. McCulloch did exactly what Forster asked, granting a nine-month extension and waiting until December 11, 2017, to announce that he would not seek the death penalty. *See* Joel Currier, *Suspected Mo. Cop Killer Won't Face Death Penalty*, St. Louis Post-Dispatch (Dec. 11, 2017), available at https://www.police1.com/legal/articles/suspected-mo-cop-killer-wont-face-death-penalty-zrvnJ5s1Cz4e7bHY/.

33. The decision outraged the victim's family, but McCulloch gave no explanation, stating simply: "that his decision came after 'a complete examination and reexamination of all evidence in this case'" and that he "'cannot elaborate on the decision,' citing ethical rules for prosecutors." *See* Joel Currier, *Suspected Mo. Cop Killer Won't Face Death Penalty*, St. Louis Post-Dispatch (Dec. 11, 2017), available at https://www.police1.com/legal/articles/suspected-mo-cop-killer-wont-face-death-penalty-zrvnJ5s1Cz4e7bHY.

34. Seeking to learn about Mr. McCulloch's handling the case, the Special Prosecutor wrote Mr. McCulloch a letter, emailing him on four separate

occasions. The Special Prosecutor also called Mr. McCulloch four times. The Special Prosecutor visited Mr. McCulloch's official address. Lights were on, a car was in front, and the Special Prosecutor saw a woman visibly walking around the home, but refusing to come to the door or even acknowledge that the prosecutor was there. He has not responded to any of these attempts - not even an offer of a five-minute phone call. (*See* Ex. 3, Bradford Aff.; Ex. 4, McCulloch Corr.)

35. Mr. McCulloch is willing and able to talk to others about his cases: he recently sat down for a two-hour interview with the *Riverfront Times*, a St. Louis newspaper, where he discussed the death penalty. (See Ex. 9, *Riverfront Times* Article.)

36. The Prosecuting Attorney's files do not contain any record of an invitation to any Black police killing defendants to provide mitigation evidence. (*See* Ex. 3, Bradford Aff.)

D. Attempted Use of Backdoor Racial Strikes at Trial.

37. During the first trial in this case, Mr. McCulloch attempted to waive some of the State's peremptory strikes in an attempt to have Black jurors - whose numbers were higher in the strike pool sequence - stricken without him needing to announce a strike; the Court refused to permit this. (*See* Ex. 11, Trial Transcript 1 Excerpt.)

38. Between the first and second trial, the Prosecuting Attorney's office conducted legal research and prepared a confidential memo - which it instructed others not to copy - trying to find ways around the Circuit Court's ruling or to convince the Circuit Court to change its mind and permit Mr. McCulloch to use backdoor strikes of minority jurors. (Ex. 7, Work Product Memorandum re: Johnson Jury Selection.)

E. Personal Animus Against Black Youth Expressed by Robert McCulloch.

39. In 2018, Mr. McCulloch gave a presentation at the Oregon District Attorneys' Association summer conference. (Ex. 1, Hummel Aff..)

40. During his talk, Mr. McCulloch displayed a photograph on a PowerPoint slide showing several Black males, whose ages appeared to be 16 to 20. (*Id.*)

41. The picture did not show them engaging in any unlawful activity, nor did Mr. McCulloch state that they were engaged in any unlawful activity. (*Id.*)

42. While displaying this picture, Mr. McCulloch stated: "This is what we were dealing with." (*Id.*)

43. John Hummel, a District Attorney who has personally made the

decision to seek the death penalty, witnessed the presentation. He states that Mr. McCulloch's tone of voice when speaking of these young people was sharp, and expressed contempt and animosity about them. (*Id.*)

The State discussed further facts below as necessary.

DISCUSSION

The authority of the State to seek to set aside a judgment and this Court's jurisdiction to consider and decide any such motion derives from RSMo 547.031. This Court must set aside the judgment upon a finding of "clear and convincing evidence of actual innocence ***or*** constitutional error at the original trial or plea that undermines the confidence in the judgment." Pursuant to this "constitutional error" provision, there are three requirements which must be met for the judgment to be set aside.

First, the standard of proof to be met is clear and convincing evidence, which imposes a higher burden than mere preponderance of the evidence, but less than the beyond a reasonable doubt standard. "Clear and convincing evidence means that you are clearly convinced of the affirmative of the proposition to be proved. This does not mean that there may not be contrary evidence." *In re Pogue*, 315 S.W.3d 399, 400 (Mo. App. 2010).

Second, the State must show evidence of "constitutional error at the

original trial." As demonstrated below, the evidence uncovered in this case shows discriminatory purpose that violates the equal protection provisions of the Missouri and United States Constitutions.

Lastly, the error must be such that it "undermines the confidence in the judgment." The term "judgment" necessarily embraces the defendant's sentence as well as the underlying conviction. In Missouri, after all, "A final judgment occurs only when a *sentence* is entered." *State v. Williams*, 871 S.W.2d 450, 452 (Mo. banc 1994) (emphasis in original). In assessing whether confidence in the conviction or sentence has been undermined, "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 342 (Mo. banc 2013) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). As the United States Supreme Court stated: "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

A. Legal Standards.

To establish a selective prosecution violation, the defendant must show that similarly situated individuals of a different race were not prosecuted. In

United States v. Armstrong, 517 U.S. 456, 469 (1996):

> The requirements for a selective-prosecution claim draw on ordinary equal protection standards. The claimant must demonstrate that the federal [or state] prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.

United States v. Armstrong, 517 U.S. 456, 465 (1996) (internal quotation and citation omitted).

Armstrong does not require identity of facts, only that the cases be substantially similar. *Chavez v. Ill. St. Police*, 251 F.3d 612, 635 (7th Cir. 2001) (court should take "care[ ] not to define the [similarly situated] requirement too narrowly."). It is not necessary that individuals be similar in all respects, only that the movant demonstrate that he or she shares "common features essential to a meaningful comparison." *Id.*

"It is appropriate to judge selective prosecution claims according to ordinary equal protection standards." *Wayte v. United States*, 470 U.S. 598, 608 (1985). Where direct evidence is unavailable, equal protection claimants can, and frequently do, rely on the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g.*, *Ballou v. McElvain*, 29 F.4th 413, 422 (9th Cir. 2022) (as to equal protection employment

discrimination case); *Demoret v. Zegarelli*, 451 F.3d 140, 151 (2d Cir. 2006) (same). Under that framework, the criminal defendant may make a prima facie case of discrimination by showing that he or she has been adversely prosecuted while "persons similarly situated to the defendant were not generally subject to prosecution," along with a producing a reasonable inference that "the prosecutor's discriminatory selection was based on an impermissible consideration such as race, religion, or any other . . . discriminatory purpose." *State v. Kramer*, 637 N.W.2d 35, 42-43 (Wisc. 2001); *United States v. Schoolcraft*, 879 F.2d 54, 68 (3d Cir. 1989). Once the defendant makes a prima facie case, the burden shifts to the prosecution to state a "reasonable basis to justify the classification," or a legitimate and non-discriminatory and legitimate reason for the challenged decision. *Kramer*, 637 N.W.2d at 44; *Schoolcraft*, 879 F.2d at 68; *see also United States v. Carron*, 541 F. Supp. 347, 349 (W.D.N.Y. 1982) ("Once the defendant satisfies this burden of proof, the burden shifts to the government, which must justify its actions in singling out a particular person or persons for prosecution."). At the third and final stage of any burden-shifting case, the claimant may produce evidence showing that the stated reason is a pretext for discrimination. *See*, *e.g.*, *Demoret*, 451 F.3d at 151; *Floyd-Gimon v. Univ. of Ark. for Med. Sciences*, 716 F.3d 1141, 1149 (8th Cir. 2013); *Ottoman v. City of Independence*, 341 F.3d 751, 759 (8th Cir. 2003).

Statistical evidence also plays a role. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court was asked to infer discriminatory purpose from a demonstration of state-wide systemic race-of-victim discrimination. The Court stated: "[T]o prevail under the Equal Protection Clause, [a defendant] must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* at 292-93 (emphasis in original). Here, evidence appears that focuses on a single decision maker: Prosecuting Attorney Robert P. McCulloch. This is the type of evidence the Court in *McCleskey* indicated it would look for.

B. Argument

1. The Capital Prosecution of Kevin Johnson was Motivated in Substantial Part by Discriminatory Intent and the State Violated Equal Protection.

At every stage of capital prosecutions under Mr. McCulloch, race played a prominent role, and remained a decisive factor when the analysis is limited to cases most similar to Mr. Johnson's, police officer killing. The State violated Equal Protection.

From the outset, direct evidence shows a differential in treatment: Mr. McCulloch gave Trenton Forster a year to plead for his life and provide mitigation evidence. He provided no such opportunity to Black killers. Mr. McCulloch's decision to give extra leniency to a White cop killer finds no

support in the record of the case. Mr. Forster had previously boasted about how he hated the police and wanted to get into a violent confrontation with a police officer. He then executed his plan: shooting at police officers and killing one of them. Mr. McCulloch articulated no explanation for this leniency, and any explanation he might try to offer at the hearing in this case would lack credibility. He has only said that Mr. Forster had mental health problems, but so did every other police-killing defendant - including Kevin Johnson. Importantly, Mr. McCulloch could not have learned of the extent of Forster's mental health problems unless he had gone searching for mitigating evidence. In other words, he found the conclusion that he was looking for.

Missouri courts have consistently looked to the treatment of other similarly-situated parties to assess pretext. *See, e.g., McGhee v. Schreiber Foods, Inc.*, 502 S.W.3d 658, 667 (Mo. App. W.D. 2016) ("[I]nstances of disparate treatment, that is, when the employee has been treated differently from other employees, can support a claim of discrimination[.]") Comparators "[n]eed not be identical in every conceivable way. . . . So long as the distinctions between the [defendant] and the proposed comparators are not so significant that they render the comparison effectively useless, the similarly-situated requirement is satisfied." *Id.* at 668.

Narrowing the inquiry to cases most similar to Mr. Johnson's, the State

can discern no significant distinctions that would justify seeking death against Mr. Johnson and the other Black defendants, but not for Mr. Forster, who is White. The five defendants were similarly situated. All involved the killing of a police officer. In all, multiple aggravating circumstances were present. Indeed, it could be reasonably maintained that Forster's case was the most aggravated. Forster was prosecuted and convicted for assault on a second officer, and there is strong evidence that but for the fact his gun jammed, the second officer would have been killed as well.

Any claim that Forster, the White defendant, was not deserving of death due to his mental illness smacks of pretext; all five defendants suffered from mental disorders which diminished their culpability. Forster suffered from bipolar disorder, attention deficit hyperactivity disorder, generalized anxiety disorder, panic disorder, and polysubstance use disorder. Johnson had been diagnosed with three serious mental illnesses as recognized by DSM-IV, dysthymia, adjustment disorder with mixed disturbance of emotions and conduct, and child abuse. Todd Shepard suffered from a delusional disorder. Dennis Blackman experienced psychotic and dissociative episodes. Lacy Turner suffered from an intellectual disability, depression, and dependent personality disorder. By today's standards, his disability would render him ineligible for the death penalty. Each of these defendants could be viewed as

having significantly diminished culpability due to their mental disorders.

Disparate treatment is blatant in another respect. Only Forster was specifically invited to make his case for life; the Black defendants received no comparable invitation. Even if Forster made a better showing of mitigation—which he does not—it was because the State solicited it solely from the White defendant; it had no interest in actually considering waiving death for the Black defendants. And McCulloch made clear his disdain for the mitigating side of the scale in aggravated cases ("so what … if these people can become a productive member of society … they still committed a horrible, brutal, vicious, murder,"), further evidence that race, not mental illness, was the deciding factor in Forster. Finally, Forster's mental impairment simply could not have been the reason for waiving death; the State vigorously disputed this same evidence when Foster put forth a diminished capacity defense to first degree murder. McCulloch's newly articulated justification regarding Forster's mental illness and diminished capacity is inconsistent with his decision to nonetheless pursue prosecution for first degree murder.

It is well-settled that shifting explanations are circumstantial evidence of pretext. *Foster v. Chatman*, 578 U.S. 488, 512 (2016). In *Foster*, "the prosecution's principal reasons for the strike shifted over time, suggesting that those reasons may be pretextual." *Id.* at 507. Indeed, "[s]uch implausible

explanations and false or shifting reasons support a finding of illegal motivation." *Hall v. N.L.R.B.*, 941 F.2d 684, 688 (8th Cir. 1991). *See York Prod., Inc. v. N.L.R.B.*, 881 F.2d 542, 545 (8th Cir. 1989) (finding illegal motivation where, inter alia, initial reason was later abandoned and new position was adopted at hearing); *N.L.R.B. v. RELCO Locomotives, Inc.*, 734 F.3d 764, 782 (8th Cir. 2013) (vacillation in reasons supported finding employment termination illegal); *Aerotek, Inc. v. Nat'l Lab. Rels. Bd.*, 883 F.3d 725, 732 (8th Cir. 2018) (finding implausible employer's rationale that was contradicted by their own activity and communications).

In assessing the similarities of these cases, the State notes the complete absence of both guidelines for when death is appropriate, or any contemporaneous memoranda reflecting the decision-making process. Requests for these materials reveal none exist. Rather, it seems these were *ad hoc* decisions, and as such are further prone to the influence of improper factors. Neither has the Special Prosecutor been favored with a response from the trial prosecutors. Finally, the trial prosecution team was provided the opportunity to dispute claims of purposeful discrimination but declined to do so. McCulloch has failed to respond to numerous emails, and telephone messages.

Even an email requesting a five minute telephone call went unanswered.

Second chair prosecutor Patrick Monahan has been similarly unresponsive, declining to speak with the Special Prosecutor except if provided with written notice of the questions to be asked.

Third chair prosecutor Sheila Whirley picked up the Special Prosecutor's phone call. But she was similarly unhelpful, stating that she would not "give up the family secrets" without a clearer understanding of the Special Prosecutor and his role. She then simply pointed the finger at McCulloch, said he made the decision, and directed the Special Prosecutor to look at the notice of aggravating factors filed with the Court.

The trial prosecutors have declined to justify their actions, let alone prove any such justifications. The Court can and should draw a credibility inference from the trial team's refusal to give any real explanation of their decision. Most especially, Mr. McCulloch's decisions lack credibility because he has refused to even acknowledge the Special Prosecutor's attempts at contact - all while giving a two-hour news media interview.

In addition, statistical evidence supports an inference of discrimination. Statistical evidence is "relevant in conjunction with all other evidence in determining intentional discrimination." *Cox v. First Nat. Bank*, 792 F.3d 936, 941 (8th Cir. 2015) (citation omitted).

The Baumgartner Report presents compelling evidence that racial discrimination was pervasive in the selection of cases for capital prosecution; at virtually every decision-point race played a prominent role. Overall, White-victim cases saw a death rate of 14 percent, whereas Black-victim cases saw a rate of just four percent. Thus, cases with White victims were 3.5 times as likely to lead to a sentence of death as cases with Black victims, and 2.2 times as likely to lead to the filing of first degree murder charges. These unadjusted results were highly statistically significant.

Baumgartner then employed commonly accepted statistical procedures to determine if the disparities could be explained by legitimate case characteristics, aggravating and mitigating circumstances. He concluded:

> [T]he multivariate analysis results are highly consistent and confirm the simple comparisons laid out in Table 1 [unadjusted results]. The most important result from this analysis is the very powerful White-victim effect, consistently leading to results suggesting 3 to 4 times the rate of use of the death penalty in such cases compared to those with Black victims. In effect, the presence of a White victim in a particular case acts as non-statutory and impermissible aggravating factor, with an influence on capital sentencing comparable to the defendant's status of having a prior conviction of first-degree murder or felonious assault.

Baumgartner Report at 20-21.

The Baumgartner Report differs in significant respects to the study

rejected in *McCleskey*. In *McCleskey*, the Court found the combined statewide effects—encompassing all decision-makers, prosecutors, juries, and judges—did not alone demonstrate McCleskey himself was a victim of purposeful discrimination. Here, the focus was on a single jurisdiction, St. Louis County, and the tenure of a single prosecutor, Robert P. McCulloch. The study also permits a close look at the discrete decision-points, from arrest through sentencing, to determine the source of the observed disparities. Notably, most of the ultimate disparity is attributable to prosecutorial decision-making, fairly imputed to Mr. McCulloch, not the juries or courts. The sheer pervasiveness and magnitude of this demonstration goes a long way to proving purposeful discrimination in Mr. Johnson's case.

2. Previously Undisclosed Work Product, Together with Newly Available Legal Authority, Sustain Mr. Johnson's *Batson* Claim and Further Show the Pervasive Racial Bias Underlying His Conviction and Sentence.

Beyond systematically discriminating against Black defendants in charging first degree murder and seeking the death penalty, Mr. Johnson's prosecutors discriminated against Black jurors as well. Work product materials generated between the two trials show the prosecution's conscious

intent to evade *Batson* and exclude Black jurors from trial.

Jury selection in the first trial began on March 26, 2007, or only six days after the second of the Missouri Supreme Court's finding of *Batson* error in a St. Louis County case because the prosecution's stated explanations for striking a Black juror were "implausible and merely a pretext to exercise a peremptory strike for racially discriminatory reasons." *McFadden*, 216 S.W.3d at 677.

After the parties and the Court had completed challenges for cause in Mr. Johnson's first trial, McCulloch announced that he wished to exercise fewer than nine of his allotted peremptory strikes. (1st Tr. 372-73.). The Court explained that it would strike whatever number of jurors the State declined to strike (for a total of nine), but, in doing so, the Court would follow its longstanding practice of ensuring that reducing the remaining juror pool to the final twelve jurors would not result in the arbitrary elimination of Blacks. (1st Tr. 373-74).

Mr. McCulloch called the Court's rule "silly," and "bizarre." (1st Tr. 374-75). He asked, "[I]f I don't have nine people I don't strike, *why am I being penalized*?," (1st Tr. 375), suggesting that the retention of Black jurors would "penalize" the prosecution. McCulloch then struck four jurors, leaving the Court to strike five, and resulting in a jury with six White and six Black

members. (1st Tr. 376). McCulloch objected to the judge's method as an act of discrimination against White and male jurors. (1st Tr. 378).

The Court explained that, if it had engaged stricken jurors in the manner suggested by McCulloch, by starting with the highest non-stricken member and counting downward, the Court would have stricken four Black jurors. (1st Tr. 378-79). The Court suggested that McCulloch was asking the Court to strike the Black jurors rather than having the prosecution do so (1st Tr. 379: "Not by the prosecutor. You're asking the Court to do it"). McCulloch insisted that the jurors stricken by the Court "are people that I think would make fine jurors and would not strike them." (1st Tr. 381).

The prosecution engaged in a similar tactic during Mr. Johnson's retrial, again exercising only four of its nine available strikes. (Tr. 1048-49). The prosecutor's four strikes included three Black jurors, which left three additional Black jurors from among the 26 remaining jurors on the venire. (Tr. 1049-53, 1057). This time, the Court announced that it would exercise the five remaining state strikes by random draw. (Tr. 1054). With three Blacks remaining, and five random strikes to be allocated among the 26 veniremembers, McCulloch could hope to achieve an additional one or two Black strikes while attributing those strikes to the judge instead of the prosecution—a distinction he made clear. (Tr. 1055).

McCulloch's objectives are laid bare by the prosecution's work product between the two trials - evidence that Mr. McCulloch's office tried to shroud behind an instruction not to copy it. (See Memorandum to Patrick Monahan, attached as Exhibit.) A research memorandum sought to provide support for the proposition that Judge Wiesman's "decision to only strike white jurors claiming that the State was trying to circumvent *Batson* was an erroneous decision." It urged that the prosecution's exercise of fewer than its allotted strikes "is insufficient to establish discrimination." And it contended that the trial judge had wrongly "interject[ed] himself into the process and allow[ed] himself more say than the state.

The implications of the prosecution's memo are several and troubling. First, the prosecution's actions from the first trial show a deliberate attempt to strike Black jurors from the back of the venire, and then to attribute those strikes to the judge instead of the prosecution. Judge Wiesman understood the tactic and identified it as such. (1st Tr. 379). The prosecution recognized what the judge had inferred; its memorandum described the "Judge's decision to only strike white jurors claiming that the State was trying to circumvent *Batson*," and it sought to "argue that Judge Wiesman's decision was erroneous." Second, even random strikes undertaken by the Court on retrial helped the prosecution evade *Batson*. If indeed McCulloch was content to proceed with a small number

of Black jurors in the months immediately following *McFadden*, which he did by striking three of the available six Black veniremembers, he could hope that the Court's five random strikes would result in the exclusion of one or two more minorities, and without the State being blamed for that exclusion (Tr. 1055: "I would prefer not to call them the State's strikes."). Third, at the very least, the memorandum clarifies that the prosecutors were committed in advance to a strategy of leaving multiple peremptory challenges unexercised, but without knowing who the veniremembers were. There is no rational strategic basis for such a pre-commitment, other than to weaken any inference of racial discrimination from strikes that the prosecution expected to take, that is, to immunize in advance whatever limited number of Black strikes the prosecution would feel compelled to make. All told, the tactic shows that the prosecution was more interested in defeat any *Batson* claim than in seating a fair and impartial jury.

McCulloch's motives at jury selection should be revisited for another reason: the United States Supreme Court's 2019 opinion in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), lends credence to the plausible *Batson* claim that Mr. Johnson brought on direct appeal.

At trial, the primary panel of 30 veniremembers comprised 24 Whites and six Blacks. Thus, the prosecution had an opportunity to strike 24 Whites

and struck one for a strike rate of 4%. The prosecution had the opportunity to strike six Blacks and struck three for a strike rate of 50%. Including the eight additional venirepersons comprising the alternate pool, the prosecution had the opportunity to strike 30 Whites and struck two (7%). It had the opportunity to strike eight Blacks and struck four (50%).

Based on these facts, there did not appear to be a dispute as to the existence of a prima facie case of discrimination, thus the burden shifted to the State to justify its strikes on non-racial grounds. The focus was principally on the strike of Debra Cottman, a Black woman. McCulloch offered two grounds, that he struck Cottman because she was "not all that willing to answer the questions regarding the death penalty," and because Cottman served as a foster parent for children at the Annie Malone Children's Home, which is one of several such homes where Mr. Johnson briefly stayed during his troubled childhood. (Tr. 1051).

As to the first ground, unwillingness to answer questions, there appears to be no record support differentiating Cottman's voir dire responses from those of other jurors, and it is noted that the Supreme Court of Missouri focused solely on the second ground, the juror's connection with Annie Malone Children's Home. Cottman testified that she had been a foster parent for children from the Annie Malone Children's Home. But her association with

Annie Malone was fleeting. Cottman was what was known as a "visiting foster parent." (Tr. 1010). She explained, "They come visit at my home, stay at my home for the weekend." (Tr. 1010). Cottman did not know anyone from Annie Malone that was associated with the case, including Kevin Johnson. (Tr. 1011). Similarly, Mr. Johnson himself had little contact with that agency. The record shows he had stayed there for one week as a child, through placement by the DFS. (Tr. 1003-04, 1051, 2112-13, 2270). Nevertheless, McCulloch said, "I don't want anyone associated with Annie Malone." (Tr. 1051).

Mr. McCulloch, though, declined to strike White jurors who had worked within DFS and/or in the foster care system. Juror Bayer had worked as a "weekend foster parent" at the St. Vincent Home for Children. (Tr. 1009-10). Juror Duggan worked as a teacher and had been "involved in hot lining several students during [her] teaching career" meaning it was necessary to report to DFS that "something going on with a student." (Tr. 1005). Juror Georger was a mentor for the Family Court for two or three years and worked extensively with children. (Tr.1003-04, 1006-07). Juror Boedeker worked with "new moms and babies" and occasionally would consult with DFS whenever there was "a positive drug screen on the mother or baby after delivery." (Tr. 1007-08). None of the jurors, including Cottman, were asked by McCulloch about their experiences in the foster care system, and none said that their experiences

would affect their consideration of Mr. Johnson's trial.

In his application, Mr. Johnson asks the State to revisit his claim of discriminatory jury selection, acknowledging that this claim has been decided adversely in the courts, but without taking into consider historical evidence of discrimination. On direct appeal Mr. Johnson called the Court's attention to previous *Batson* violations from St. Louis County during the few years before his trial, specifically, *State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007); *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006); *State v. Hampton*, 163 S.W.3d 903 (Mo. banc 2005); and *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. E.D. 2004). The Court refused to consider the evidence as relevant, stating that "A previous *Batson* violation by the same prosecutor's office does not constitute evidence of a *Batson* violation in this case, absent allegations relating to this specific case." *State v. Johnson*, 284 S.W.3d 561, 571 (Mo. banc 2009). Intervening authority from the United States Supreme Court is directly to the contrary: A defendant may rely on, and a court must consider, "relevant history of the State's peremptory strikes in past cases." *Flowers*, 139 S. Ct. at 2243.

Flowers also makes clear that a stricken Black juror and a non-stricken White juror need not be identical in all respects in order for the comparison to support an inference of discrimination. At issue in *Flowers* was the strike of a Black juror who worked at Wal-Mart where the defendant's father also worked.

To discredit the prosecutor's explanation the Black juror might sympathize with a defendant whose father worked at the same Wal-Mart as the juror, the Court relied on the fact that the prosecution declined to strike multiple White jurors who worked at a bank where the defendant's family were customers. *Id.* at 2245. The comparison jurors did not work at the identical location (Wal-Mart) as the stricken juror, and their experience with the defendant's family was different (working at a place where they had contact with numerous relatives of the defendant, as opposed to working at a place where the defendant's father worked). That ruling contrasts with the Missouri Supreme Court's reasoning on direct appeal. The Court in *Johnson* accepted the prosecutor's explanation that he struck a juror who worked as a foster parent at the Annie Malone Children's home. *Johnson*, 284 S.W.3d at 570-71. It rejected Mr. Johnson's and the dissent's showing that the prosecution declined to strike numerous White jurors who worked at other foster care agencies or with the Division of Family Services, which took custody of Mr. Johnson for most of his childhood. *Id.* The comparison was not probative, the Court suggested, because the White jurors did not work at Annie Malone's itself. *Id.*; *but see id.* at 590 (Teitelman, J., dissenting: "There were at least four white jurors who had substantial contacts with the division, which had legal custody of appellant for most of his childhood.").

The Supreme Court did not have the full opportunity to consider the record of other cases involving Mr. McCulloch's office, because the United States Supreme Court had not decided *Flowers* at the time this case was appealed, or even in any later PCR or habeas proceedings. Further, the new evidence of a prosecution memo showing an intent to evade *Batson* and strike Black jurors through the back door shows the prosecutor's intentions. Here, the prosecution intentionally discriminated against Black jurors in Mr. Johnson's case.

CONCLUSION

The effect of race was pervasive throughout the capital decision-making by former Prosecuting Attorney Robert P. McCulloch. No significant factors explain why death was sought against the Black capital defendants, including Mr. Johnson, but not the White defendant, Trenton Forster. Mr. Forster got extra due process - the right to successfully plead for his life for a year - that no Black defendant got. Those disparities are made worse by the St. Louis County Prosecutor's Office pattern of discriminating against Black jurors, as it appears to have done intentionally at Mr. Johnson's trial.

The facts demonstrate, by clear and convincing evidence, that the capital prosecution of Kevin Johnson and the exclusion of Black jurors at his trial was motivated in substantial part by discriminatory intent—equal protection violations that undermine the confidence in the judgment.

Sergeant McEntee's survivors, the women and men of law enforcement, and the community deserve a just conclusion to this case. That conclusion will only be just if it comports with the law. Unfortunately, the available evidence all shows that racial bias infected the process here. The Court must vacate the judgment and allow further proceedings to bring this case to a lawful conclusion.

Dated: November 15, 2022

Respectfully submitted,

KEENAN & BHATIA,LLC

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CERTIFICATE OF SERVICE

I certify service of the foregoing on the date of filing, by e-mail, to the following:

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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: The state's motion to strike the entry of appearance, notice of filing, and motion for stay of execution filed by Mr. Keenan are sustained on the ground that there are no matters pending before this Court at the present time to which Mr. Keenan is a proper party or representative.

By: _____ November 17, 2022
Chief Justice Date

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
TWENTY-FIRST JUDICIAL CIRCUIT, Division 7
Before the Honorable Mary Elizabeth Ott

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. 2105R-02833-01
	)	
KEVIN JOHNSON,	)	EXECUTION SCHEDULED
	)	November 29, 2022
Defendant.	)	

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PHONE CONFERENCE
November 18, 2022

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Reported by:
Megan E. Granda CCR 1360
Official Court Reporter, Division 7
Twenty-First Judicial Circuit
(314) 615-4700

November 18, 2022

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The following phone conference took place on Friday, November 18, 2022 at 10:30 a.m., in chambers of Division 7 of the Twenty-First Circuit Court of St. Louis County, State of Missouri, with the Honorable Mary Elizabeth Ott.

JUDGE OTT: Hello. This is Judge Ott. Hello?

MR. KEENAN: Good morning, Your Honor. This is EE Keenan. I am a Special Prosecutor on this case and I'm joined by my co-counsel, Special Prosecutor JR Montgomery, as well as counsel for all other parties defending Kevin Johnson, and the Attorney General's Office. And so --

JUDGE OTT: Well, hold on. Let me interrupt you. Let me interrupt you. And let you know who is here on my side. I am here and I have also invited my court reporter here.

This is not a hearing. I want her to start the transcript. I wanted to have a transcription of the conference. It's not a record. This is not a hearing. But I did want there to be a transcript in case there was any misunderstanding to guard against misrepresentation. So unless I hear

anything from anyone about that. Again, not a hearing, not a record, simply, a transcription of the conference. So if you would make -- if everyone would make the announcement of who is here that would be helpful.

MR. KEENAN: Thank you, Your Honor. Since we asked for this teleconference, I'll go ahead and start. May it please the Court. This is EE Keenan.

JUDGE OTT: You don't have to please the Court, we're just have a conference.

MR. KEENAN: All right. This is EE Keenan at Keenan & Bhatia on behalf of the State as Special Prosecutor. Joining me is JR Montgomery of my firm also as Special Prosecutor in this case.

JUDGE OTT: Well, I don't believe that Mr. Montgomery was appointed. If he's assisting you that's one thing, but he was not appointed. Go ahead.

MR. KEENAN: He's assisting me, Your Honor. I should make that clarification.

JUDGE OTT: All right. And then who else is on the phone with us?

MR. CRANE: Your Honor, my name is Andrew Crane. I'm an Assistant Attorney General at the

Attorney General's Office. I also have with me Andrea Clarke, Assistant Attorney General, and Greg Goodwin is on the line, but he can only hear, he can't talk.

JUDGE OTT: Okay. And who is representing Mr. Johnson?

MR. LUBY: Your Honor, this is Joe Luby. I represent the defendant, Mr. Johnson.

JUDGE OTT: All right. Is there anyone else that we've missed?

MS. WOODMAN: Yes, this is Rebecca Woodman. I also represent Mr. Johnson.

JUDGE OTT: Okay. So that's everybody, right?

MR. KEENAN: Yes, Your Honor.

JUDGE OTT: Okay. All right. And so it's my understanding, and Mr. Keenan, I think you indicated this initially that you had requested this conference, so here we are.

MR. KEENAN: Thank you, Your Honor.

The Court knows this is a death penalty case with an execution date coming up in twelve days, and I was appointed by the court as special prosecutor to conduct an investigation. And then if warranted by the evidence, and evidence we found is

warranted, file a motion to vacate the judgment in this case.

We filed this motion under Revised Statutes of Missouri Section 547.031, which is a newly enacted statute signed and passed by the governor last year. Perhaps a little different than some other post-conviction like proceedings, say Rule 29.15 where a court can dismiss a petition without hearing. The text of Section 547.031, it's clear that --

JUDGE OTT: I've read it. Counsel, I've read it.

MR. KEENAN: Thank you, Your Honor.

So we saw that the Court's judgment earlier this week, and we want to make sure that we're following all the procedures that we need to. So we're here to get clarification from the Court and see if the Court can schedule a hearing, and make time to make findings of fact and conclusions of law after the hearing that's required under the statute.

JUDGE OTT: Well, here's what I will say. I did rule that and that was not, you know, that was after I'd had a chance to read all the materials while attending the judicial college. And I did that. I also am aware that there is only one

reported case concerning 547.031.

Before I speak actually, I'd like to hear the Attorney General's position on this. Not that there's a position. We're just have a conference, phone conference. But I would be interested to hear before I say what I'm thinking.

MR. CRANE: I'm happy to do that, Your Honor.

So we would have, if we had time to respond, we would ask the Court to dismiss it without a hearing because we think the Court lacks jurisdiction to consider the case while there's pending execution warrant before the --

JUDGE OTT: Right.

MR. CRANE: -- Missouri Supreme Court. We can't see how this Court could set aside a warrant commanding Mr. Johnson --

JUDGE OTT: Right. Right.

MR. CRANE: On the Supreme Court.

JUDGE OTT: Right. Right. Right.

And I did it quickly so as not to lose any time for the defense to take whatever steps they thought were appropriate going forward, and that remains the case.

In addition, I would point out that

although Mr. Keenan, you have indicated that there are 12 days between now and the execution date of November 29, there are actually, if you count from the date of filing giving the most generous time calculation available to us, there are only six business days. Because there is, of course, the intervening Thanksgiving holiday, which for the State of Missouri includes both Thursday Thanksgiving day and the following Friday. So by my count, there are only six -- and that is in the most generous calculation -- six business days.

The one reported case regarding this statute that I'm able to find -- and I'd be interested if others have more -- was a case concerning the time for a hearing. And that case indicates that three days was insufficient time to prepare. And I think six days, in light of all the is circumstances is similarly insufficient, so that's where we are.

MR. KEENAN: Your Honor, this is EE Keenan again. If I can be heard on this point. I've heard everything that the Court said and understands the Court's position. I guess where we sit, we're between a bit of a rock and a hard place because the Supreme Court has -- we as special prosecutors have a

statutory right to pursue this. And the Supreme Court has said -- we asked them for a stay in the underlying case and they said, well, we can't ask for a stay here even though, you know, even though we're the ones who've been appointed. So I guess what I'm trying to figure out is procedurally -- and I understand what the court is saying about trying to move this along. What the Court -- I want to prevent my -- I want to dedicate my statutory function, I guess, what procedurally what should we do?

JUDGE OTT: Well, I can't advise you on that.

MR. KEENAN: Your Honor, if the Court is determined that this is the course it's going for purposes of formalizing this for appeal, I think what we could do then is to essentially in light of this compressed timeframe, we're going to need to file a motion for new trial and to set aside the judgment, because, you know, we don't want to have anybody say up on appeal, you didn't file the appropriate motion for new trial to way it out for appeal. So I think we're prepared to file that right away today, and I assume that the Court based on what it says is simply going to deny that, and then we can head out; is that correct?

JUDGE OTT: I'm not going to tell you in advance or anybody, any party, in advance what I'm going to do. Except I can assure everyone that I will carefully review any pleadings that are filed.

MR. KEENAN: Okay. I think that that covers everything that the Special Prosecutors have. I don't know if any of the other parties have any other --

JUDGE OTT: Well, I would add -- I would add this that any filings under that new statute from 2021 that we're operating under, you know, everybody gets notice of any filings, anywhere.

MR. KEENAN: You're saying you want to make sure that all parties to this call that Special Prosecutor and the Attorney General get notice of those filings that's what the Court is saying?

JUDGE OTT: I'm not ordering that. I'm suggesting that my reading of the statute indicates that.

MR. KEENAN: And in order to proceed, out of an abundance of caution, so when we file the motion on Tuesday, we served a copy of it on the Attorney General's Office.

JUDGE OTT: Okay. Because that wasn't clear to me in what I saw, so that's good.

Okay. Anything else?

MR. LUBY: Your Honor, this is Joseph Luby on behalf of the defendant Kevin Johnson. How would we go about obtaining a transcript of this conference this morning?

JUDGE OTT: My court reporter is Megan Granda, and you can ask her right here. She's listening to you.

COURT REPORTER: You can send an e-mail to megan.granda@courts.mo.gov.

MR. LUBY: All right. I will reach out to you. Thank you.

MR. CRANE: Nothing further from the Attorney General's Office, Your Honor.

JUDGE OTT: All right. Anything further anybody? Thank you.

MR. KEENAN: Thank you very much for your time this morning.

JUDGE OTT: Thank you very much. Good bye.

(At 10:42 a.m. the phone conference ended.)

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

STATE OF MISSOURI Plaintiff, v. KEVIN JOHNSON, Defendant.	)	Case No. 2105R-02833-01 **EXECUTION SCHEDULED NOVEMBER 29**

STATE'S MOTION TO AMEND JUDGMENT AND, ALTERNATIVELY, FOR NEW TRIAL

The State, by and through the Special Prosecutor, and pursuant to Rules 29.11, 78.01, and 78.07, moves the Court to amend its order and judgment of Nov. 16, 2022, and alternatively to grant a new trial, on the following grounds:

1. The Court's order and judgment does not provide any findings of fact or conclusions of law, as required by RSMo § 547.031.2 ("Upon the filing of a motion to vacate or set aside the judgment, the court shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented.")

2. The Court's order and judgment is erroneous, as it was entered without the Court having conducted the hearing required by RSMo § 547.031.2 ("Upon the filing of a motion to vacate or set aside the judgment, the court shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented.")

3. The Court's order and judgment was entered *sua sponte*, without notice to the State or other parties that the Court was considering an order to deny the

State's motion to vacate judgment, or the reasons why such an order was being considered. Such *sua sponte* dismissals are disfavored in the law because they are fundamentally unfair. *See*, *e.g.*, *Roberts v. Bolin*, 562 S.W.2d 338, 340 (Mo. banc 1978). The Special Prosecutor as well as Defendant have been denied due process as guaranteed by the Fourteenth Amendment, because they have been deprived of notice and the opportunity to be heard, and also because they have been deprived of the procedures required by the clear and express terms of the statute.

4. The Court is mistaken in its view that it lacks jurisdiction to consider the motion to vacate during the pendency of an execution warrant. Section 547.031.1 states that such a motion may be brought "at any time." "The circuit court in which the person was convicted *shall have jurisdiction and authority* to consider, hear, and decide the motion." *Id.* (emphasis added). A circuit court has broad jurisdiction over "*all* cases, civil and criminal." *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. 2009) (emphasis in original) (quoting MO. CONST. ART. V sec. 14). The circuit may entertain a motion to vacate without ordering the Supreme Court to withdraw its warrant, and the Special Prosecutor's intent in this case is to move the Supreme Court to stay its warrant so that the Special Prosecutor's claims may be resolved in the normal course.

5. The Court should vacate its order and judgment, permit any and all briefing and motion practice in response to the motion to vacate, and schedule the evidentiary hearing required by RSMo § 547.031. In order that the parties may have sufficient opportunity to participate in a full and fair evidentiary hearing after

"adequate preparation," *State ex rel. Schmitt v. Harrell*, 633 S.W.3d 463, 468 (Mo. App. W.D. 2021), Defendant and the Special Prosecutor intend to seek a stay of execution from the Missouri Supreme Court so that the proceedings in this Court may be completed in the normal course.

6. What follows below is a recitation of the Special Prosecutor's Motion to Vacate Judgment and Suggestions in Support. For the reasons set forth there, the Court erred by not granting the motion because the evidence clearly and convincingly shows constitutional error that undermines confidence in the underlying criminal judgment.

7. The Department of Corrections plans to execute Kevin Johnson on November 29, 2022. Just over a month ago, the Court appointed the undersigned Special Prosecutor to review allegations of constitutional error at trial.

Since then, the State has reviewed tens of thousands of pages of evidence, and has contacted every member of the prosecution team. The State has also reviewed extrinsic evidence bearing on the case. This evidence clearly and convincingly shows that improper racial factors played a substantial role throughout the process - in the prosecutor's selection of defendants for first degree prosecution, the decision to seek a death sentence, and in the selection of jurors ultimately tasked with determining guilt and sentence. The evidence is equally clear and convincing that these improper factors substantially influenced prosecutorial decision-making in Mr. Johnson's case.

The crime here - the killing of Kirkwood Police Sergeant William McEntee - is horrific. Mr. McEntee's family, the law enforcement community, and the community

deserve justice. Unfortunately, the original Prosecuting Attorney did not pursue that justice according to law. The law requires this Court to vacate the judgment, and order a new trial that adheres to constitutional standards. *See* RSMo § 547.031.

Kevin Johnson was 19 years old when he killed Kirkwood Police Sergeant William McEntee.[1] Mr. Johnson is Black; Sgt. McEntee was White. Mr. Johnson claims that he saw the police failing to intervene to help his dying12-year-old brother the day of the killing. Out of anger, he claims he got a gun and killed Sgt. McEntee.

The St. Louis County Prosecuting Attorney charged Mr. Johnson with first degree murder and sought the death penalty. The first trial deadlocked 10-2 in favor of conviction on second degree murder. Following a retrial, the State secured a conviction on first degree murder and a death sentence.

In 2021, the Missouri General Assembly passed, and Governor Parson signed, a new law codified as RSMo § 547.031. This statute allows a prosecutor to reopen a judgment for, among other reasons, constitutional error at trial.

Proof of discrimination "often depend[s] on inferences rather than on direct evidence," because those who discriminate are "shrewd enough not to leave a trail of direct evidence." *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 116 (Mo. banc 2015) (citation omitted). Analysis "generally must rely on circumstantial evidence." Id. "There will seldom be eyewitness testimony as to the [decisionmaker]'s mental processes." *Id.*

[1] These facts come generally from *State v. Johnson*, 284 S.W.3d 561, 567 (Mo. banc 2009), as well as other portions of the record, of which the Court may take judicial notice.

Following a comprehensive review of the evidence, the undersigned Special Prosecutor has determined that unconstitutional racial discrimination infected this prosecution, and that this error requires the judgment to be set aside. Among other key facts:

Five police-officer killings were prosecuted by the office during Mr. McCulloch's tenure. Mr. McCulloch pursued the death penalty against four Black defendants but not against the one White defendant, Trenton Forster. This was despite the fact that Forster's conduct was more aggravated: he had bragged on social media about wanting to kill police officers ("I want fuck the police carved into my grave"), and had also indicated an intent to "tak[e] out every single nigga in the city." (Ex. 13, Forster Messages.)

In the White-defendant police-killing case, Mr. McCulloch's office issued a written invitation to defense counsel to submit mitigating evidence that might convince the prosecutor's office not to seek death. His office granted the defense nearly a year to provide arguments against death, and Mr. McCulloch ultimately decided not to seek death against the White defendant, Trenton Forster, without giving any specific explanation why. (Ex. 6, Corr. with Forster Counsel.)

By contrast, Mr. McCulloch never issued a mitigation-invitation to Mr. Johnson or any of the other three Black defendants accused of killing police officers. (Ex. 3, Bradford Aff.).

Work product from the prosecution team shows the prosecutors' strategy to evade *Batson* by exercising fewer than their allotted nine peremptory challenges, in

the hope that the trial court might eliminate Black jurors ranked high in the strike pool without those strikes counting against the prosecution. (Ex. 7, Work Product Memorandum re: Johnson Jury Selection.)

Mr. McCulloch has refused to even acknowledge correspondence from the Special Prosecutor asking him about the case, despite his extensive statements to the news media about this and other cases. (Ex. 3, Bradford Aff.; Ex. 4, McCulloch Corr.) Former Assistant Prosecutor Sheila Whirley, who participated in Mr. Johnson's trial, when questioned about why the State pursued death, stated that she is reluctant to reveal "family secrets," and said the death decision was Robert McCulloch's. (Ex. 3, Bradford Aff.)

Mr. McCulloch's office maintained no record of guidelines, practices, or procedures on whether to seek the death penalty, despite Mr. McCulloch's own statement that the existence of such procedures is the reason no bias exists in the death penalty. (Ex. 2, Alton Aff.) A comprehensive and rigorous statistical study of 408 St. Louis County death-eligible homicide prosecutions during Mr. McCulloch's tenure as prosecuting attorney, shows that he largely reserved the death penalty for defendants whose victims were White when deciding whether to charge first degree murder and to seek the death. (Ex. 10, Baumgartner Report.) Later statements by Mr. McCulloch to other prosecutors show a particular animosity towards young Black males like Mr. Johnson, viewing them as a population that "we had to deal with." (Ex. 1, Hummel Aff.)

These facts and others leave no serious doubt that Mr. McCulloch's office discriminated. The judgment must be set aside so that a lawful trial and sentence may proceed.

STATEMENT OF FACTS

A. Capital charging and sentencing.

1. Dr. Frank Baumgartner of the University of North Carolina has submitted a report based on his investigation of the 408 death-eligible cases prosecuted under Mr. McCulloch. *See* Baumgartner, Frank, *Homicides, Capital Prosecutions, and Death Sentences in St. Louis County, Missouri, 1990- 2021, Report,* Sept. 20, 2022. In an investigation conducted in two stages, Dr. Baumgartner found large race-of-victim effects at virtually every stage of St. Louis County capital prosecutions (cases where the facts would support a first degree homicide conviction and at least one aggravating circumstance), meaning that cases with White victims were highly favored to proceed to the next step toward an ultimate death sentence. Dr. Baumgartner summarized the unadjusted results: "The cleanest comparison is simply this: Black victim cases have a 4.0 percent chance of leading to a death sentence; White-victim cases see a 14.1 percent chance. The ratio of these two rates is 3.5. White-victim cases are 3.5 times as likely to lead to a death sentence than Black victim cases." (Ex. 10, Baumgartner Report at 6.)

2. Dr. Baumgartner conducted a further analysis to investigate whether the observed race effects could be a result of the level of aggravation present in the case. Dr. Baumgartner produced four separate models for the overall death result

that controlled for statutory aggravating and mitigating circumstances that could plausibly influence the charging and sentencing decision. In each model the White race-of-victim effect strongly persisted even after controlling for other statutory factors. Baumgartner Report at 19, 22. Examining the overall likelihood of receiving death, the odds multiplier for White victim cases consistently ranged from 3.3 to 3. 7. The study demonstrates a "very powerful White-victim effect, consistently leading to results suggesting 3 to 4 times the rate of use of the death penalty in such cases compared to those with Black victims." (Ex. 10, Baumgartner Report at 20.)

3. Dr. Baumgartner concluded:

> . In the prosecution of death-eligible homicides in St. Louis County for the years studied there are strong race-of-victim effects at multiple key stages of the prosecution.
>
> . The effects are particularly pronounced at two decision-points attributable solely to the prosecutor, the decision to charge the case as a first-degree murder and the decision to give notice of intention to seek death.
>
> . The likelihood that the defendant will be charged with death-eligible first degree murder instead of second degree murder is approximately 2.2 times greater in White-victim cases than in Black-victim cases.
>
> . The ultimate likelihood of receiving a death sentence if the victim is White is approximately 3.5 times the likelihood of a death sentence in cases where the victim is Black.
>
> . These effects persist after the introduction of controls for aggravating and mitigating factors, meaning that these disparities cannot be explained by legitimate case characteristics.

(Ex. 10, Baumgartner Report at 22-24.)

4. In terms of predicting which case proceeds to the next stage, and to an ultimate death sentence, the presence of a White victim essentially functioned as an aggravating factor. *Id.* at 20-21.

B. Cases Most Similar to Mr. Johnson's

5. There were five St. Louis County defendants prosecuted to completion[2] for the intentional killing of a police officer for which Prosecuting Attorney Robert P. McCulloch considered death: Lacy L. Turner[3], Dennis Blackman, Todd L. Shepard, Kevin Johnson, and Trenton Forster.[4] Forster is White. Turner, Blackman, Shepard, and Johnson are Black. All five victims, Sergeant Kenneth Koeller, Officer JoAnn Liscombe, Sergeant Michael King, Sergeant William McEntee, and Officer Blake Snyder were White.

6. The State reproduces here non-exclusive summaries of the facts of these cases.

[2] In another police officer killing, Sergeant Richard Eric Weinhold was shot to death by Thomas Russell Meek on October 31, 2000, while trying to evict Meek from an apartment. See William C. Lhotka, *Man held in officer's death tries to claim self-defense*, St. Louis Post-Dispatch, Nov. 3, 2000. Meek, who is White, was charged with first degree murder, but found to be mentally incompetent and committed. He was never tried.

[3] Although the murder occurred in 1987, Turner was not arrested until 1989 and was charged with first degree murder. The docket shows notice of aggravating circumstances was filed April 29, 1991 (amended July 2, 1991), during McCulloch's tenure. *State v. Turner*, 21CCR-604615.

[4] Forster's case was tried after Mr. McCulloch left office, but it was Mr. McCulloch who made the decision not to seek death. Joel Currier and Christine Byers, *Suspect in Killing of St. Louis County Officer Won't Face Death Penalty*, St. Louis Post-Dispatch (Dec. 9, 2017) ("After a complete examination and reexamination of all evidence in this case, I have determined that seeking a death sentence in this case is not appropriate.").

***State v. Lacy Turner*, No. 21CCR-604615**

7. The facts were summarized in Respondent's brief on appeal:

> At about 2:09 a.m. on January 28, 1987, a silent alarm went off at the Dandy Man's Store at Northland Shopping Center in Jennings in St. Louis County (Tr. 808, 871).
>
> ***
>
> Officer Yarbrough arrived at the crime scene at about 2: 13 a.m. (Tr. 808). As he drove towards the Dandy Man's Store, he saw that Sergeant [Kenneth] Koeller's police car was parked in front of that store (Tr. 811). The victim's car was still running, and its headlights were on (Tr. 811-812). Officer Yarbrough noticed that the display window of the aforementioned store was broken and that several items were lying on the ground in front of the store (Tr. 812).
>
> Officer Yarbrough stopped his patrol car, exited it, took cover on the passenger side of it, and radioed for assistance (Tr. 811-813). He saw a radio mike hanging out of the victim's car and two feet sticking out from behind the victim's car (Tr. 813). He ran to the back of that car and found the victim lying on his back (Tr. 814). There were no signs of life (Tr. 818). Officer Yarbrough radioed for an ambulance and additional assistance (Tr. 818, 823). The victim had been shot in the neck (Tr. 815, 817, 906-907). The entrance wound was a contact wound on front of the neck, while the exit wound was on the back of the neck (Tr. 11 77-1183). The victim bled to death after the bullet transected the victim's right carotid artery (Tr. 912-913). There was evidence of blunt trauma to the victim's face (Tr. 910-913). Some of the abrasions and bruises were inflicted with a linear object, such as the barrel of a gun (Tr. 910-913). Some of the abrasions and bruises could have been made by a fist (Tr. 911-913). The victim's pistol was missing (Tr. 826). The victim's pistol was a .357 magnum (Tr. 826).

Respondent's Brief, 3-7.

***State v. Dennis Blackman*, No. 2191R-01060-01**

8. According to the Missouri Court of Appeals:

> At 1:13 a.m., Officer [Joann] Liscombe reported to the dispatcher that she was on a "pedestrian check". Meanwhile, another driver, Steve Carter, saw the man at the corner of Old Halls Ferry and Patricia Ridge.

> As Carter turned the corner, the man gave him a "frightening" look, causing Carter to lock his car door. Carter saw Officer Liscombe pull up, stop in the intersection and turn her spotlight toward the man. The man initially tried to run away up a hill but was unsuccessful because of the amount of ice on the ground. He saw Officer Liscombe get out of her car and walk toward the man.
>
> After overhearing the report in the 7-Eleven store, Charles Myers decided to drive by the area. As he drove by, he saw Officer Liscombe standing face to face with the man. Officer Liscombe looked at Myers as he passed them, and then turned her head back toward the man. The man never took his eyes off Officer Liscombe.
>
> Meanwhile, the dispatcher tried to reach Officer Liscombe but received no response. The dispatcher called for another car to check on her. As another motorist approached the intersection of Old Halls Ferry Road and Patricia Ridge, he saw Officer Liscombe lying on the ground with blood on her hand and in her hair. Her flashlight and glasses were lying several feet away and her gun was missing from its holster. He and other motorists came to her assistance. The first police officer arrived at 1:23 a.m. All noticed a massive head wound. She was eventually taken to a hospital.

State v. Blackman, 875 S.W.2d 122, 127-28 (Mo. Ct. App. 1994).

***State v. Todd Shepard*, No. 08SL-CR08802-01**

9. According to the Missouri Court of Appeals:

> [Todd] Shepard testified that on the night of the murder he was driving around in the Loop area on what he called a "reco[n] mission" and that he considered the police to be the enemy. He further testified that after he saw Sergeant King in a parked police car, Shepard parked his car "kind of strategically," checked his gun, put the gun in his pocket and approached the officer's car, made eye contact with the officer, and then fired five shots at the officer through his open window.

Memorandum Supplementing Order Affirming Judgment Under Rule 30.25(B) at 3.

***State v. Kevin Johnson*, No. 05CR-2833**

> [Kevin Johnson] had an outstanding warrant for a probation violation resulting from a misdemeanor assault. Around 5:20 in the evening of

July 5, 2005, Kirkwood police, with knowledge of the warrant, began to investigate a vehicle believed to be Appellant's at his residence in the Meacham Park neighborhood. The investigation was interrupted at 5:30 when Appellant's younger brother had a seizure in the house next door to Appellant's residence. The family sought help from the police, who provided assistance until an ambulance and additional police, including Sgt. McEntee, arrived. Appellant's brother was taken to the hospital, where he passed away from a preexisting heart condition. Appellant was next door during this time, and the police suspended their search for Appellant and never saw Appellant.

After the police left, Appellant retrieved his black, nine millimeter handgun from his vehicle. When talking with friends that evening, Appellant explained his brother's death as, "that's f _ up, man. They wasn't trying to help him, that he was too busy looking for me." Around 7:30, two hours after Appellant's brother had the seizure, Sgt. McEntee responded to a report of fireworks in the neighborhood and Appellant was nearby. As Sgt. McEntee spoke with three juveniles, Appellant approached Sgt. McEntee's patrol car and squatted down to see into the passenger window. Appellant said "you killed my brother" before firing his black handgun approximately five times. Sgt. McEntee was shot in the head and upper torso, and one of the juveniles was hit in the leg. Appellant reached into the patrol car and took Sgt. McEntee's silver .40 caliber handgun.

***

Meanwhile, Sgt. McEntee's patrol car rolled down the street, hit parked car, and then hit a tree before coming to rest. Sgt. McEntee, alive but bleeding and unable to talk, got out of the patrol car and sat on his knees. Appellant reappeared, shot Sgt. McEntee approximately two times in the head, and Sgt. McEntee collapsed onto the ground.

State v. Johnson, 284 S.W.3d 561, 567-68 (Mo. banc 2009)

***State v. Trenton Forster*, No. 16SL-CR07513-01**

11. According to the Missouri Court of Appeals:

On October 6, 2016, St. Louis County Police Officers Snyder and John Becker ("Officer Becker") responded to a 9-1-1 call from a residential house. In uniform and in a marked police vehicle, Officer Snyder pulled behind Forster's car. Officer Snyder approached Forster's driver's side door and tried to talk to Forster. Officer Snyder stated "show me your

> hands" and repeated "police, show me your hands." Forster then shot Officer Snyder in the face.
>
> Officer Becker took cover and told Forster to show his hands. Forster responded, "I have a f---ing gun, kill me." As Forster kept moving within his car, Officer Becker opened fire on him. Forster said, "F---ing shoot me, I have a gun," and pointed his gun at Officer Becker. Officer Becker reloaded and fired several more shots at Forster, who dropped his gun and was handcuffed. Officer Snyder died from his gunshot wound. In addition to the handgun used to shoot Officer Snyder, police recovered an AK-47, ammunition, and drug paraphernalia from Forster's car.
>
> *State v. Forster*, No. ED107837, Memorandum Opinion, at 2.

12. According to the State's appellate brief in Forster, the defendant expressed his intent to kill a police officer on social media multiple times. See Respondent's Brief, Forster, at 9. In the months before the charged offenses, Forster made several Twitter posts regarding killing and his hostile attitude towards police, such as "**I want fuck the police carved into my grave**," "I'm going to kill people," and "**I'll pull that thing on an officer**." *Id.* at 10-13. In addition to the fatal shot that Forster fired into Officer Snyder's face, Forster attempted to shoot a second officer but was unsuccessful only because the gun had "jammed, or 'stovepiped,' meaning that an empty cartridge case that had been fired had failed to eject and was protruding from the slide, which prevented another cartridge from being cycled into the firing chamber." Respondent's Brief, Forster, at 16. For the attempted second shooting, Forster was convicted of second degree assault of a law enforcement officer. *See State v. Forster*, 616 S.W.3d 436, 439 (Mo. App. E.D. 2020). (See also Ex. 13, Forster Messages.)

13. Forster also expressed his intent to kill Black St. Louisans, stating: "I swear bruh **I'm takin [sic] out every single nigga in the city** with drugs." (*See* Ex. 13, Forster Messages.)

14. As to mitigation, all five defendants were afflicted with serious mental health disorders. Trenton Forster suffered from bipolar disorder, attention deficit hyperactivity disorder, generalized anxiety disorder, panic disorder, and polysubstance use disorder. *See Forster*, 616 S.W.3d at 440. Bipolar disorder is marked by "clear changes in mood, energy, and activity levels. These moods range from periods of extremely "up," elated, irritable, or energized behavior (known as manic episodes) to very "down," sad, indifferent, or hopeless periods (known as depressive episodes). Less severe manic periods are known as hypomanic episodes."[5] As early as age twelve, Forster expressed suicidal ideation, and was reported to have made attempts at that age. A second attempt was reported to have occurred at age sixteen. He continued to have suicidal thoughts throughout his adolescence, compounded by his drug

addiction. *State v. Forster*, 16SL-CR07513-0l (Tr. 590, 919, 1206-16, 1425).

15. 15. At age 17, Kevin Johnson was diagnosed under DSM-IV with three Axis I disorders; Dysthymia (masked) 300.4, Adjustment disorder with mixed disturbance of emotions and conduct. 309.4; and Child Neglect 995.5. See Levin Report. Each of these can be highly debilitating. At one of Mr. Johnson's placements in a group home as a juvenile, St. Joseph Home for Boys, where he was being treated

[5] https://www.nimh.nih.gov/health/topics/bipolar-disorder.

with Ritalin and imipramine for depression and attention deficit disorder, Mr. Johnson attempted to commit suicide by hanging himself with towels and a bedsheet. (Tr. 2259-60). He was thereafter admitted to a psychiatric facility. (Tr. 2260). Another examiner noted suicidal ideation at age fifteen. (Tr. 2264).

16. Some of the most common symptoms to be associated with Dysthymic Disorder are "feelings with inadequacy; social withdrawal; general loss of interest or pleasure; feelings of guilt or brooding about the past; excessive anger; decreased activity; productivity; or effectiveness."[6] Adjustment disorder with mixed disturbance of emotions and conduct may result from any stressful change that impacts family life. These include: "Distress caused by a stressful and life-changing event; behavioral patterns are impacted in a substantially negative way; enjoyable, healthy and fun activities no longer attract interest; sadness, helplessness, hopelessness or symptoms of clinical depression; anxiety, panic attacks, nervousness or problems with sleeping; behavioral issues, such as acting out in a negative way at home, at school at work or in public; potential arrest or school suspension for behavioral problems."[7] Child abuse typically results in "greater emotional than physical damage. An abused child may

[6] BILL PELZ, *Abnormal Psychology – Dysthymic Disorder,* at Chpt. 300.4, *available at* https://fscj.pressbooks.pub/abnormalpsychology/chapter/dysthymic-disorder-300-4/ (last visited November 18, 2022).

[7] *Adjustment Disorder with Mixed Disturbance of Emotions and Conduct,* REGIONALCENTER.ORG, *available at* https://www.regionalcenter.org/mental-health/adjustment-disorder-with-mixed-disturbance-of-emotions-and-conduct (last visited November 18, 2022).

become depressed. He or she may withdraw, think of suicide or become violent. An older child may use drugs or alcohol, try to run away or abuse others."[8]

17. Later evaluators determined Johnson has a history of hearing voices, suicidality, and rendered additional diagnoses including dissociative identity disorder and depression, as well as a frontal lobe impairment that diminished his impulse control. Report of Neuropsychologist Daniel A. Martell, Ph.D., July 16, 2016, at 22; Report of Richard G. Dudley, Jr., M.D., Aug. 7, 2016, at 8-10.

18. In Todd Shepard's case, a defense psychiatrist found:

> Mr. Shepard presents with an equally longstanding and significant history of delusions and paranoid thinking consistent with a type of serious mental illness called a "psychosis" in which he cannot tell what is real from what is imagined. The main feature of this disorder is the presence of delusions, which are unshakable beliefs in something untrue. Mr. Shepard experiences non-bizarre delusions, which involve situations that could occur in real life, however, the situations are either not true at all or highly exaggerated. Mr. Shepard's delusions involve the belief that he is to be responsible for inciting a "racial/class revolution" and that his actions on the night of the incident offense were a part of his messianic mission. These misinterpretations and misperceptions or experiences of reality are a manifestation of his psychotic thinking which are hallmarks of a psychotic thought disorder.

Trial Court Report, Todd Shepard.

19. According to a psychiatrist (whose testimony was later excluded by the trial court), Dennis Blackman suffered a psychotic episode or dissociative episode while he was in police custody based on his statements to police that he had another personality named "Death." *See Blackman*, 875 S.W.2d at 133.

[8] Family Practice Notebook, *Child Abuse* FPNOTEBOOK.COM, *available at* https://fpnotebook.com/prevent/Abuse/ChldAbs.htm (last visit November 18, 2022).

20. Turner was intellectually disabled, and suffered from depression and dependent personality disorder. (*State v. Turner*, Tr. 2199, 2216-17).

21. Both Forster and Johnson had very difficult upbringings.[9] Trenton Forster's family was dysfunctional. His father and sister suffered from depression. His father had an addiction to opioids and suffered from alcoholism early in Forster's life. At a young age Forster displayed odd behaviors (e.g. sleeping in closets) and experienced low resilience, anger, irritability and an inability to regulate emotions. Forster's mother was extremely strict and this caused substantial tension between them. His parent's marriage was dissolving, resulting in much yelling, screaming, and profanity. His parents divorced in 2010 and there was a traumatizing, bitter custody battle. Forster later developed a drug addiction and experienced suicidal ideation. Appellant's Brief, *State v. Forster*, 2020 WL 2514845 (Mo. App. E.D. 2020).

22. Kevin Johnson suffered parental abandonment at a young age. Johnson's father was imprisoned for murder when defendant was two years old. His mother was addicted to crack cocaine and prostituted herself to support her habit-oftentimes in front of her children. At Mr. Johnson's trial, a defense witness, Dr. Daniel Levin, testified that records from the Department of Family Services (DFS) showed his mother's inability to care for her children, and noted that twelve hotline calls were made on her. There was no food in the house because the mother sold food

[9] As to Shepard, the presentence investigation related that his parents had divorced, both drank, and at least one source said the father was physically abusive toward the mother. Trial court report, Todd Shepard. Insufficient information was available on the social histories of Lacy and Blackman.

stamps in order to get money to buy drugs, workers found the children alone with roaches and unsanitary living conditions, a social worker observed the mother yelling at and threatening her children even in their presence. (Tr. 2240-41). The resulting trauma to Mr. Johnson was profound.

> This is something we see in children who, first of all, have suffered terrible losses. He's already suffered the loss of his father, but now he has a mother who's very troubled. She's barely functioning. She has serious drug problems, she's abandoned the children at night, there's no food in the house. So what happens is that any child of Kevin's age, any child in that situation is going to become traumatized. It's going to be extremely traumatic for them. And they're going to be scared to death. They are going to be crying out for help and wondering where their parents are.

(Tr. 2241-42).

23. DFS removed Mr. Johnson and his younger sister from their Mother's home when he was four-years-old, and Mr. Johnson went to live with his aunt, Edythe Richey. (Tr. 2243-45). DFS did nothing to help Mr. Johnson cope with the severe neglect, loss, and trauma that he had experienced. (Tr. 2246). Mr. Johnson began wetting the bed and acting aggressively with other children when he was seven years old, which confirmed that he had not been receiving the help that he needed. (Tr. 2248). His aunt responded to the bedwetting by hitting him with a switch every night, and continued to do that into his teenage years. (Tr. 2250).

24. The remainder of Mr. Johnson's childhood was spent in group homes. (See Trial Record.)

C. The Decision to Seek Death

25. During the course of the investigation, the Special Prosecutor sought information about whether the Prosecuting Attorney's Office under Mr. McCulloch maintained any written procedures or guidelines on making the decision to seek the death penalty. (See Ex. 2, Alton Aff.)

26. Procedures are key in making the death decision. According to comments in Mr. McCulloch's own personnel file, he "disputes claims of bias" in the death penalty because of "the process and procedure that is employed by prosecutors in making the determination of whether or not to seek death." (See Ex. 8, McCulloch Personnel Records.)

27. Contrary to his own representations, Mr. McCulloch did not maintain any such process or procedure. (*See* Ex. 2, Alton Aff.)

28. Instead, he made the decision of whether to seek death on his own. (*See* Ex. 3, Bradford Aff.)

29. The available case records show that, as a practical matter, Mr. McCulloch employed two separate processes for the death determination in police officer killings: one for a White defendant, and another for Black defendants. (*See* Ex. 3, Bradford Aff.)

30. When prosecuting White police killer Trenton Forster, McCulloch directed a letter to Forster's counsel requesting information on why the State should not seek death. (Ex. 6, Corr. with Forster Counsel (letter of Oct. 24, 2016, containing bottom notation of RPMc, the initials of Robert P. McCulloch).)

31. Forster's counsel wrote back, requesting a nine-month extension of time to provide mitigation evidence. (Ex. 6, Corr.with Forster Counsel t (Letter of Feb. 28, 2017).)

32. Mr. McCulloch did exactly what Forster asked, granting a nine-month extension and waiting until December 11, 2017, to announce that he would not seek the death penalty. See Joel Currier, *Suspected Mo. Cop Killer Won't Face Death Penalty*, St. Louis Post-Dispatch (Dec. 11, 2017), available at https://www.policel.com/legal/articles/suspected-mo-cop-killerwont-face-death-penalty-zrvnJ 5s 1 Cz4e 7bHY /.

33. The decision outraged the victim's family, but McCulloch gave no explanation, stating simply: "that his decision came after 'a complete examination and reexamination of all evidence in this case'" and that he "'cannot elaborate on the decision,' citing ethical rules for prosecutors." *See* Joel Currier, *Suspected Mo. Cop Killer Won't Face Death Penalty*, St. Louis Post-Dispatch (Dec. 11, 2017), available at https://www.policel.com/legal/articles/suspected-mo-cop-killer-wont-face-death-penalty-zrvnJ 5s 1 Cz4e7bHY.

34. Seeking to learn about Mr. McCulloch's handling the case, the Special Prosecutor wrote Mr. McCulloch a letter, emailing him on four separate occasions. The Special Prosecutor also called Mr. McCulloch four times. The Special Prosecutor visited Mr. McCulloch's official address. Lights were on, a car was in front, and the Special Prosecutor saw a woman visibly walking around the home, but refusing to come to the door or even acknowledge that the prosecutor was there. He has not

responded to any of these attempts – not even an offer of a five-minute phone call. (*See* Ex. 3, Bradford Aff.; Ex. 4, McCulloch Corr.)

35. Mr. McCulloch is willing and able to talk to others about his cases: he recently sat down for a two-hour interview with *the Riverfront Times*, a St. Louis newspaper, where he discussed the death penalty. (See Ex. 9, *Riverfront Times* Article.)

36. The Prosecuting Attorney's files do not contain any record of an invitation to any Black police killing defendants to provide mitigation evidence. (See Ex. 3, Bradford Aff.)

D. Attempted Use of Backdoor Racial Strikes at Trial.

37. During the first trial in this case, Mr. McCulloch attempted to waive some of the State's peremptory strikes in an attempt to have Black jurors - whose numbers were higher in the strike pool sequence - stricken without him needing to announce a strike; the Court refused to permit this. (See Ex. 11, Trial Transcript 1 Excerpt.)

38. Between the first and second trial, the Prosecuting Attorney's office conducted legal research and prepared a confidential memo - which it instructed others not to copy - trying to find ways around the Circuit Court's ruling or to convince the Circuit Court to change its mind and permit Mr. McCulloch to use backdoor strikes of minority jurors. (Ex. 7, Work Product Memorandum re: Johnson Jury Selection.)

E. Personal Animus Against Black Youth Expressed by Robert McCulloch.

39. In 2018, Mr. McCulloch gave a presentation at the Oregon District Attorneys' Association summer conference. (Ex. 1, Hummel Aff..)40. During his talk, Mr. McCulloch displayed a photograph on a

PowerPoint slide showing several Black males, whose ages appeared to be 16 to 20. (*Id.*)

41. The picture did not show them engaging in any unlawful activity, nor did Mr. McCulloch state that they were engaged in any unlawful activity. (*Id.*)

42. While displaying this picture, Mr. McCulloch stated: "This is what we were dealing with." (*Id.*)

43. John Hummel, a District Attorney who has personally made the decision to seek the death penalty, witnessed the presentation. He states that Mr. McCulloch's tone of voice when speaking of these young people was sharp, and expressed contempt and animosity about them. (*Id.*)

The State discussed further facts below as necessary.

DISCUSSION

The authority of the State to seek to set aside a judgment and this Court's jurisdiction to consider and decide any such motion derives from RSMo § 547.031. This Court must set aside the judgment upon a finding of "clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in the judgment." Pursuant to this "constitutional error"

provision, there are three requirements which must be met for the judgment to be set aside.

First, the standard of proof to be met is clear and convincing evidence, which imposes a higher burden than mere preponderance of the evidence, but less than the beyond a reasonable doubt standard. "Clear and convincing evidence means that you are clearly convinced of the affirmative of the proposition to be proved. This does not mean that there may not be contrary evidence." *In re Pogue*, 315 S.W.3d 399, 400 (Mo. App. 2010).

Second, the State must show evidence of "constitutional error at the original trial." As demonstrated below, the evidence uncovered in this case shows discriminatory purpose that violates the equal protection provisions of the Missouri and United States Constitutions.

Lastly, the error must be such that it "undermines the confidence in the judgment." The term "judgment" necessarily embraces the defendant's sentence as well as the underlying conviction. In Missouri, after all, "A final judgment occurs only when a *sentence* is entered." *State v. Williams*, 871 S.W.2d 450, 452 (Mo. banc 1994) (emphasis in original). In assessing whether confidence in the conviction or sentence has been undermined, "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 342 (Mo. banc 2013) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). As the United States Supreme

Court stated: "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 4 76 U.S. 79, 87 (1986).

A. Legal Standards

To establish a selective prosecution violation, the defendant must show that similarly situated individuals of a different race were not prosecuted. In *United States v. Armstrong*, 517 U.S. 456, 469 (1996):

> The requirements for a selective-prosecution claim draw on ordinary equal protection standards. The claimant must demonstrate that the federal [or state] prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose. To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.

United States v. Armstrong, 517 U.S. 456, 465 (1996) (internal quotation and citation omitted). *Armstrong* does not require identity of facts, only that the cases be substantially similar. *Chavez v. Ill. St. Police*, 251 F.3d 612, 635 (7th Cir. 2001) (court should take "care[ ] not to define the [similarly situated] requirement too narrowly."). It is not necessary that individuals be similar in all respects, only that the movant demonstrate that he or she shares "common features essential to a meaningful comparison." *Id.*

"It is appropriate to judge selective prosecution claims according to ordinary equal protection standards." *Wayte v. United States*, 470 U.S. 598, 608 (1985). Where direct evidence is unavailable, equal protection claimants can, and frequently do, rely on the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g.*, *Ballou v. McElvain*, 29 F.4th 413, 422 (9th Cir. 2022) (as to

equal protection employment discrimination case); *Demoret v. Zegarelli*, 451 F.3d 140, 151 (2d Cir. 2006) (same). Under that framework, the criminal defendant may make a prima facie case of discrimination by showing that he or she has been adversely prosecuted while "persons similarly situated to the defendant were not generally subject to prosecution," along with a producing a reasonable inference that "the prosecutor's discriminatory selection was based on an impermissible consideration such as race, religion, or any other ... discriminatory purpose." *State v. Kramer*, 637 N.W.2d 35, 42-43 (Wisc. 2001); *United States v. Schoolcraft*, 879 F.2d 54, 68 (3d Cir. 1989). Once the defendant makes a prima facie case, the burden shifts to the prosecution to state a "reasonable basis to justify the classification," or a legitimate and non-discriminatory and legitimate reason for the challenged decision. *Kramer*, 637 N.W.2d at 44; *Schoolcraft*, 879 F.2d at 68; *see also United States v. Carron*, 541 F. Supp. 347, 349 (W.D.N.Y. 1982) ("Once the defendant satisfies this burden of proof, the burden shifts to the government, which must justify its actions in singling out a particular person or persons for prosecution."). At the third and final stage of any burden-shifting case, the claimant may produce evidence showing that the stated reason is a pretext for discrimination. *See*, *e.g.*, *Demoret*, 451 F.3d at 151; *Floyd-Gimon v. Univ. of Ark. for Med. Sciences*, 716 F.3d 1141, 1149 (8th Cir. 2013); *Ottoman v. City of Independence*, 341 F.3d 751, 759 (8th Cir. 2003).

Statistical evidence also plays a role. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court was asked to infer discriminatory purpose from a demonstration of state-wide systemic race-of-victim discrimination. The Court stated:

"[T]o prevail under the Equal Protection Clause, [a defendant] must prove that the decisionmakers in his case acted with discriminatory purpose." *Id.* at 292-93 (emphasis in original). Here, evidence appears that focuses on a single decision maker: Prosecuting Attorney Robert P. McCulloch. This is the type of evidence the Court in McCleskey indicated it would look for.

B. Argument

1. The Capital Prosecution of Kevin Johnson was Motivated in Substantial Part by Discriminatory Intent and the State Violated Equal Protection.

At every stage of capital prosecutions under Mr. McCulloch, race played a prominent role, and remained a decisive factor when the analysis is limited to cases most similar to Mr. Johnson's, police officer killing. The State violated Equal Protection.

From the outset, direct evidence shows a differential in treatment: Mr. McCulloch gave Trenton Forster a year to plead for his life and provide mitigation evidence. He provided no such opportunity to Black killers. Mr. McCulloch's decision to give extra leniency to a White cop killer finds no support in the record of the case. Mr. Forster had previously boasted about how he hated the police and wanted to get into a violent confrontation with a police officer. He then executed his plan: shooting at police officers and killing one of them. Mr. McCulloch articulated no explanation for this leniency, and any explanation he might try to offer at the hearing in this case would lack credibility. He has only said that Mr. Forster had mental health problems, but so did every other police-killing defendant - including Kevin Johnson.

Importantly, Mr. McCulloch could not have learned of the extent of Forster's mental health problems unless he had gone searching for mitigating evidence. In other words, he found the conclusion that he was looking for.

Missouri courts have consistently looked to the treatment of other similarly-situated parties to assess pretext. *See*, *e.g.*, *McGhee v. Schreiber Foods, Inc.*, 502 S.W.3d 658, 667 (Mo. App. W.D. 2016) ("[I]nstances of disparate treatment, that is, when the employee has been treated differently from other employees, can support a claim of discrimination[.]") Comparators "[n]eed not be identical in every conceivable way .... So long as the distinctions between the [defendant] and the proposed comparators are not so significant that they render the comparison effectively useless, the similarly-situated requirement is satisfied." *Id.* at 668.

Narrowing the inquiry to cases most similar to Mr. Johnson's, the State can discern no significant distinctions that would justify seeking death against Mr. Johnson and the other Black defendants, but not for Mr. Forster, who is White. The five defendants were similarly situated. All involved the killing of a police officer. In all, multiple aggravating circumstances were present. Indeed, it could be reasonably maintained that Forster's case was the most aggravated. Forster was prosecuted and convicted for assault on a second officer, and there is strong evidence that but for the fact his gun jammed, the second officer would have been killed as well.

Any claim that Forster, the White defendant, was not deserving of death due to his mental illness smacks of pretext; all five defendants suffered from mental disorders which diminished their culpability. Forster suffered from bipolar disorder,

attention deficit hyperactivity disorder, generalized anxiety disorder, panic disorder, and polysubstance use disorder. Johnson had been diagnosed with three serious mental illnesses as recognized by DSM-IV, dysthymia, adjustment disorder with mixed disturbance of emotions and conduct, and child abuse. Todd Shepard suffered from a delusional disorder. Dennis Blackman experienced psychotic and dissociative episodes. Lacy

Turner suffered from an intellectual disability, depression, and dependent personality disorder. By today's standards, his disability would render him ineligible for the death penalty. Each of these defendants could be viewed as having significantly diminished culpability due to their mental disorders.

Disparate treatment is blatant in another respect. Only Forster was specifically invited to make his case for life; the Black defendants received no comparable invitation. Even if Forster made a better showing of mitigation – which he does not - it was because the State solicited it solely from the White defendant; it had no interest in actually considering waiving death for the Black defendants. And McCulloch made clear his disdain for the mitigating side of the scale in aggravated cases ("so what ... if these people can become a productive member of society ... they still committed a horrible, brutal, vicious, murder,"), further evidence that race, not mental illness, was the deciding factor in Forster. Finally, Forster's mental impairment simply could not have been the reason for waiving death; the State vigorously disputed this same evidence when Foster put forth a diminished capacity defense to first degree murder. McCulloch's newly articulated justification regarding

Forster's mental illness and diminished capacity is inconsistent with his decision to nonetheless pursue prosecution for first degree murder.

It is well-settled that shifting explanations are circumstantial evidence of pretext. *Foster v. Chatman*, 578 U.S. 488, 512 (2016). In *Foster*, "the prosecution's principal reasons for the strike shifted over time, suggesting that those reasons may be pretextual." *Id.* at 507. Indeed, "[s]uch implausible explanations and false or shifting reasons support a finding of illegal motivation." *Hall v. N.L.R.B.,* 941 F.2d 684, 688 (8th Cir. 1991). *See York Prod., Inc. v. N.L.R.B.*, 881 F.2d 542, 545 (8th Cir. 1989) (finding illegal motivation where, inter alia, initial reason was later abandoned and new position was adopted at hearing); *N.L.R.B. v. RELCO Locomotives, Inc.*, 734 F.3d 764, 782 (8th Cir. 2013) (vacillation in reasons supported finding employment termination illegal); Aero*tek, Inc. v. Nat'l Lab. Rels. Bd.*, 883 F.3d 725, 732 (8th Cir. 2018) (finding implausible employer's rationale that was contradicted by their own activity and communications).

In assessing the similarities of these cases, the State notes the complete absence of both guidelines for when death is appropriate, or any contemporaneous memoranda reflecting the decision-making process. Requests for these materials reveal none exist. Rather, it seems these were ad hoc decisions, and as such are further prone to the influence of improper factors. Neither has the Special Prosecutor been favored with a response from the trial prosecutors. Finally, the trial prosecution team was provided the opportunity to dispute claims of purposeful discrimination but

declined to do so. McCulloch has failed to respond to numerous emails, and telephone messages.

Even an email requesting a five-minute telephone call went unanswered. Second chair prosecutor Patrick Monahan has been similarly unresponsive, declining to speak with the Special Prosecutor except if provided with written notice of the questions to be asked.

Third chair prosecutor Sheila Whirley picked up the Special Prosecutor's phone call. But she was similarly unhelpful, stating that she would not "give up the family secrets" without a clearer understanding of the Special Prosecutor and his role. She then simply pointed the finger at McCulloch, said he made the decision, and directed the Special Prosecutor to look at the notice of aggravating factors filed with the Court.

The trial prosecutors have declined to justify their actions, let alone prove any such justifications. The Court can and should draw a credibility inference from the trial team's refusal to give any real explanation of their decision. Most especially, Mr. McCulloch's decisions lack credibility because he has refused to even acknowledge the Special Prosecutor's attempts at contact - all while giving a two-hour news media interview.

In addition, statistical evidence supports an inference of discrimination. Statistical evidence is "relevant in conjunction with all other evidence in determining intentional discrimination." *Cox v. First Nat. Bank*, 792 F.3d 936, 941 (8th Cir. 2015) (citation omitted).

The Baumgartner Report presents compelling evidence that racial discrimination was pervasive in the selection of cases for capital prosecution; at virtually every decision-point race played a prominent role. Overall, White victim cases saw a death rate of 14 percent, whereas Black-victim cases saw a rate of just four percent. Thus, cases with White victims were 3.5 times as likely to lead to a sentence of death as cases with Black victims, and 2.2 times as likely to lead to the filing of first degree murder charges. These unadjusted results were highly statistically significant.

Baumgartner then employed commonly accepted statistical procedures to determine if the disparities could be explained by legitimate case characteristics, aggravating and mitigating circumstances. He concluded:

> [T]he multivariate analysis results are highly consistent and confirm the simple comparisons laid out in Table 1 [unadjusted results]. The most important result from this analysis is the very powerful White-victim effect, consistently leading to results suggesting 3 to 4 times the rate of use of the death penalty in such cases compared to those with Black victims. In effect, the presence of a White victim in a particular case acts as non-statutory and impermissible aggravating factor, with an influence on capital sentencing comparable to the defendant's status of having a prior conviction of first-degree murder or felonious assault.

Baumgartner Report at 20-21.

The Baumgartner Report differs 1n significant respects to the study rejected in McCleskey. In McCleskey, the Court found the combined statewide effects - encompassing all decision-makers, prosecutors, juries, and judges did not alone demonstrate McCleskey himself was a victim of purposeful discrimination. Here, the focus was on a single jurisdiction, St. Louis County, and the tenure of a single

prosecutor, Robert P. McCulloch. The study also permits a close look at the discrete decision-points, from arrest through sentencing, to determine the source of the observed disparities. Notably, most of the ultimate disparity is attributable to prosecutorial decision-making, fairly

imputed to Mr. McCulloch, not the juries or courts. The sheer pervasiveness and magnitude of this demonstration goes a long way to proving purposeful discrimination in Mr. Johnson's case.

2. Previously Undisclosed Work Product, Together with Newly Available Legal Authority, Sustain Mr. Johnson's Batson Claim and Further Show the Pervasive Racial Bias Underlying His Conviction and Sentence.

Beyond systematically discriminating against Black defendants in charging first degree murder and seeking the death penalty, Mr. Johnson's prosecutors discriminated against Black jurors as well. Work product materials generated between the two trials show the prosecution's conscious intent to evade *Batson* and exclude Black jurors from trial.

Jury selection in the first trial began on March 26, 2007, or only six days after the second of the Missouri Supreme Court's finding of *Batson* error in a St. Louis County case because the prosecution's stated explanations for striking a Black juror were "implausible and merely a pretext to exercise a peremptory strike for racially discriminatory reasons." *McFadden*, 216 S.W.3d at 677.

After the parties and the Court had completed challenges for cause in Mr. Johnson's first trial, McCulloch announced that he wished to exercise fewer than nine of his allotted peremptory strikes. (1st Tr. 372-73.). The Court explained that it would strike whatever number of jurors the State declined to strike (for a total of nine), but,

in doing so, the Court would follow its longstanding practice of ensuring that reducing the remaining juror pool to the final twelve jurors would not result in the arbitrary elimination of Blacks. (1st Tr. 373-74).

Mr. McCulloch called the Court's rule "silly," and "bizarre." (1st Tr. 374-75). He asked, "[I]f I don't have nine people I don't strike, *why am I being penalized*?," (1st Tr. 375), suggesting that the retention of Black jurors would "penalize" the prosecution. McCulloch then struck four jurors, leaving the Court to strike five, and resulting in a jury with six White and six Black members. (1st Tr. 376). McCulloch objected to the judge's method as an act of discrimination against White and male jurors. (1st Tr. 378).

The Court explained that, if it had engaged stricken jurors in the manner suggested by McCulloch, by starting with the highest non-stricken member and counting downward, the Court would have stricken four Black jurors. (1st Tr. 378-79). The Court suggested that McCulloch was asking the Court to strike the Black jurors rather than having the prosecution do so (1st Tr. 379: "Not by the prosecutor. You're asking the Court to do it"). McCulloch insisted that the jurors stricken by the Court "are people that I think would make fine jurors and would not strike them." (1st Tr. 381).

The prosecution engaged in a similar tactic during Mr. Johnson's retrial, again exercising only four of its nine available strikes. (Tr. 1048-49). The prosecutor's four strikes included three Black jurors, which left three additional Black jurors from among the 26 remaining jurors on the venire. (Tr. 1049-53, 1057). This time, the

Court announced that it would exercise the five remaining state strikes by random draw. (Tr. 1054). With three Blacks remaining, and five random strikes to be allocated among the 26 veniremembers, McCulloch could hope to achieve an additional one or two Black strikes while attributing those strikes to the judge instead of the prosecution-a distinction he made clear. (Tr. 1055).

McCulloch's objectives are laid bare by the prosecution's work product between the two trials - evidence that Mr. McCulloch's office tried to shroud behind an instruction not to copy it. (*See* Memorandum to Patrick Monahan, attached as Exhibit 7.) A research memorandum sought to provide support for the proposition that Judge Wiesman's "decision to only strike white jurors claiming that the State was trying to circumvent Batson was an erroneous decision." It urged that the prosecution's exercise of fewer than its allotted strikes "is insufficient to establish discrimination." And it contended that the trial judge had wrongly "interject[ed] himself into the process and allow[ed] himself more say than the state."

The implications of the prosecution's memo are several and troubling. First, the prosecution's actions from the first trial show a deliberate attempt to strike Black jurors from the back of the venire, and then to attribute those strikes to the judge instead of the prosecution. Judge Wiesman understood the tactic and identified it as such. (1st Tr. 379). The prosecution recognized what the judge had inferred; its memorandum described the "Judge's decision to only strike white jurors claiming that the State was trying to circumvent *Batson*," and it sought to "argue that Judge Wiesman's decision was erroneous." Second, even random strikes undertaken by the

Court on retrial helped the prosecution evade *Batson*. If indeed McCulloch was content to proceed with a small number of Black jurors in the months immediately following McFadden, which he did by striking three of the available six Black veniremembers, he could hope that the Court's five random strikes would result in the exclusion of one or two more minorities, and without the State being blamed for that exclusion (Tr. 1055: "I would prefer not to call them the State's strikes."). Third, at the very least, the memorandum clarifies that the prosecutors were committed in advance to a strategy of leaving multiple peremptory challenges unexercised, but without knowing who the veniremembers were. There is no rational strategic basis for such a pre-commitment, other than to weaken any inference of racial discrimination from strikes that the prosecution expected to take, that is, to immunize in advance whatever limited number of Black strikes the prosecution would feel compelled to make. All told, the tactic shows that the prosecution was more interested in defeat any Batson claim than in seating a fair and impartial jury. McCulloch's motives at jury selection should be revisited for another reason: the United States Supreme Court's 2019 opinion in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), lends credence to the plausible *Batson* claim that Mr. Johnson brought on direct appeal.

At trial, the primary panel of 30 veniremembers comprised 24 Whites and six Blacks. Thus, the prosecution had an opportunity to strike 24 Whites and struck one for a strike rate of 4%. The prosecution had the opportunity to strike six Blacks and struck three for a strike rate of 50%. Including the eight additional venirepersons

comprising the alternate pool, the prosecution had the opportunity to strike 30 Whites and struck two (7%). It had the opportunity to strike eight Blacks and struck four (50%).

Based on these facts, there did not appear to be a dispute as to the existence of a prima facie case of discrimination, thus the burden shifted to the State to justify its strikes on non-racial grounds. The focus was principally on the strike of Debra Cottman, a Black woman. McCulloch offered two grounds, that he struck Cottman because she was "not all that willing to answer the questions regarding the death penalty," and because Cottman served as a foster parent for children at the Annie Malone Children's Home, which is one of several such homes where Mr. Johnson briefly stayed during his troubled childhood. (Tr. 1051).

As to the first ground, unwillingness to answer questions, there appears to be no record support differentiating Cottman's voir dire responses from those of other jurors, and it is noted that the Supreme Court of Missouri focused solely on the second ground, the juror's connection with Annie Malone Children's Home. Cottman testified that she had been a foster parent for children from the Annie Malone Children's Home. But her association with Annie Malone was fleeting. Cottman was what was known as a "visiting foster Parent." (Tr. 1010). She explained, "They come visit at my home, stay at my home for the weekend." (Tr. 1010). Cottman did not know anyone from Annie Malone that was associated with the case, including Kevin Johnson. (Tr. 1011).

Similarly, Mr. Johnson himself had little contact with that agency. The record shows he had stayed there for one week as a child, through placement by the DFS. (Tr. 1003-04, 1051, 2112-13, 2270). Nevertheless, McCulloch said, "I don't want anyone associated with Annie Malone." (Tr. 1051).

Mr. McCulloch, though, declined to strike White jurors who had worked within DFS and/or in the foster care system. Juror Bayer had worked as a "weekend foster parent" at the St. Vincent Home for Children. (Tr. 1009-10). Juror Duggan worked as a teacher and had been "involved in hot lining several students during [her] teaching career'" meaning it was necessary to report to DFS that "something going on with a student." (Tr. 1005). Juror Georger was a mentor for the Family Court for two or three years and worked extensively with children. (Tr.1003-04, 1006-07). Juror Boedeker worked with "new moms and babies" and occasionally would consult with DFS whenever there was "a positive drug screen on the mother or baby after delivery." (Tr. 1007-08). None of the jurors, including Cottman, were asked by McCulloch about their experiences in the foster care system, and none said that their experiences would affect their consideration of Mr. Johnson's trial.

In his application, Mr. Johnson asks the State to revisit his claim of discriminatory jury selection, acknowledging that this claim has been decided adversely in the courts, but without taking into consider historical evidence of discrimination. On direct appeal Mr. Johnson called the Courts attention to previous Batson violations from St. Louis County during the few years before his trial, specifically, *State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007); *State v. McFadden*,

191 S.W.3d 648 (Mo. banc 2006); *State v. Hampton*, 163 S.W.3d 903 (Mo. banc 2005); and *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. E.D. 2004). The Court refused to consider the evidence as relevant, stating that "A previous Batson violation by the same prosecutor's office does not constitute evidence of a Batson violation in this case, absent allegations relating to this specific case." *State v. Johnson*, 284 S.W.3d 561, 571 (Mo. banc 2009). Intervening authority from the United States Supreme Court is directly to the contrary: A defendant may rely on, and a court must consider, "relevant history of the State's peremptory strikes in past cases." *Flowers*, 139 S. Ct. at 2243.

Flowers also makes clear that a stricken Black juror and a non-stricken White juror need not be identical in all respects in order for the comparison to support an inference of discrimination. At issue in *Flowers* was the strike of a Black juror who worked at Wal-Mart where the defendant's father also worked. To discredit the prosecutor's explanation the Black juror might sympathize with a defendant whose father worked at the same Wal-Mart as the juror, the Court relied on the fact that the prosecution declined to strike multiple White jurors who worked at a bank where the defendant's family were customers. *Id.* at 2245. The comparison jurors did not work at the identical location (WalMart) as the stricken juror, and their experience with the defendant's family was different (working at a place where they had contact with numerous relatives of the defendant, as opposed to working at a place where the defendant's father worked). That ruling contrasts with the Missouri Supreme Court's reasoning on direct appeal. The Court in *Johnson* accepted the prosecutor's explanation that he struck a juror who worked as a foster parent at the Annie Malone

Children's home. *Johnson*, 284 S.W.3d at 570-71. It rejected Mr. Johnson's and the dissent's showing that the prosecution declined to strike numerous White jurors who worked at other foster care agencies or with the Division of Family Services, which took custody of Mr. Johnson for most of his childhood. Id. The comparison was not probative, the Court suggested, because the White jurors did not work at Annie Malone's itself. *Id.*; *but see id.* at 590 (Teitelman, J., dissenting: "There were at least four white jurors who had substantial contacts with the division, which had legal custody of appellant for most of his childhood.").

CONCLUSION

The effect of race was pervasive throughout the capital decision-making by former Prosecuting Attorney Robert P. McCulloch. No significant factors explain why death was sought against the Black capital defendants, including Mr. Johnson, but not the White defendant, Trenton Forster. Mr. Forster got extra due process - the right to successfully plead for his life for a year – that no Black defendant got. Those disparities are made worse by the St. Louis County Prosecutor's Office pattern of discriminating against Black jurors, as it appears to have done intentionally at Mr. Johnson's trial.

The facts demonstrate, by clear and convincing evidence, that the capital prosecution of Kevin Johnson and the exclusion of Black jurors at his trial was motivated in substantial part by discriminatory intent-equal protection violations that undermine the confidence in the judgment.

Sergeant McEntee's survivors, the women and men of law enforcement, and the community deserve a just conclusion to this case. That conclusion will only be just if it comports with the law. Unfortunately, the available evidence all shows that racial bias infected the process here. The Court must vacate the judgment and allow further proceedings to bring this case to a lawful conclusion.

Dated: November 18, 2022

Respectfully submitted,

KEENAN & BHATIA, LLC

/s/ Edward (E.E.) Keenan

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CERTIFICATE OF SERVICE

I certify service a copy of the foregoing was electronically filed on November 18, 2022 with the Court's ECF and was also sent via electronic mail on November 18, 2022 to the following case participants:

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IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	Case No. 2105R-02833-01
	)	
v.	)	**This is a capital case**
	)	
KEVIN JOHNSON,	)	**Execution scheduled November 29**
	)	
Defendant.	)	

DEFENDANT KEVIN JOHNSON'S MOTION TO AMEND JUDGMENT AND, ALTERNATIVELY, FOR NEW TRIAL

Defendant Kevin Johnson, pursuant to Rules 29.11, 78.01, and 78.07, moves the Court to amend its order and judgment of Nov. 16, 2022, and alternatively to grant a new trial, on the identical grounds raised in the State's "Motion to Amend Judgment, And, Alternatively, for New Trial," filed earlier today on November 18, 2022. Defendant Johnson adopts in full the motion filed by the State through the special prosecutor, he advances all grounds set forth therein, and he incorporates by reference the State's motion.

WHEREFORE for the reasons stated above and in the State's above-described Motion, Defendant respectfully requests that the Court grant his motion to amend the judgment and for new trial.

Respectfully submitted,

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Certificate of Service

I certify that a true and correct copy of the foregoing was filed and served electronically via the Court's electronic filing system upon all counsel of record on November 18, 2022.

/s/ Joseph W. Luby
Joseph W. Luby

Attorney for Defendant

Case No. SC99873

In the Supreme Court of Missouri

STATE OF MISSOURI
Plaintiff,

v.

KEVIN JOHNSON,
Defendant.

SPECIAL PROSECUTOR'S MOTION FOR STAY OF EXECUTION AND SUGGESTIONS IN SUPPORT

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Special Prosecutor for Plaintiff
State of Missouri

INTRODUCTION

This Court issued an execution warrant for defendant Kevin Johnson for November 29, 2022. The Special Prosecutor has determined that racist prosecution techniques infected Mr. Johnson's conviction and death sentence. Unless this Court stays the execution, the result in this case will forever have this cloud over it. This Court should stay the execution so that the Special Prosecutor may pursue the Legislatively-conferred right to appeal the Circuit Court's summary denial of the motion to vacate.

At the time it appointed a Special Prosecutor, the Circuit Court knew of the pending November 29, 2022 execution date. The Special Prosecutor faced a high task: review a case file spanning some 31,744 pages, reach out to witnesses, conduct legal research, and make follow-up document requests that led to 12 more boxes of files. The Special Prosecutor reviewed all this evidence. Having determined that the facts compelled action, the Special Prosecutor filed an extensive motion to vacate on November 15, 2022.

The Circuit Court - in direct contravention of RSMo § 547.031's language - denied it summarily the next morning.

Section 547.031 grants prosecutors a clear mandate: to file a motion to vacate an illegal judgment, to see that motion through an evidentiary hearing, and to appeal if the Circuit Court denies relief. *See* RSMo § 547.031. This mandate will prove pointless if the execution moves forward.

I. SUMMARY

This Court has issued an execution warrant for defendant Kevin Johnson for November 29, 2022. The Special Prosecutor has determined that purposeful racial discrimination infected Mr. Johnson's conviction and death sentence, and filed a motion to vacate the judgment. But the Circuit Court has determined there was insufficient time to conduct the required hearing, and to issue findings of fact and conclusions of law, and denied the motion. Unless this Court stays the execution, the claims of racial discrimination will never be heard, and the result will forever have this cloud over it. This Court should stay the execution.

At the time it appointed a Special Prosecutor, the Circuit Court knew of the pending November 29, 2022 execution date. The Special Prosecutor faced a high task: review a case file spanning some 31,744 pages, reach out to witnesses, conduct legal research, and make follow-up document requests that led to 12 more boxes of files, all in a month. Having determined that the facts compelled action, the Special Prosecutor filed an extensive motion to vacate on November 15, 2022.

The Circuit Court - citing RSMo § 547.031's requirement for a hearing, and findings of fact and conclusion of law – has recognized that, short of a stay, it is impossible to comply with the Legislature's dictates. Order and Judgement, November 19, 2022, at 4.

Section 547.031 grants prosecutors a clear mandate: to file a motion to vacate an illegal judgment, to see that motion through an evidentiary hearing, and to appeal if the Circuit Court denies relief. *See* RSMo § 547.031.

The Special Prosecutor has acted with lightning speed in pursuing this case. But, as the Circuit Court recognized, the scant time left is both a physically and legally impossible timeframe in which to do this legal duty.

Preparing for the hearing will, at the very least, require noticing and taking the depositions of two of the trial prosecutors, Robert McCulloch and Patrick Monahan, because both have outright refused to talk with the Special Prosecutor. (Ex. 3, Bradford Aff.) The Special Prosecutor even asked Mr. McCulloch if he could spare *five minutes* for a phone call. (Ex. 4, McCulloch Corr.) Under RSMo § 547.031, the Attorney General has the right to intervene and prepare for the hearing; due process would likewise require that Mr. Johnson have time to prepare, as his rights are at stake. And if the Circuit Court does not grant the motion to vacate, the Legislature has conferred on the Prosecutor an absolute right to appeal. *See id.* To put it mildly, it is not realistic for this all to happen in the remaining time available.

The State meets the standards for a stay. The State has a strong likelihood of success on the merits. Procedurally, as the Circuit Court recognized, there is insufficient time to conduct the required hearing, as an expedited hearing would be unfair to the Attorney General. Order and

Judgement, November 19, 2022, at 4. Substantively, the evidence proves that racial considerations motivated the decision-making in Mr. Johnson's case.

The balance of equities overwhelmingly favors a stay. Executing Kevin Johnson on November 29, 2022 will effectively decide the merits of the Section 547.031 motion and its appeal without the due process that the state legislature and the Constitution guarantee. Section 547.031 - passed by the current Legislature and signed by the current Governor - provides for a hearing, findings of fact and conclusions of law, and a right to appeal. *See* RSMo § 547.031.

The State would suffer irreparable injury because it will not be able to vindicate its right to seek review of the judgment under Section 547.031, a process that includes a hearing and a right to appeal.

A stay serves the public interest. Our constitutional systems depends on democratic processes and separation of powers. Section 547.031 is a duly-enacted law. Its procedural mandates are not options, they are obligations. Executing Mr. Johnson on the current schedule effectively repeals a statute the Legislature passed and the Governor signed without the attendant democratic processes. Enforcement of a democratically-passed law always serves the public interest. Further, the public interest is served by vindication of constitutional rights, as well as the State's and the Prosecutor's sovereign and individual interest in ensuring that justice be done. *See* MO. R. P. C. 4-3.8.

This motion is not the sort of Hail Mary pass that courts often see in death penalty cases. For one, it comes from the State. Further, the timing of this motion is not a matter of the State's choosing. The statute at issue only came into being last year. The undersigned Special Prosecutor was only appointed to this case last month, and had an ethical duty to investigate the facts before filing a motion to vacate and seeking a stay. The Special Prosecutor could not have responsibly moved for a stay any sooner than now. Finally, the process here is a process specifically authorized by the law, and the failure of the Circuit Court to follow it is plain and obvious: the court held no hearing and issued no factual findings.

A stay will respect the separation of powers, permit a Court to assess the newly-discovered facts on the merits, and ensure public confidence in the outcome of this case, whatever it may be. The Court should grant the stay.

II. FACTUAL AND PROCEDURAL BACKGROUND

The police were looking for Mr. Johnson at a family residence to serve an outstanding warrant for a probation violation resulting from a misdemeanor assault.[1] While the police were present, Mr. Johnson's twelve-year old brother suffered a seizure and was dying of heart failure. Mr. Johnson was observing

[1] These facts come generally from *State v. Johnson*, 284 S.W.3d 561, 567-68 (Mo. banc 2009), as well as the case record here and in the Circuit Court.

unseen from next door. Mr. Johnson would later be heard saying that the police, including Sgt. William McEntee, were consumed with arresting him, and blaming the death of his younger brother on police indifference to the medical emergency.

Two hours after the seizure, Sgt. McEntee responded to a report of fireworks in the neighborhood. Mr. Johnson approached Sgt. McEntee's patrol car and was heard to accuse him of killing his brother before firing several times. Sgt. McEntee's patrol car rolled down the street, coming to rest at a tree. Mr. Johnson returned and fired additional shots, killing Sgt. McEntee.

After an initial trial resulted in a hung jury split 10-2 in favor of conviction on the lower charge of second-degree murder, a new trial jury found Mr. Johnson guilty of one count of first-degree murder, and sentenced him to death.

On August 28, 2021, RSMo § 547.031 went into effect. Mr. Johnson timely requested review under the statute. (*See* Motion for App't of Special Prosecutor, filed Oct. 12, 2022, available on Case.net in underlying case.) On December 1, 2021, the St. Louis County Prosecuting Attorney's Office received an application from Mr. Johnson pursuant to RSMo § 547.031, asserting that he was a victim of pervasive racial discrimination practiced by that office and requesting investigation of his allegations. (*Id.*)

That office conducted an initial investigation into Mr. Johnson's application. The investigation remained incomplete because the office determined that a conflict of interest precluded further participation, and sought to identify a special prosecutor to handle Mr. Johnson's case. (*Id.*) The office engaged in a lengthy search for a qualified, disinterested, and available candidate.

The State and Mr. Johnson were at all times diligent. RSMo § 547.031 authorizes the Prosecuting Attorney of the county of conviction to seek to set aside a judgment if it finds clear and convincing evidence of a wrongful conviction. Mr. Johnson made his initial application in December, 2021, and amended it an April 2022, before the current execution warrant issued, citing *inter alia* an ongoing but a yet to be completed study of Mr. McCulloch's capital decision-making and intervening law relevant to discrimination at jury selection. Only after it determined the St. Louis County Prosecuting Attorney could not, within the bounds of its professional and ethical responsibilities, continue to consider Mr. Johnson's application, did it begin the process of seeking a Special Prosecutor. The Conviction Incident and Review Unit has represented to the Special Prosecutor that the fact an execution warrant had issued, and the requirement that any special prosecutor candidate not only be competent and willing but also itself be free of any potential conflicts (including the active representation of any client where the St Louis County Prosecuting

Attorney), made the task exponentially more difficult, with numerous otherwise qualified candidates ultimately having to decline.

By October 12, 2022, the Prosecutor's Office identified a qualified, disinterested, and available candidate for Special Prosecutor, who was appointed by the Circuit Court on that date. (*Id.*) Upon appointment the State moved diligently in investigating Mr. Johnson's allegations.

Given the scant few weeks since the appointment, the Special Prosecutor (mindful of the execution warrant) has filed the Section 547.031 Motion as soon as it was clear the standard was met and the allegations capable of proof. The Special Prosecutor has attempted to ensure that not only Mr. Johnson's allegations were adequately investigated but also that the State's interest in the preservation of a fairly earned judgment—if indeed that had proved to be the case—were respected. In the end, the evidence was so clear that the Special Prosecutor had no ethical option but to move to vacate the judgment. The Special Prosecutor filed this motion yesterday last Tuesday evening.

Concurrently with the filing of the Motion, but prior to its disposition, the Special Prosecutor sought a stay in this Court so that the required hearing could be conducted. This Court found the stay request by the State to be premature, as no matter to which Special Prosecutor was party was yet pending. Now that that there is a final Order and Judgment, and the State has appealed, the Special Prosecutor has standing to be heard as to a stay request.

RSMo § 547.031 (4) ("The prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal of the denial or disposal of such a motion.") The stay request is properly ancillary to the right to "maintain" an appeal as conferred by the statute. Without such a stay, the Special Prosecutor's appeal will become moot.

The Circuit Court denied it Wednesday morning in a summary order. The Special Prosecutor then sought a stay in this Court. On Thursday, this Court denied a stay "on the ground that there are no matters pending before this Court at the present time to which [the special prosecutor] is a proper party or representative." (Order, Nov. 17. 2022, Case No. SC89168, on Casenet.)

On Friday, the Special Prosecutor, Attorney General, and Mr. Johnson's counsel held a teleconference with the Circuit Court. The Circuit Court explained its reasons for the summary denial. Both the Special Prosecutor and Mr. Johnson filed motions to amend the judgment or for a new trial later that day, and the Special Prosecutor filed a notice of appeal. On Saturday morning, the Circuit Court issued an amended judgment, denying the motions for new trial or to amend.

The Circuit Court, Presiding Judge Mary Elizabeth Ott, who carefully reviewed the pleadings below, concurs that a hearing is necessary, and thus, at least implicitly, that a stay is warranted:

> This Court recognizes that §547.031 RsMo. (2021) requires a hearing, and is also aware of the requirement that sufficient time for all parties to prepare and present evidence at such hearing is essential to its proper function
>
> ***
>
> Of course, the Court will, in light of the exigent circumstances present in this case, continue to give it the highest priority that must always be given to cases involving the penalty of death. However, the question is not simply can a hearing be conducted but rather can the date of the hearing afford the parties adequate time to prepare and present the evidence, and the Court adequate time to thoughtfully consider the evidence admitted at hearing, keeping in mind the important public interests at issue.

Order and Judgment, November 19, 2022, at 3, 4.

The Special Prosecutor is now a proper party in a pending appeal. See RSMo 547.031 ("The prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal of the denial or disposal of such a motion.")

III. DISCUSSION

This Court should stay the November 29th execution date because the State demonstrates that it is likely to succeed on the appeal of the Motion to Vacate. Irreparable harm would result absent a stay. These factors outweigh any prospect of harm caused to others if a reasonable amount of time is granted to afford a full and fair adjudication of the § 547.031 motion. As shown further below, the public interest cannot be served by proceeding with the scheduled execution date.

A. Standards Governing Stays of Execution.

The Supreme Court of Missouri has adopted the federal four-factor test for considering whether to issue a stay: "(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839-40 (Mo. banc 1996) (quoting *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm.*, 812 F.2d 288, 290 (6th Cir. 1987)).

A motion to stay should be granted when the moving party has shown "that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest if a stay is issued." *Id.* at 840 (citing *Celebrezze*, 812 F.2d at 290). The balance of these four factors "cannot be accomplished with mathematical precision," so "the equitable nature of the proceedings mandates that the court's approach be flexible." *Id.* (internal citations omitted).

B. The State has Demonstrated the Likelihood of Success on the Merits.

The Special Prosecutor's investigation and review of available evidence has revealed key facts showing that racial bias infects Mr. Johnson's conviction and death sentence. (*See* Motion to Vacate and Exhibits), attached here.)

1. Procedural Error.

The State shows a strong probability of success on the merits of its appeal based on procedural error alone. Section 547.031 is crystal clear. Due to the importance of the statutory language, the Special Prosecutor quotes it in full here, with key phrases bolded:

> 1. A prosecuting or circuit attorney, in the jurisdiction in which a person was convicted of an offense, may file a motion to vacate or set aside the judgment at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted. The circuit court in which the person was convicted shall have jurisdiction and authority to consider, hear, and decide the motion.
>
> 2. Upon the filing of a motion to vacate or set aside the judgment, the **court shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented.** The attorney general shall be given notice of hearing of such a motion by the circuit clerk and shall be permitted to appear, question witnesses, and make arguments in a hearing of such a motion.
>
> 3. The court shall grant the motion of the prosecuting or circuit attorney to vacate or set aside the judgment where the court finds that there is clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in the judgment. In considering the motion, the court shall take into consideration the evidence presented at the original trial or plea; the evidence presented at any direct appeal or post-conviction proceedings, including state or federal habeas actions; and the information and evidence presented at the hearing on the motion.

> 4. **The prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal of the denial or disposal of such a motion.** The attorney general may file a motion to intervene and, in addition to such motion, file a motion to dismiss the motion to vacate or to set aside the judgment in any appeal filed by the prosecuting or circuit attorney.

RSMo § 547.031.

The Circuit Court felt itself in a difficult position with an execution date pending. As it recognized, it cannot on its own stay a mandate of this Court. But this Court can always stay its own orders. That is now possible because this matter is before this Court.

The Circuit Court was mistaken in denying the motion due to timing. The statute expressly states "A prosecuting or circuit attorney . . . may file a motion to vacate or set aside the judgment at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted." RSMo § 547.031.1 (emphasis added). The Special Prosecutor had an ethical duty to investigate the allegations at issue before filing a motion to vacate. He did so as soon as humanly possible once he had "information that the convicted person" had been "erroneously convicted." *See id*. The Legislature could have set time limits on when a motion can be filed, but it did not.

"Statutory analysis requires ascertaining the intent of the legislature, as expressed in the words of the statute." *Utility Service Co. v. Dep't of Lab. & Indus. Rels.*, 331 S.W.3d 654, 658 (Mo. banc 2011). "Statutory language is given its plain and ordinary meaning." *Id.*

The Legislature said "at any time." That language is plain and unambiguous. But even if a court were to graft in an exception for what looked like strategic delay, that is not this case. The undersigned prosecutor commenced an investigation immediately once receiving an appointment, and after reviewing troves of evidence, got a comprehensive motion on file in one month. To the extent the circuit court attempted to cast blame on the St. Louis County Prosecutor's Office, that lacks basis in fact: as the Court itself recognized in the order of appointment, that office determined it lacked the power to act due to a conflict of interest. The actions of a conflicted office cannot be counted against the motion once an unconflicted prosecutor timely filed it.

The statute says the Circuit Court "shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented." RSMo § 547.031.2 (emphasis added). "The word 'shall' generally prescribes a mandatory duty." *Gross v. Parson*, 624 S.W.3d 877, 889 (Mo. banc 2021).

The Circuit Court did not do any of these things. It did not order a hearing: it summarily denied the motion. It did not issue findings of fact or conclusions of law. And it did not address "all issues presented."

"The failure to follow [a] mandatory procedure and make the required determinations is reversible error." *Crumbaker v. Zadow*, 151 S.W.3d 94, 98 (Mo. App. E.D. 2004) (citing similar "shall" language requiring a hearing and determination on joinder issues).

2. Substantive Error.

The question before the Court is whether this appeal is likely to succeed. On procedural error alone, it is. And this suffices for the likelihood of success prong of stay analysis. But if the Court were to look beyond that to the underlying merits of the motion to vacate, these also demonstrate a likelihood of ultimate success if this Court were to reverse and remand for the required hearing and findings.

The Special Prosecutor found clear and convincing evidence of racial bias by the trial prosecutor. Contrary to the Circuit Court's comment in its recent order, these are not claims that have been rejected by prior courts. The claims here rely on previously-unavailable evidence and changes in the law. These changed circumstances now enable the prosecutor to prove a constitutional violation. And regardless, the entire point of Section 547.031 is to allow a prosecutor to reopen previously adjudicated cases where justice requires it.

As this Court has held, proof of discrimination "often depend[s] on inferences rather than on direct evidence," because those who discriminate are "shrewd enough not to leave a trail of direct evidence." *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 116 (Mo. banc 2015) (citation omitted). Analysis "generally must rely on circumstantial evidence." *Id.* "There will seldom be eyewitness testimony as to the [decisionmaker]'s mental processes." *Id.* The key facts showing discrimination and the need for a full hearing include:

- The-Prosecuting Attorney Robert P. ("Bob") prosecuted five police-officer killings during his tenure. Mr. McCulloch pursued the death penalty against four Black defendants but not against the one White defendant, Trenton Forster. Forster's conduct was more aggravated. He had bragged on social media about wanting to kill police officers ("I want fuck the police carved into my grave"), and stated that he planned "to go pull my .9 on a cop." *State v. Forster*, 616 S.W.3d 436, 440 (Mo. App. E.D. 2020).

- In the White-defendant police-killing case, Mr. McCulloch's office issued a written invitation to defense counsel to submit mitigating evidence that might convince the prosecutor's office not to seek death. (Ex. 6.) His office granted the defense nearly a year to provide arguments against death, and Mr. McCulloch ultimately decided not to seek death against this White defendant, without giving any specific explanation why. (Ex. 6, Corr. with Forster

Counsel.)

- By contrast, Mr. McCulloch never issued a mitigation-invitation to Mr. Johnson or any of the other three Black defendants accused of killing police officers. (Ex. 3, Bradford Aff.)

- Work product from the prosecution team shows the prosecutors' strategy to evade *Batson* by exercising fewer than their allotted nine peremptory challenges, in the hope that the trial court might eliminate Black jurors ranked high in the strike pool without those strikes counting against the prosecution. (Ex. 7, Work Product Memorandum re: Johnson Jury Selection.)

- A stay is further required to permit compulsory process through depositions or at a hearing because the entire trial prosecution team has declined to cooperate with the Special Prosecutor. Mr. McCulloch has refused to even acknowledge correspondence from the Special Prosecutor asking him about the case, despite his extensive statements to the news media about this and other cases. (Ex. 3, Bradford Aff.; Ex. 4, McCulloch Corr.)

- Former Assistant Prosecutor Sheila Whirley, who participated in Mr. Johnson's trial, when questioned about why the State pursued death, would only state that she is reluctant to reveal **"family secrets,"** and said the death decision was Robert McCulloch's. (Ex. 3, Bradford Aff.)

- Mr. McCulloch's office maintained *no record* of guidelines,

practices, or procedures on whether to seek the death penalty. (Ex. 2, Alton Aff.) This contradicts Mr. McCulloch's own statements that he "disputes claims of bias" in the death penalty because of "the process and procedure that is employed by prosecutors in making the determination of whether or not to seek death." (Ex. 8, McCulloch Death Penalty Statements.)

- A comprehensive and rigorous statistical study of 408 St. Louis County death-eligible homicide prosecutions during Mr. McCulloch's tenure as prosecuting attorney, shows that he largely reserved the death penalty for defendants whose victims were White when deciding whether to charge first degree murder and to seek the death. (Ex. 10, Baumgartner Report.)

- Later statements by Mr. McCulloch to other prosecutors show a particular animosity towards young Black males like Mr. Johnson, viewing them as a population that "we had to deal with," and portraying them as stereotypical criminals. (Ex. 1, Hummel Aff.)

i. The State is Likely to Succeed on the Equal Protection Claim.

Mr. McCulloch's race-consciousness is inescapably evident. Of five such cases he sought death only against the four Black defendants, finding death was "not appropriate" for the sole White defendant. Following an exhaustive review of the facts of the five cases, and a comprehensive search for internal standards, guidelines, and contemporaneous memoranda reflecting the

decisions, there is simply no discernable legitimate case characteristics that can plausibly explain the disparate treatment.

Missouri courts have consistently looked to the treatment of other similarly-situated parties to infer racial animus or other illicit bias. *See*, *e.g.*, *McGhee v. Schreiber Foods, Inc.*, 502 S.W.3d 658, 667-68 (Mo. App. W.D. 2016) ("[I]nstances of disparate treatment, that is, when the employee has been treated differently from other employees, can support a claim of discrimination[.]") Comparators "[n]eed not be identical in every conceivable way. . . . So long as the distinctions between the [defendant] and the proposed comparators are not so significant that they render the comparison effectively useless, the similarly-situated requirement is satisfied.")

The appended motion demonstrates, at length, that the five defendants are similarly situated: they committed similarly aggravated crimes, and they have similarly mitigating backgrounds and psychological impairments. Despite those similarities, it was only the White defendant whose attorneys were invited to dissuade the prosecution from seeking death, and it was only the White defendant for whom Mr. McCulloch decided that the death penalty would be inappropriate.

The evidence shows that race was a pervasive factor throughout Mr. McCulloch's capital decision-making; he reserved the most severe penalty

largely for defendants whose victims were White. In Dr. Frank Baumgartner's comprehensive study, he found:

> Black victim cases have a 4.0 percent chance of leading to a death sentence; White-victim cases see a 14.1 percent chance. The ratio of these two rates is 3.5. White-victim cases are 3.5 times as likely to lead to a death sentence than Black victim cases.

Ex. 10, Baumgartner, Frank, *Homicides, Capital Prosecutions, and Death Sentences in St. Louis County, Missouri, 1990-2021, Report* (Sept. 20, 2022) at 8-9. He further concluded, "The effects are particularly pronounced at two decision-points attributable solely to the prosecutor, the decision to charge the case as a first-degree murder and the decision to give notice of intention to seek death." *Id.* at 23-24. "These effects persist after the introduction of controls for aggravating and mitigating factors, meaning that these disparities cannot be explained by legitimate case characteristics." *Id.* Dr. Baumgartner's thorough analysis supports an inference of discrimination. Statistical evidence is "relevant in conjunction with all other evidence in determining intentional discrimination." *Cox v. First Nat. Bank*, 792 F.3d 936, 941 (8th Cir. 2015) (citation omitted).

In a Section 547.031 proceeding, the Prosecutor is the voice of the State. The State confesses error: race was a substantial factor in Mr. McCulloch's exercise of discretion in the capital prosecution of Kevin Johnson. Notwithstanding the prodigious and unassailable evidence that discrimination

was operative in this case, this confession alone makes success on the merits likely.

ii. The State is Likely to Succeed on the *Batson* claim.

At jury selection, the primary panel of 30 comprised 24 Whites and six Blacks. Thus, the prosecution had an opportunity to strike 24 Whites and struck one for a strike rate of 4%. The prosecution had the opportunity to strike six Blacks and struck three for a strike rate of 50%. Including the eight additional venirepersons comprising the alternate pool, the prosecution had the opportunity to strike 30 Whites and struck two (7%). It had the opportunity to strike eight Blacks and struck four (50%).

Based on these disparities, a prima facie case of discrimination was found, thus the burden shifted to the state to justify its strikes on non-racial grounds. The focus was principally on the strike of Debra Cottman, a Black woman. Cottman testified that she was a "visiting foster parent" at the Annie Malone children's home. Trial Tr. 1010. Cottman did not know anyone from Annie Malone that was associated with the case, including Kevin Johnson. Trial Tr. 1011. Similarly, Mr. Johnson himself had little contact with that agency. The record shows he had stayed there for one week as a child, through placement by the DFS. Trial Tr. 1003-04, 1051, 2112-13, 2270.

Nevertheless, Mr. McCulloch said, "I don't want anyone associated with Annie Malone." This Court found this explanation was not pretextual to be sufficient to satisfy *Batson*, notwithstanding that Mr. McCulloch had accepted a White juror with comparable experience at a similar agency. It further declined to consider as one factor multiple other instances of discrimination at jury selection practiced by Mr. McCulloch.

Two intervening factors compel the Special Prosecutor to revisit the *Batson* claim, notwithstanding that this Court has previously addressed racial discrimination at jury selection.[2] First is a memorandum discovered in the last few weeks composed after the racially-balanced first jury failed to reach a verdict. (Ex. 7, Memorandum re: Johnson Jury Selection.) It sets forth procedures for exploiting certain idiosyncrasies in the trial judge's jury selection procedures that would result in the elimination of Blacks from the remaining prospective jury panel without overt State strikes.

The very existence and timing of the memo allows for the inference of purposeful intent to subvert the rule of law in *Batson* in the upcoming retrial.

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[2] The Circuit Court, apparently referring to the *Batson* claim, noted "the Motion at issue herein renew[s] arguments and claims previously raised on behalf of Kevin Johnson," Order and Judgment, at 4. But, as demonstrated herein and in the Motion, the State based its conclusions not only on the trial record, but on new factual revelations from which discriminatory intent can be inferred, and intervening case law.

Second is the recent case *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019), a case which this Court did not have the benefit of when it first decided the *Batson* claim. Under *Flowers*, courts must take into account the background history of a prosecutor's office in assessing racial discrimination claims around jury selection. *See id.*

On direct appeal, Mr. Johnson called the Court's attention to previous *Batson* violations from St. Louis County during the few years before his trial, specifically, *State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007); *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006); *State v. Hampton*, 163 S.W.3d 903 (Mo. banc 2005); and *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. E.D. 2004). This Court declined to consider the evidence as relevant, stating that "A previous *Batson* violation by the same prosecutor's office does not constitute evidence of a *Batson* violation in this case, absent allegations relating to this specific case." *State v. Johnson*, 284 S.W.3d 561, 571 (Mo. banc 2009).

Intervening authority from the United States Supreme Court is directly to the contrary: A defendant may rely on, and a court must consider, "relevant history of the State's peremptory strikes in past cases." *Flowers*, 139 S. Ct. at 2243.

Previously unavailable law, and previously hidden facts, now make clear that Mr. McCulloch's proffered explanations at trial were pretextual; a Court must reexamine Mr. McCulloch's specious decision to strike a Black juror.

D. Irreparable Harm is Certain if the Court Denies a Stay.

Absent a stay, the State's right to pursue the § 547.031 motion would be nullified. The State answers to the people; it has an obligation to be conscientious and thorough. As this Court has stated:

> The duty of a prosecuting officer necessarily requires that he investigate, i.e., inquire into the matter with care and accuracy, that in each case he examine the available evidence, the law and the facts, and the applicability of each to the other; that his duties further require that he intelligently weigh the chances of successful termination of the prosecution, having always in mind the relative importance to the county he serves of the different prosecutions which he might initiate.

State on inf. McKittrick v. Wallach, 182 S.W.2d 313, 318–19 (Mo. 1944).

And prosecutors, when performing their duties, are authorized "to exercise a sound discretion." *State, on Inf. McKittrick v. Wymore*, 132 S.W.2d 979, 986 (Mo. 1939).

The serious time constraint imposed by the November 29th execution date undermines the State's performance of its duties. And the integrity of the proceedings in the Circuit Court. Mr. Johnson's execution is scheduled to occur November 29, 2022. An appeal cannot be briefed, argued, and decided on that timeframe. And if a remand occurs, the Circuit Court could not hear the motion in time.

The state and Mr. Johnson will also suffer irreparable injury if Mr. Johnson's execution goes forward before the courts can consider whether racial bias tainted his conviction and sentence. *See e.g., Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring in decision to vacate stay of execution) ("The third requirement – that irreparable harm will result if a stay is not granted – is necessarily present in capital cases."); *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, J.) (granting stay of execution in light of the "obviously irreversible nature of the death penalty"); *Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) ("There can be no doubt that a defendant facing the death penalty at the hands of the state faces irreparable injury.")

The Circuit Court has indicated its willingness to act expeditiously, while respecting the need to review the evidence with care:

> There is no question that "Death is Different" [;] it is different from all other punishments and in fact qualitatively different and requires particular care in its application in every case. *See Furman v. Georgia*, 408 US 238(1972), *Lockett v. Ohio*, 438 US 586 ((1978). The procedural and temporal posture of the instant motion places the court in an untenable position. To comply strictly with the plain language of § 547.031 is in conflict with current Missouri law analyzing its provisions and the appropriate administration of Due Process of Law and Equal Protection of the law as insufficient time remains to comply in a meaningful and appropriate manner given the grave punishment at issue herein. This weighs heavily upon this court.

Order and Judgement, November 19, 2022 at 5.

E. On Balance the Pursuit of Justice Outweighs any Harm Occasioned by the Granting of a Stay.

The Special Prosecutor recognizes that the surviving victims of this tragedy have an interest in finality. But this is not a case where a death row prisoner is bringing a last-minute motion for stay of execution as a tactical step. The statute here became effective on August 28, 2021. He filed his application for review under it just over two months later, on December 1, 2021. He has pursued this new avenue for relief diligently, and justice requires that the claims be heard Once the Prosecuting Attorney's office determined it had a conflict, it had to first identify a willing and capable candidate to serve as special prosecutor, a process that counsel understands took significant time. Once appointed, counsel acted quickly.

The Circuit Court seemingly agrees that neither the Special Prosecutor nor Mr. Johnson are to blame for the "inexplicable" failure to present the claims sooner, singling out only the "failure of the Saint Louis County Office of Prosecuting Attorney to recognize the conflict of interest" sooner. Order and Judgment, November 19, 2022, at 4.

Nor can it be said such relief was previously available to Mr. Johnson. The Special Prosecutor had unique access to documents and personnel in the course of the investigation, access impossible for Mr. Johnson to have benefitted from prior to the passage of RSMo § 547.031. He could not, as a practical matter, have sought comparable relief. Indeed, the law precluded

such action by the prosecuting attorney. *State v. (Lamar) Johnson*, 617 S.W.3d 439, 444 (Mo. banc 2021).

F. A Stay Serves the Public Interest.

No public interest is more paramount than ensuring that the rule of law be respected. The Supreme Court has admonished "that capital punishment be imposed fairly, and with reasonable consistency, or not at all." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Denial of a stay would irrevocably conflict with a number of rights, the interest of all three branches of government, and would deny Mr. Johnson statutory and constitutional protections.

1. Denying the State the Opportunity to Prove its Allegations Would Offend the Doctrine of Separation of Powers.

In its current, and unusual, procedural posture, this case sits at the intersection of the powers and duties of the executive, judicial and legislative branches. This Court has recognized that "separation of the powers [is] vital to our form of government … because it prevents the abuses of power that would surely flow if power accumulated in one department." *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997) (internal citation and quotation omitted). This Court observed:

> There are two broad categories of acts that violate the constitutional mandate of separation of powers. One branch may interfere impermissibly with the other's performance of its constitutionally assigned power. Alternatively, the doctrine of separation of powers may be violated when one branch assumes a power that more properly is entrusted to another.

State Auditor v. Joint Comm. on Legislative Research, 956 S.W.2d 228, 231 (Mo. banc 1997) (internal punctuation omitted).

Here, the Legislature authorized a prosecuting attorney to seek to remedy an unjust judgment, and provided a procedural forum to effect its intent. The statute requires the Circuit Court to "order a hearing" and "issue findings of fact and conclusions of law on all issues presented." RSMo § 547.031(2). Unfortunately, the Circuit Court is already running afoul of this textual command by summarily denying the motion. The State is seeking to remedy this error, and also has the absolute right to appeal. *See id.*

To deny the State the opportunity to give proper effect to the Legislature's expression of the electorate's will, would "interfere impermissibly" with the duty the constitution has assigned that body.

The "common law maxim … [w]here there is a right, there is a remedy [is an] essential doctrine [and] precept of our law." *State ex inf. Ashcroft v. Kansas City Firefighters Local No. 42*, 672 S.W.2d 99, 109 (Mo. App. W.D. 1984). Here, the Legislature provided the Prosecutor the right to correct an unjust judgment; to deny the Prosecutor the opportunity to do so would nullify that right and impermissibly subvert the powers entrusted exclusively to the Legislature. And by extension, since the right at issue was granted the State, to fail to afford a reasonable opportunity to do what it is constitutionally

mandated to do—seek justice—would similarly diminish powers reserved for the Executive Branch.

Finally, the statute imposes specific duties on the judiciary itself. The court conducting the mandated hearing "shall … issue findings of fact and conclusions of law on all issues presented." If the Circuit Court denies the motion, "[t]he prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal." *Id.* Denial of a stay would obviate a duty—to find and state publicly the applicable facts and conclusions law and hear an appeal on the merits—that the Legislature rightfully imposed.

2. Denial of a Stay Would Contravene Due Process.

It is anathema to due process to elevate the interest in the expeditious carrying out of the execution of Mr. Johnson over the interest in ensuring all constitutional and statutory remedies be meaningfully made available.

This is an expression of the State's interest as much as Mr. Johnson's. As one court has stated, "[t]he state … is entitled to due process just as much as the petitioner [and] has an interest in its punishments being carried out in accordance with the Constitution." *Harris v. Vasquez*, 901 F.2d 724, 727 (9th Cir. 1990) (upholding grant of stay to permit evidentiary hearing on whether petitioner was denied competent psychiatric assistance at trial). *See also Zagorski v. Mays*, 906 F.3d 414, 416 (6th Cir. 2018) ("If we do not grant a stay, we will necessarily be deciding or rendering moot his appeal . . . . At a

minimum, due process requires that [the defendant] be afforded an opportunity to present his appeal to us").

Due process rights are further implicated when a state irrationally or arbitrarily applies a right granted under state law. *Hicks v. Oklahoma*, 447 U.S. 343 (1980). If a stay were to be denied, this would necessarily be an arbitrary result as it would render the full and fair hearing and adjudication required under RSMo § 547.031 impossible. Such an outcome would be particularly irrational here, as the process was commenced about nine months prior to the issuance of the warrant, but extended into the warrant period only because the St. Louis County Prosecuting Attorney's Office was exercising due diligence in ensuring Mr. Johnson's application could be reviewed unencumbered by a conflict of interest.

3. Discovery of Potentially Exculpatory Impeachment Evidence has Further Due Process Implications.

The State's review of work product and other documents not available to Mr. Johnson has revealed evidence that undermines the credibility determinations made in Mr. McCulloch's favor, in particular Mr. McCulloch's proffered race neutral reasons for striking Black jurors. The evidence permits the inference that that there was an office policy crafted by Mr. McCulloch to evade the rule in *Batson*.

The Special Prosecutor further notes that although relevant to action under RSMo § 547.031, the undisclosed evidence could well support an independent cause of action by Mr. Johnson. Failure to disclose these materials and Mr. McCulloch's false representations, should the Circuit Court so find, implicates due process.

Events as they are unfolding almost hourly only reinforce the admonition that a prosecutor has the duty to "inquire into the matter with care and accuracy." *McKittrick*, 182 S.W.3d at 318–19. Although the evidence marshaled thus far amply proves by clear and convincing evidence a constitutional violation undermining confidence in the verdict, there is likely even more evidence of discrimination to be uncovered. Similarly, there remain numerous, potentially illuminating witnesses to be interviewed, especially in light of recent discoveries. Finally, there are credible accounts of Mr. McCulloch publicly making overt and derogatory racial references. (Ex. 1, Hummel Aff.) Mr. McCulloch refuses to speak with the Special Prosecutor, only further undermining this process. (Ex. 4, McCulloch Corr.) Further investigation of these and potentially similar incidents, to the extent they may bear on the question of discriminatory intent in Mr. Johnson's case, is necessary.

The Legislature has passed a clear statute that sets forth a clear process. The public has already expressed its interest through its duly-elected

Legislators. The protection of constitutional rights, and the importance of public confidence in the integrity of criminal judgments, also supports a pause to allow this appeal and any further proceedings to reach an on-the-merits conclusion.

CONCLUSION

The State is mindful that cases such as this have reverberations beyond the Court and parties, particularly for the victim's family and law enforcement colleagues. But it is the prosecutor's duty to do justice. Further, the Legislature has specifically conferred on the prosecutor a vehicle for pursuing that justice - a vehicle that the other branches of government must honor. The State, Mr. Johnson, and the Circuit Court are prepared to conduct the hearing in an expeditious but fair manner. Justice requires that the clock be modestly reset to permit the hearing required under RSMo § 547.031. The State requests that the execution be stayed.

Dated: November 21, 2022

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify service a copy of the foregoing was electronically filed on November 21, 2022 with the Court's ECF and was also sent via electronic mail on November 21, 2022 to the following case participants:

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IN THE SUPREME COURT OF MISSOURI

State of Missouri,	)	
	)	
Respondent,	)	
	)	
vs.	)	**Case No. SC89168**
	)	
Kevin Johnson,	)	**Execution scheduled Nov. 29, 2022**
	)	
Appellant	)	

MOTION FOR STAY OF EXECUTION

Through the special prosecutor, the State has alleged that Kevin Johnson's conviction and death sentence are the product of systematic racial discrimination. *See* Ex. 1 (State of Missouri's Motion to Vacate Judgment). Through the Legislature, state law provides that such errors can be remedied "at any time." Mo. Rev. Stat. § 547.031.1 Yet, the circuit court and the Attorney General are now saying that, because Johnson's execution has been scheduled for November 29, the courts cannot consider whether the special prosecutor's conclusions are true. Ex. 2 (transcript of telephone conference, Nov. 18, 2022) at 5–6; Ex. 3 (Order and Judgment of Nov. 19, 2022), at 4–5.

The state's current execution schedule should not be a vehicle for such manifest injustice – particularly without any fault of Johnson, who applied for relief with the prosecuting attorney's office last December, and who bears no responsibility for the fact that the office has a conflict of interest and did not move for the appointment of a special prosecutor until six weeks before his execution

date. Ex. 4 (motion to appoint); Ex. 5 (order of appointment). From Johnson's perspective, one arm of the state is rushing to execute him in order to prevent another arm of the state from having its findings of racial bias and discrimination heard in court. Johnson's execution should be stayed so that the prosecutor's claims – which remain uncontested at this point – can be fully and fairly decided on their merits.

As for this Court, its first premise for scheduling Johnson's execution was that "on February 1, 2008, the St. Louis County circuit court entered its judgment fixing punishment at death." Order of Aug. 24, 2022, at 1. That judgment is now under attack by the same prosecutor's office that obtained it. Acting through a court-appointed special prosecutor, the St. Louis County Prosecuting Attorney moved to vacate and set aside Johnson's conviction and sentence under Mo. Rev. Stat. § 547.031. Ex. 1.

Presiding Judge Mary Elizabeth Ott denied the motion to vacate on the grounds that the court did not have time to conduct a fair hearing and decide the claims before the scheduled execution date, and that it lacked authority itself to stay Johnson's execution. Ex. 3 at 4–5; *see also* Mo. Rev. Stat. § 547.031.2 ("Upon the filing of a motion to vacate or set aside the judgment, the court shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented."). Judge Ott explained:

> [T]he Court will, in light of the exigent circumstances present in this case, continue to give it the highest priority that must always be given

> to cases involving the penalty of death. However, the question is not simply can a hearing be conducted but rather can the date of the hearing afford the parties adequate time to prepare and present the evidence, and the Court adequate time to thoughtfully consider the evidence admitted at hearing, keeping in mind the important public interests at issue.

Id. at 4. The court found it "disconcerting" that the prosecutor's office did not move for the appointment of a special prosecutor until October 12,[1] and "inexplicable" that the motion to vacate was not filed until November 15. *Id.* at 4. Judge Ott did not blame Johnson for this situation, which "weigh[ed] heavily" on her because the court lacked the time to conduct the statutorily required hearing in a manner consistent with the demands of due process and equal protection. *Id.* at 5.

Johnson does not dispute that the circuit court cannot stay an execution warrant issued by this Court – a measure that neither he nor the special prosecutor requested of the circuit court. *See* Ex. 1 (motion to vacate); Ex. 10, 11 (motions to amend judgment). He instead asks this Court to stay the execution so that the prosecutor may assert his claims in the circuit court, which can resolve the claims in a non-warrant posture that satisfies the court's concerns about procedural fairness to all parties. *See* Ex. 3 at 4–5.

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[1] To be fair, the prosecutor's office explained to this Court in July that it had been searching for a special prosecutor but had been unable to locate one "who is willing and able to serve." Ex. 6 (letter from Jessica Hathaway to Clerk Betsy AuBuchon, Jul. 11, 2022). Among other limitations, a special prosecutor must refrain from representing any party other than the state "in any criminal case or proceeding in th[e] circuit for the duration of th[e] appointment." Mo. Rev. Stat. § 56.110.

In deciding whether to grant a stay, this Court should consider the special prosecutor's motion to vacate for what it is: the state's confession of error. Through the special prosecutor, the state admits long-standing and pervasive racial bias in St. Louis County's handling of this case and other death-eligible prosecutions, including the office's decisions of which offense to charge, which penalty to seek, and which jurors to strike. Among the "key facts" relied upon by the special prosecutor are the following:

> ●Of the five police-officer killings that were prosecuted during his tenure as St. Louis County Prosecuting Attorney, Robert McCulloch pursued the death penalty against four Black defendants but not against the one White defendant, Trenton Forster. As compared to the other cases, "Forster's conduct was more aggravated: he had bragged on social media about wanting to kill police officers ('I want fuck the police carved into my grave'), and had also indicated an intent to 'tak[e] out every single nigga in the city.'"
>
> ●In the Forster case, McCulloch's office "issued a written invitation to defense counsel to submit mitigating evidence that might convince the prosecutor's office not to seek death," then "granted the defense nearly a year to provide arguments against death." McCulloch ultimately decided not to seek death against Forster, without giving any specific explanation why. By contrast, McCulloch issued no such "mitigation-invitation" to Johnson or other Black defendants who stood accused of killing police officers.
>
> ●The prosecution's work product shows a "strategy to evade *Batson* [*v. Kentucky*, 476 U.S. 79 (1986)] by exercising fewer than their allotted nine peremptory challenges, in the hope that the trial court might eliminate Black jurors ranked high in the strike pool without those strikes counting against the prosecution."
>
> ●Former Assistant Prosecutor Sheila Whirley, who was among the three prosecutors at Johnson's trial, told the special prosecutor that she was reluctant to reveal the office's "family secrets," but she acknowledged that the decision to seek the death penalty was

McCulloch's.

> ●Mr. McCulloch's office maintained no record of guidelines, practices, or procedures on whether to seek the death penalty.
>
> ●A comprehensive study of 408 St. Louis County death-eligible homicide prosecutions during Mr. McCulloch's tenure demonstrates that the prosecutor's office "largely reserved the death penalty for defendants whose victims were White when deciding whether to charge first degree murder and to seek the death."

Ex. 1 ("State of Missouri's Motion to Vacate and Suggestions in Support"), at 3–5.

Johnson wishes to make clear that the matters asserted by the special prosecutor are not a "rearticulation of previously litigated claims," as the circuit court remarked in passing. Ex. 3 at 5. Indeed, the special prosecutor newly asserts that the state engaged in selective prosecution by seeking the death penalty against Johnson and three other Black defendants who were charged with killing police officers but not against a similarly situated White defendant (Forster). Ex. 1 at 8–23, 29–34. It was not until 2017 that McCulloch elected not to seek death against Forster, so Johnson could not assert such a selective prosecution claim at his 2007 trial, on direct appeal in 2009, or in post-conviction proceedings that terminated in 2014.

Similarly, the special prosecutor relies on Dr. Baumgartner's careful study of all 408 death-eligible prosecutions that took place during McCulloch's tenure from 1991 through 2018. Ex. 1 at 5–7, 34–36. The study was not completed until September 20, 2022. Ex. 7 at 1. In no sense is the study duplicative of any previous claim. Finally, although Johnson has previously litigated a *Batson* claim in this

Court and elsewhere, the special prosecutor supports that claim with incriminating work product materials that undermine the trial prosecution's denial of racial motives in jury selection, and which have never been available to Johnson previously. Ex. 1 at 36–40.

Johnson's execution is scheduled for November 29. The Court should stay the execution so that the prosecution's claims can be fully and fairly decided under all the relevant evidence. Were the execution to go forward, it would not be because the state's claims lacked merit, or because Johnson was dilatory, but because the imminence of the execution (sought by the Attorney General), prevented the circuit court from performing its statutory obligation to conduct a hearing and issue findings of fact and conclusions of law. The allegations of racial bias, conceded to be true by the prosecutor, are too grave to go unheard.

PROCEDURAL BACKGROUND

1. Johnson was charged with first degree murder in 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. Although a first trial ended when the jury deadlocked 10-2 in favor of a conviction on the lesser offense of second degree murder, a second jury convicted Johnson of first degree murder and sentenced him to death in 2007. Former Prosecuting Attorney Robert McCulloch made the decision to charge first degree murder and seek the death penalty, personally prosecuted both trials, conducted all of the state's direct and

cross examinations, and gave all opening statements and closing arguments.

2. This Court affirmed Johnson's conviction and sentence on direct appeal, and it later affirmed the circuit court's denial of post-conviction relief. *State v. Johnson*, 284 S.W.3d 561 (Mo.), *cert. denied*, 558 U.S. 1054 (2009); *Johnson v. State*, 406 S.W.3d 892 (Mo. 2013), *cert. denied*, 571 U.S. 1240 (2014). The federal courts thereafter denied habeas corpus relief. *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).

3. On December 1, 2021, Johnson filed an application for relief with the Conviction and Incident Review Unit (CIRU) within the Office of the St. Louis County Prosecuting Attorney. Johnson asked the CIRU to investigate, among other things, his claim that the prosecution intentionally discriminated against Black jurors at the second of his two trials, and following that investigation, to move the circuit court to vacate Johnson's conviction and sentence under Mo. Rev. Stat. § 547.031.

4. Johnson supplemented his CIRU application on April 21, 2022. Based on the preliminary results of a comprehensive statistical study by Prof. Frank R. Baumgartner of the University of North Carolina, Johnson asserted that the St. Louis County Prosecutor's Office acted with racial bias in death-eligible homicide

prosecutions throughout McCulloch's tenure as prosecuting attorney. Johnson also asserted that McCulloch and his office selectively prosecuted Johnson and other Black defendants in cases involving the killings of police officers by pursuing the death penalty against all four such Black defendants but not against a White defendant charged with an equally or more aggravated crime. Johnson again asked the CIRU to investigate his claims and to file a motion under § 547.031.

5. Acting through the Attorney General, the state on May 11, 2022, moved this Court to set an execution date against Johnson.

6. In response to the Attorney General's motion, CIRU Chief Jessica Hathaway wrote a letter to the Clerk on July 11, 2022. Ex. 6 (letter from Jessica Hathaway to Clerk Betsey AuBuchon). Hathaway informed the Court that Johnson was seeking relief under § 547.031 based on claims "that his conviction and death sentence are unfairly and unconstitutionally tainted by racial bias." *Id.* She explained that her office had conducted a "preliminary investigation" and that further investigation may be warranted. *Id.* Nevertheless, Hathaway advised the Court that the CIRU had a conflict of interest because one of Johnson's trial attorneys is employed by the prosecuting attorney's office. *Id.* She explained that the CIRU had been attempting to locate a special prosecutor to complete the investigation of Johnson's claims, but was thus far "unable to locate a special prosecutor who is willing and able to serve." *Id.* The CIRU requested that the Court refrain from setting an execution date "until we have a special prosecutor in

place to take any further action he or she deems appropriate with respect to Mr. Johnson's case." *Id.*

7. On August 24, 2022, the Court scheduled Johnson's execution for November 29, 2022.

8. On October 12, 2022, the St. Louis County Prosecuting Attorney moved the circuit court to appoint attorney E.E. Keenan as special prosecutor, pursuant to Mo. Rev. Stat. 56.110. *See* Ex. 4 (motion). The circuit court granted the motion on the same day, and Keenan entered his appearance. *See* Ex. 5 (order of appointment); Ex. 8 (appearance). Johnson then submitted an updated CIRU application consolidating his initial application with the supplemented claims, along with a finalized version of the statistical study and analysis conducted by Prof. Baumgartner. Following his appointment, the special prosecutor reviewed "tens of thousands of pages of evidence [including file materials], … contacted every member of the prosecution team, [and] reviewed extrinsic evidence bearing on the case." Ex. 1 at 1.

9. On November 15, 2022, the St. Louis County Prosecuting Attorney, acting through the court-appointed special prosecutor, filed a motion to vacate and set aside Johnson's conviction and sentence on account of the racial bias infecting the underlying criminal judgment. Ex. 1. That same day, the court-appointed special prosecutor entered his appearance and alerted this Court that a motion to vacate had been filed in the circuit court.

10. On November 16, 2022, the Attorney General moved to strike the special prosecutor's appearance and notice of filing in this Court. The special prosecutor filed suggestions in opposition to the motion to strike later that day.

11. The circuit court denied the motion to vacate on November 16, 2022, stating only that: "This Court has received a pleading entitled Motion to Vacate Judgement. The Court enters the following judgment: The Motion to Vacate Judgement is DENIED." Ex. 9.

12. Later on November 16, 2022, the special prosecutor filed a motion in this Court to stay Johnson's execution.

13. On November 17, 2022, the Attorney General moved to strike the motion for stay and any other filings from the special prosecutor. Prior to the filing of the special prosecutor's suggestions in opposition to the motion, the Court struck the special prosecutor's filings on the ground that "there are no matters pending before this Court at the present time to which Mr. Keenan is a proper party or representative." Order of Nov. 17, 2022.

14. On November 18, 2022, Judge Ott held a telephone conference concerning the special prosecutor's motion to vacate and the court's order denying the motion. The court explained that it had denied the motion to vacate because the court could not conduct a hearing and resolve the claims between the time of the motion's filing and the scheduled execution date of November 29. *See* Ex. 2 (transcript) at 5–6.

15. Later on November 18, 2022, the special prosecutor filed a motion to amend the circuit court's judgment and for new trial. *See* Ex. 10 (State's Motion to Amend Judgment and for New Trial, Nov. 18, 2022). The special prosecutor argued, among other things, that the circuit court had jurisdiction to consider the motion to vacate during an execution warrant, because the statute allows for the prosecutor to bring a motion to vacate "at any time," and it provides that the circuit court of conviction "shall have jurisdiction and authority to consider, hear, and decide the motion." *Id.* at 2 (quoting Mo. Rev. Stat. § 547.031.1). The special prosecutor did *not* ask the circuit court to stay Johnson's execution. *Id.* Rather, he argued that the court could consider the motion to vacate despite the warrant's pendency, and that a stay would be sought from this Court so that the circuit court could resolve the special prosecutor's claims "in the normal course." *Id.* at 2–3.

16. Shortly after the filing of the special prosecutor's motion, Johnson separately moved to amend the judgment and for new trial, adopting the grounds urged by the special prosecutor. *See* Ex. 11 (Defendant Kevin Johnson's Motion to Amend Judgment and for New Trial, Nov. 18, 2022).

17. On November 19, 2022, Judge Ott entered an Order and Judgment denying the motions to amend judgment and for new trial. *See* Ex. 3 (Order and Judgment, Nov. 19, 2022). The court recognized that § 547.031 requires a hearing. Nevertheless, the court reasoned that it could not conduct an adequate hearing – that is, a hearing consistent with the statute and in accordance with the

requirements of due process and equal protection – before the scheduled execution date, relying on *State ex rel Schmitt v. Harrell*, 633 S.W.3d. 463, 468 (Mo. App. W.D. 2021) (finding that three days was insufficient time to adequately prepare for a hearing under § 547.031). Ex. 3 at 3–5. Without blaming Johnson for the timing, the court found it "inexplicable" that the motion to vacate was filed only 14 days before the scheduled execution date. *Id.* at 4. The court also found it "disconcerting" that the prosecutor's office did not "recognize [its] conflict of interest . . . prior to October of 2022." *Id.* at 4.[2]

18. As additional grounds for its decision, the circuit court stated that it lacked authority to stay an execution warrant issued by the Supreme Court. Ex. 3 at 4–5. The circuit court did not address the special prosecutor's and Johnson's arguments that it could consider the motion to vacate while the prosecutor and Johnson sought a stay in this Court, and that entry of a stay by this Court would permit the circuit court to resolve the prosecutor's claims in the regular course rather than in the rushed timeframe of a warrant posture. *See* Ex. 10 at 2–3; Ex. 11.

19. The circuit court also wrote that "many of" the claims brought by the special prosecutor "renew arguments and claims previously raised on behalf of Kevin Johnson and rejected in the various Courts of Appeal in the State and

[2] In fact the prosecutor's office described the conflict in its letter to this Court on July 11, 2022, urging the Court to refrain from setting an execution date while the office searched for a special prosecutor. *See* Ex. 6 (Letter to clerk from Jessica Hathaway, Jul. 11, 2022).

Federal systems" and were a "rearticulation of previously litigated claims." Ex. 3 at 4–5.

20. As explained elsewhere in this motion, the special prosecutor's motion raises matters well beyond Johnson's previous claims. The special prosecutor's legal claim of racial bias is essentially three-fold:

> *First*, the trial prosecutor violated equal protection by selectively prosecuting and seeking the death penalty against four Black defendants accused of killing police officers, but not against a similarly situated White defendant (Trenton Forster). It was not until December 2017, or more than three years after the end of Johnson's post-conviction proceedings, that former prosecuting attorney McCulloch declined to seek death against Forster. *See* Ex. 1 at 8 & n.4. Johnson has never before asserted a selective prosecution claim in any court.
>
> *Second*, a rigorous study of all of St. Louis County's death-eligible prosecutions during the years of McCulloch's tenure shows that cases with White victims were 3.5 times more likely to result in a death sentence than cases involving Black victims, and that White-victim cases were more than twice as likely to result in a charge of first degree murder instead of a lesser offense. Johnson submitted a preliminary version of the study to the prosecutor's office on April 21, 2022, and the final version was completed on September 20, 2022. Ex. 7 at 1. At no point has Johnson ever asserted, in

any court, a claim involving statistical evidence showing racial bias by the St. Louis County Prosecutor's Office.

Third, the special prosecutor found substantial, previously undisclosed support for Johnson's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). It is true that Johnson raised a *Batson* claim at trial, on direct appeal, and on federal habeas review. Nevertheless, the special prosecutor discovered an incriminating memorandum from the trial team's work product materials, showing that the prosecutors strategized in advance of trial to use fewer than their allotment of nine peremptory challenges in the hope that additional Black jurors would be stricken by the trial judge instead of the prosecution. *See* Ex. 1 at 36–40. The special prosecutor also urged that the United States Supreme Court's intervening opinion in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), calls into question this Court's *Batson* ruling on direct appeal. *See* Ex. 1 at 43–45.

21. The prosecutor and Johnson have filed separate notices of appeal in the circuit court.

22. Johnson now moves for a stay of execution.

STANDARDS GOVERNING A STAY OF EXECUTION

This Court has never issued an opinion governing the standards for issuing a stay of execution. In the similar context of a preliminary injunction, though, a court weighs "the movant's probability of success on the merits, the threat of irreparable

harm to the movant absent the injunction, the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest." *State ex rel. Dir. of Rev. v. Gabbert*, 925 S.W.2d 838, 839 (Mo. 1996). The Attorney General will likely invoke the similar framework of *Hill v. McDonough*, 547 U.S. 573 (2006), which governs federal-court stays of state executions. *Hill* disfavors a stay when the prisoner's claim "could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* at 584 (quotation omitted). In this case the Court need not decide whether the *Hill* standard applies in the absence of the comity and federalism concerns that motivate it. *See id.* ("[E]quity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts."). Johnson demonstrates below that he satisfies all requirements for a stay and has not delayed the assertion of any claims.

I. THE PROSECUTOR IS LIKELY TO SUCCEED ON THE MERITS OF HIS CLAIMS.

A stay requires "some showing of probability of success on the merits." *Gabbert*, 925 S.W.2d at 839 (as to preliminary injunction). Johnson and the prosecuting attorney readily make that showing.

A. Section 547.031 embraces the prosecuting attorney's constitutional claims against Johnson's conviction and sentence.

The prosecuting attorney has the authority to move for an order vacating or setting aside a criminal judgment "at any time." Mo. Rev. Stat. § 547.031.1. There

is no question that the prosecuting attorney may seek appointment of a special prosecutor, who stands in the elected prosecutor's shoes and represents the state to "prosecute or defend the case." Mo. Rev. Stat. § 56.110. And there is no question that the duly appointed special prosecutor has moved to vacate Johnson's conviction and sentence. *See* Ex. 1. It remains for the circuit court to exercise its "jurisdiction and authority to consider, hear, and decide the motion," Mo. Rev. Stat. § 547.031.1. The proper and orderly exercise of that jurisdiction requires a stay from this Court.

In determining the scope of relief available under the new statute, the General Assembly's language controls. "When ascertaining the legislature's intent in statutory language, it commonly is understood that each word, clause, sentence, and section of a statute should be given meaning." *Middleton v. Mo. Dep't. of Corr.*, 278 S.W.3d 193, 196 (Mo. 2009). By its own terms, the statute is not limited to claims of actual innocence. The circuit court must grant the prosecutor's motion if it finds "clear and convincing evidence of actual innocence *or constitutional error* at the original trial or plea that undermines the confidence in *the judgment*." Mo. Rev. Stat. § 547.031.3 (emphases added). The prosecutor's claims here allege unconstitutional racial bias in charging, sentencing, and jury selection. It is widely recognized that such bias "undermines public confidence," "compromises the defendant's right to a trial by an impartial jury," and "fosters disrespect for and lack of confidence in the criminal justice system." *Kimbrough v. United States*, 552

U.S. 85, 98 (2007) (concerning sentencing disparities between offenses involving crack and powder cocaine); *State v. McFadden*, 191 S.W.3d 648, 650 n.2 (Mo. 2006) (citing *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) and *Miller-El v. Dretke*, 545 U.S. 231, 237–38 (2005)).

In embracing claims of "constitutional error" undermining "the judgment," the statute extends not only to claims against the prisoner's conviction, but also the sentence. Mo. Rev. Stat. § 547.031.3. The term "judgment" encompasses a defendant's sentence, and indeed, there is no "judgment" in a criminal case until a sentence is imposed. *See State v. Waters*, 597 S.W.3d 185, 187 (Mo. 2020); *State v. Williams*, 871 S.W.2d 450, 452 (Mo. 1994). "The word 'sentence' in legal terms means 'a judgment or final judgment.'" *Yale v. City of Independence*, 846 S.W.2d 193, 194 (Mo. 1993). In interpreting the statute's terms, the Court must presume that "the legislature was aware of the state of the law at the time of its enactment." *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 426 (Mo. 1988). When a statute contains terms "which have had other judicial or legislative meaning attached to them, the legislature is presumed to have acted with knowledge of that judicial or legislative action." *Citizens Elec. Corp. v. Dir. Dep't of Revenue*, 766 S.W.2d 450, 452 (Mo. 1989). A constitutional error in the defendant's sentence, then, is necessarily an error in the underlying "judgment." Mo. Rev. Stat. § 547.031.3. The prosecutor's penalty-phase allegations state cognizable claims.

B. The prosecuting attorney makes a meritorious showing that racial bias infects Johnson's conviction and sentence.

The prosecuting attorney relies on a wide spectrum of evidence, covering every stage of the prosecution, and further illuminated by access to internal documents.

Looking at McCulloch's history of discrimination in capital cases, the prosecuting attorney points to a new, rigorous, and scientific study of over 400 death-eligible homicide prosecutions from 1991 through 2018, which demonstrates that under McCulloch the death penalty was largely reserved for cases in which the victim was White, and in the process substantially devaluing the lives of Black victims. *See* Frank Baumgartner, *Homicides, Capital Prosecutions, and Death Sentences in St. Louis County, Missouri, 1990-2018*, Sept. 20, 2022 (Ex. 7). Dr. Baumgartner's findings are stark and troubling:

- Overall, capital-eligible cases with White victims were 3.5 times as likely to lead to a sentence of death as cases with Black victims. White-victim cases saw a death-sentencing rate of 14 percent, whereas Black-victim cases saw a rate of four percent. These results were highly statistically significant.
- Dr. Baumgartner conducted a further analysis to investigate whether the observed race effects could be a result of the level of aggravation present in the case. He produced four separate regression models for the overall sentencing result that controlled for statutory aggravating and mitigating circumstances that could plausibly influence the charging and sentencing

decision. In each model the White race-of-victim effect strongly persisted even after controlling for other statutory factors.

●Examining the overall likelihood of receiving death, the "odds multiplier" for White victim cases consistently ranged from 3.3 to 3.7. Otherwise stated, the study demonstrates a "very powerful White-victim effect, consistently leading to results suggesting 3 to 4 times the rate of use of the death penalty in such cases compared to those with Black victims." All the models were statistically significant.

●The study shows a similar and statistically significant effect at two key prosecutorial decision-points: whether to charge first-degree murder (odds multiplier of 2.2) and whether to file a notice of intention to seek death (odds multiplier of 2.9). Even limited to guilt-phase considerations, then, the study shows that the presence of a White victim more than doubles the odds that the case will be charged as first degree murder.

●Overall, the presence of a White victim "acts as [a] non-statutory and impermissible aggravating factor, with an influence on capital sentencing comparable to the defendant's status of having a prior conviction of first-degree murder or felonious assault."

Ex. 7 at 5–6, 18–24.

The special prosecutor also describes a pattern of selective prosecution in police-killing cases over which McCulloch presided as prosecuting attorney. In the

four cases that the office capitally prosecuted for killing a police officer, the defendants were Black (Kevin Johnson, Lacy Turner, Dennis Blackman, and Todd Sheppard). The fifth case involved a White defendant (Trenton Foster), and McCulloch declined to pursue death.

Johnson will not reproduce here the prosecuting attorney's thorough comparison of the five cases. *See* Ex. 1 at 8–20. It is telling, as the special prosecutor explains, that (a) Forster's case is no less aggravated than the others, Forster tried to shoot and kill a second police officer but failed only because his gun jammed after he killed the first officer, and Forster's deliberation was made clear by multiple social media posts declaring his intent to kill a police officer; (b) Forster's background and characteristics were no more mitigating than those of the Black defendants, bearing in mind the defendants' histories of mental illness and social deprivation, and the defendants' ages at the time of the offense; and (c) the special prosecutor's review of records revealed no criteria or policies for deciding when the office should seek the death penalty, no memoranda explaining why death was sought or not sought in any of the cases, and no legitimate case-related reason for treating the Forster case more leniently than the others. *Id.* at 8–23. Worse, the prosecution extended to Forster an opportunity that it withheld from the Black defendants accused of killing police officers. *Id.* at 21–23. The office invited Forster's attorney to submit mitigating evidence. Counsel for Foster asked for, and received, a nine-month delay in which to present such evidence, after which

McCulloch publicly announced his decision not to seek the death penalty. *Id.*

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the United States Supreme Court rejected the claim that patterns of race discrimination in Georgia capital prosecutions violated the Constitution because McCleskey failed to demonstrate "a constitutionally significant risk of racial bias." *Id.* at 313. The evidence relied on by the special prosecutor overcomes the deficiencies identified in *McCleskey*. McCleskey's Fourteenth Amendment claim failed because he did not show that purposeful discrimination was operative in the case at hand. "[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* at 292 (emphasis in original). McCleskey's principal proof, as characterized by the Court, was not particularized to *his* case, but rather showed a statewide race-of-victim effect, encompassing simultaneously all key decision points from the prosecutor's election to seek death to the jury's verdict. *Id.*at 294–95.

The proof in this case, by contrast, focuses acutely on discriminatory patterns displayed by a particular prosecutor's office and a close analysis of a single decisionmaker, Robert McCulloch—who prosecuted this particular defendant. Far from a "superficial" showing based on aggregate statistics, *State v. Mallett*, 732 S.W.2d 527, 538–39 (Mo. 1987), the study specifically controls for aggravating and mitigating circumstances, and it documents a pronounced race-of-victim bias in the prosecutor's choice of criminal charge, the prosecutor's choice of

whether to file a death notice, and the prosecutor's successful effort to obtain a capital sentence.

The Baumgartner study does not merely reflect ordinary or "apparent" disparities that "are an inevitable part of our criminal justice system." *McCleskey*, 481 U.S. at 312. It shows a discriminatory practice and policy to reserve the death penalty for cases where the victim was White, or at the very least, a system in which the presence of a White victim in the case served as a de facto aggravating circumstance, with influence on the decisionmaker comparable to the presence of statutory aggravating circumstances such as multiple victims, outrageous or wanton vileness, or a defendant's history of previous assaultive or homicide convictions.

Similarly troubling is McCulloch's unequal prosecution of police-killing cases depending on the race of the defendant. The requirements for a selective prosecution claim rest on equal protection standards, requiring the defendant to show a "discriminatory effect . . . that . . . was motivated by a discriminatory purpose." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). That showing requires proof that "similarly situated individuals of a different race were not prosecuted." *Id.* The cases being employed for comparison need only be "similarly" situated to the one at hand, so that the cases reflect "common features essential to a meaningful comparison." *Chavez v. Ill. St. Police*, 251 F.3d 612, 635 (7th Cir. 2001) (quotation omitted). A selective prosecution claim does not require

direct evidence of discriminatory intent, such as a clear admission of racist motives. *See*, *e.g.*, *United States v. Tuitt*, 68 F. Supp. 2d 4, 10 (D. Mass. 1999). Rather, "[a] discriminatory effect which is severe enough can provide sufficient evidence of discriminatory purpose," *id.*, including a "complete absence" of comparable White defendants who were prosecuted as the claimant was. *Id.* at 14, 18; *cf. Armstrong*, 517 U.S. at 470 (finding no showing of discriminatory effect and discriminatory purpose because defendants "failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted").

The special prosecutor's evidence satisfies the criteria described by *Armstrong* and applied in subsequent cases. During McCulloch's tenure in office, the St. Louis County Prosecutor's Office sought the death penalty in all death-eligible police killings except the single such case that involved a White defendant. Moreover, the office provided only the White defendant, and not any of the Black defendants, the pretrial opportunity to present mitigating evidence showing why capital prosecution was not appropriate.

The present case is unique because the state's recent filing is itself evidence of racial discrimination underlying Johnson's conviction and sentence. The special prosecutor occupies the elected prosecutor's place "for all matters related to this investigation and prosecution." Ex. 5. Through the special prosecutor, the sovereign has confessed error. The state acknowledges that the office which sought

and obtained Johnson's first degree murder and death sentence acted with systematic racial bias, and that the case-files and other information reveal no legitimate factual difference that justifies seeking death against Kevin Johnson, Lacy Turner, Dennis Blackman, and Todd Sheppard, but not against Trenton Forster. *Cf. State v. Taylor*, 929 S.W.2d 209, 221 (Mo. 1996) ("More likely [than racial bias], the unique circumstances of Ann Harrison's murder and the strength of the State's case motivated the prosecutor's decision."). The disparate treatment between Forster and the Black defendants permits an inference of discrimination because other explanations have proven unavailing, including "statutory aggravating circumstances, the type of crime, the strength of the evidence, and the defendant's involvement in the crime." *State v. Taylor*, 18 S.W.3d 366, 377 (Mo. 2000).

The special prosecutor's *Batson* allegations lend further support to his showing that racial bias infects Johnson's conviction and sentence. *See McCleskey*, 481 U.S. at 309–10 (rejecting race discrimination claim, in part, because the law guarantees the safeguard of "a capital sentencing jury representative of a criminal defendant's community"). The special prosecutor describes a troubling memorandum crafted by the prosecution team between the time of Johnson's two trials. *See* Ex. 1 at 23–24, 36–40. Months before the retrial and without knowledge of which jurors might serve, the prosecution decided in advance to exercise fewer than its nine available peremptory strikes. As explained by the special prosecutor,

and as found by the circuit court during Johnson's first trial, the prosecutor's methods reflect an attempt to evade *Batson*. *Id.* By arranging for the trial judge to exercise the prosecution's unused strikes, the prosecution could achieve one or more additional strikes of Black jurors and then attribute those strikes to the court instead of the prosecutor. *Id.* Meanwhile, the prosecution could seek cover for its own strikes of Black jurors – including three of McCulloch's four strikes – by arguing that it left additional strikes on the table instead of systematically excluding as many Blacks as it could. McCulloch's objective was to make "backdoor strikes of minority jurors." *Id.* at 24. The prosecution, then, was more intent on defeating any *Batson* objections than in complying with *Batson* to begin with. *Id.*at 40. Given that McCulloch has ignored all entreaties from the special prosecutor, depositions and an evidentiary hearing will reveal whatever additional "family secrets" operated at the time of Johnson's trial. *See* Ex. 1 at 4, 22–23, 34.

The special prosecutor also invokes the United States Supreme Court's decision in *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019), to support the *Batson* claim. *See* Ex. 1 at 43–45. This Court rejected a *Batson* claim on direct appeal, concerning the prosecutor's strike of Juror Debra Cottman. *See Johnson*, 284 S.W.3d at 570–71 (principal opinion); *but see id.* at 589–91 (Teitelman, J,. dissenting). In his brief, Johnson pointed out the St. Louis County Prosecutor's recent history of *Batson* violations, including those in *State v. McFadden*, 191 S.W.3d 648 (Mo. 2006); *State v. McFadden*, 216 S.W.3d 673 (Mo. 2007); *State v.*

Hampton, 163 S.W.3d 903 (Mo. 1995); and *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. E.D. 2004). *See* Appellant's Statement, Brief, and Argument (Oct. 14, 2008), at 57–58. The Court cast aside such history as immaterial: "A previous *Batson* violation by the same prosecutor's office does not constitute evidence of a *Batson* violation in this case, absent allegations relating to this specific case." *Johnson*, 284 S.W.3d at 571. *Flowers* rejects this Court's approach and requires consideration of the "relevant history of the State's peremptory strikes in past cases" without any requirement of an additional nexus to the case at hand. *Flowers*, 139 S. Ct. at 2243. That history is especially relevant when newly-discovered evidence shows that it persisted at the time of Johnson's trial. *See* Ex. 1 at 23–24, 36–40.

Under the circumstances of this case, the state's confession of error should be given considerable weight. Courts are not mind-readers, and discriminatory purpose must be divined from the facts and circumstances of the case. In this instance, the special prosecutor had a unique window into the thought processes of the trial prosecutors and the materials that shaped this thinking. Through § 547.031, the state's legislatively-designated voice has spoken: the improper consideration of race played a substantial role in the decisions leading to Mr. Johnson's conviction and death sentence. Based on the state's admissions, there is a strong probability of success on the merits.

C. Whether or not the circuit court has jurisdiction to consider a motion to vacate during the pendency of an execution warrant, this Court should stay Johnson's execution so that the prosecutor's claims can be fairly resolved on their merits as the circuit court indicated they should be.

Judge Ott concluded that § 547.031 requires a full and fair hearing (among other procedures), and that it was impossible for the court to conduct such a hearing before Johnson's execution date. *See* Ex. 3 at 4–5. The court relied on *State ex rel Schmitt v. Harrell*, 633 S.W.3d. 463, 468 (Mo. App. W.D. 2021), which held that three days was insufficient time for the Attorney General to prepare for a hearing under the statute. Judge Ott observed that there were only six business days between the special prosecutor's filing of the motion to vacate on November 15 and the scheduled execution on November 29. Ex. 3 at 4. The court simply could not comply with the statute and treat the parties fairly within the limited time available. *Id.* at 3–5. Judge Ott acknowledged that "death is different," and that her inability to resolve the prosecutor's claims "weighs heavily upon this court." *Id.* at 5. Recognizing that the circuit court cannot stay a superior court's execution warrant in order provide more time, the court denied relief. *Id.* at 4–6.

Johnson does not contest that the circuit court cannot stay an execution warrant issued by this Court – a step that neither he nor the special prosecutor asked the circuit court to take. *See* Ex. 1 (motion to vacate); Ex. 10, 11 (motions to amend judgment). Neither does Johnson dispute that the circuit court could not hold a fair hearing and decide the prosecutor's claims in the two weeks between

the filing of the motion to vacate and the execution date. Judge Ott nevertheless believes that the prosecutor's claims deserve a full airing in accordance with § 547.031. *See* Ex. 3 at 3–5. This Court should grant a stay in order to allow the circuit court to fulfill its statutory obligation.

1. The pendency of an execution warrant does not require a circuit court to dismiss a motion to vacate or set aside a criminal judgment brought under § 547.031.

Johnson anticipates that the Attorney General will argue that a circuit court lacks jurisdiction to consider a motion to vacate during the pendency of an execution warrant. *See* Ex. 2 at 5 (so arguing during teleconference). In fact, nothing prevents the court from exercising such jurisdiction. As this Court has recognized, its exclusive authority over "matters affecting a sentence of death" is subject to statutory exceptions. *State ex rel. Nixon v. Daugherty*, 186 S.W.3d 253, 254 (Mo. 2006). To be sure, prior to the adoption of section 547.031, circuit courts had jurisdiction over final capital cases only under Rule 24.035 or Rule 29.15. *Id.* Accordingly, "[u]nless and until the legislature adopts a law authorizing a circuit or prosecuting attorney to file a motion for a new trial upon discovery of evidence indicating a wrongful conviction," no other post-conviction relief was available in the circuit court. *State v. Lamar Johnson*, 617 S.W.3d 439, 446 (Mo. 2021) (Draper, J. concurring).

Section 547.031 changed that. Within months of this Court's decision in *Lamar Johnson*, the General Assembly enacted a law providing that "[a]

prosecuting or circuit attorney . . . may file a motion to vacate or set aside the judgment at any time," and "[t]he circuit court in which the person was *convicted shall have jurisdiction and authority to consider, hear, and decide the motion*." Mo. Rev. Stat. § 547.031.1 (emphasis added). This express statutory authority is consistent with a circuit court's "unequivocal . . . 'original jurisdiction over *all cases and matters*, civil and criminal.'" *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 476–77 (Mo. 2009) (quoting Mo. Const. art. V, sec. 14) (emphasis by the Court). And, because "the judgment" in a capital case includes the sentence of death, *see*, *e.g.*, *State v. Hunter*, 840 S.W.2d 850, 869 (Mo. 1992); *see also* Mo. Sup. Ct. R. 29.08(a), section 547.031 grants the circuit court the "jurisdiction and authority" to consider a prosecuting attorney's claims against a death sentence "at any time."

These provisions are entirely consistent with this Court's "exclusive appellate jurisdiction … in all cases where the punishment imposed is death." Mo. Const. art. V, § 3. The statute thus grants the prosecuting attorney "the authority and right to file and maintain an appeal of the denial or disposal of such a motion" to vacate. Mo. Rev. Stat. § 547.031.4. In capital cases like this one, such appeals lie in this Court under article V, § 3.

Nor does § 547.031 conflict with Rule 30.30(b)'s provision that "[n]o other filing in this or any other Court shall operate to stay an execution date without further order of this Court or other competent authority." Indeed, the rule implicitly

recognizes that "other filing[s] in . . . other Court[s]" may coincide with a pending execution date but never suggests that other courts would be without jurisdiction to consider such filings. The rule limits only the power of lower Missouri courts to stay an execution. Here, the prosecuting attorney did not ask the circuit court for a stay of execution; no party disputes that this Court is the proper venue for a motion to stay. *See* Rule 30.30(b) (this Court's scheduling of an execution is "without prejudice to the defendant seeking a stay of execution after an execution date is set..."); Ex. 10 at 2–3.

In short, the circuit court had the jurisdiction – and the duty – to "consider, hear, and decide" the motion to vacate here. Nothing in § 547.031 or in the litigation of the motion below conflicts with this Court's rules for scheduling executions or with its exclusive constitutional authority over appeals in capital cases.

2. Even if the circuit court lacked authority to consider the motion to vacate during a warrant period, this Court should stay Johnson's execution so that the prosecutor may bring his claims in the circuit court in a non-warrant posture.

The appropriateness of a stay from this Court does not depend on the warrant-pending jurisdiction of the circuit court. As shown above, because the circuit court had jurisdiction to consider the motion to vacate, this Court should enter a stay so that the circuit court's ruling can be reversed on appeal and then remanded to that court for a determination of the merits of the prosecutor's claims. On the other hand, if the circuit court lacked jurisdiction, Johnson and the

prosecutor should not be left without a remedy. Section 547.031, after all, allows the prosecutor to bring a motion to vacate "at any time" if the prosecutor determines that clear and convincing evidence shows that the underlying criminal judgment is the result of constitutional error. So long as Johnson and the prosecutor otherwise show that the claims are likely to succeed on the merits – which they do for the reasons explained above – this Court should stay the execution so that the prosecutor may newly assert his claims in a non-warrant posture, which would allow the circuit court to conduct the fair and constitutional hearing that it otherwise lacks time to hold. *See* Ex. 3 (Order and Judgment), at 4–5.

II. THE REMAINING CONSIDERATIONS WEIGH IN FAVOR OF GRANTING A STAY.

Beyond the merits, the remaining factors militate in favor of a stay. Johnson would suffer irreparable harm if he were executed before a final determination of the prosecuting attorney's claims conceding the unconstitutionality of Johnson's conviction and sentence; the state would not be unfairly prejudiced by a stay, which would allow the full and fair litigation of the state's claims on appeal and then subsequently in the circuit court; the public interest favors an orderly and fair determination of those same claims under the statute recently enacted by the General Assembly; and Johnson has not delayed the instigation of those claims in any respect.

A. Johnson would suffer irreparable harm without a stay.

The death penalty is "obviously irreversible," *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, J., granting stay as circuit justice), and Johnson's execution would immediately moot the claims that are currently pending against his underlying conviction and sentence. Due process guarantees to Johnson "a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). Far from allowing Johnson to be heard, his scheduled execution would extinguish his claims (and the prosecutor's) in violation of due process. *See Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) ("Once a prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness.") (quoting *Ford v. Wainwright*, 477 U.S. 399, 424, 426 (1986)).

B. The balance of harms supports a stay.

Although the state has a recognized interest in the enforcement of criminal judgments, it "also has an interest in its punishments being carried out in accordance with the Constitution of the United States." *Harris v. Vasquez*, 901 F.2d 724, 727 (9th Cir. 1990). And the state has competing interests in this case: different representatives of the state have taken adverse positions on the validity of the underlying criminal judgment. The General Assembly specifically recognizes the prosecuting attorney's authority to bring an action in the circuit court to vacate

or set aside the judgment. Mo. Rev. Stat. § 547.031. Although the Attorney General has the authority to represent the state in Missouri's appellate courts, *see* Mo. Rev. Stat. § 27.050, the local prosecutor may appeal the circuit court's ruling on a motion to vacate. *See* Mo. Rev. Stat. 547.031.4. That power would mean little if the only relevant State interests were those voiced by the Attorney General alone. The General Assembly, after all, has the "right to create causes of actions and to prescribe their remedies." *Sanders v. Ahmed,* 364 S.W.3d 195, 205 (Mo. 2012). The prosecutor's decision to bring and maintain claims against the validity of Johnson's conviction and sentence – and to do so without those claims becoming moot – is itself a legitimate State interest that informs the appropriateness of a stay.

C. The public interest supports a stay.

The public's elected representatives have authorized the local prosecutor to seek vacatur of a prisoner's criminal judgment by bringing clear and convincing evidence that the judgment is unconstitutional. Mo. Rev. Stat. 547.031.3. That interest cannot be vindicated if the prisoner is killed before the prosecutor's claims can be resolved, including claims brought by a special prosecutor who stands in the prosecuting attorney's shoes to "prosecute or defend the cause." Mo. Rev. Stat. § 56.110. More broadly, the public has an interest in ensuring that the ultimate punishment is legally imposed. "[T]he public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's

constitutional right." *In re Ohio Execution Protocol Litigation*, 840 F. Supp. 2d 1044, 1059 (S.D. Ohio 2012).

D. Johnson has not delayed the assertion of any remedies.

At no point has Johnson "delayed unnecessarily in bringing the claim[s]." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). He applied for relief from the St. Louis County Prosecutor's Conviction and Incident Review Unit on December 1, 2021, or only three months after the effective date of § 547.031. *See* Special Prosecutor's Motion for Stay of Execution (filed Nov. 16, 2022), at 8. That application asked the CIRU to investigate Johnson's claims and to bring a motion to vacate under § 547.031. The CIRU concluded that it had a conflict of interest because one of Johnson's trial attorneys is now employed by the prosecutor's office. *See* Ex. 6 (Letter from Jessica Hathaway to Clerk of Missouri Supreme Court, dated July 11, 2022). The CIRU explained that it had been searching for a special prosecutor to handle Johnson's application for relief. *Id.* Nevertheless, it was not until October 12, 2022, that the CIRU selected attorney E.E. Keenan as a special prosecutor and moved the circuit court for his appointment. *See* Ex. 4 (motion to appoint special prosecutor); Ex. 5 (order appointing Keenan). Johnson had no control over the timing of the special prosecutor's selection and appointment, or even over the CIRU's determination that it had a conflict of interest. And it is no fault of Johnson that the special prosecutor's appointment came only six weeks before the scheduled execution date.

The circuit court was correct on one important point: there is no possibility that the prosecutor's and Johnson's claims can be fairly and properly heard and decided between now and November 29. Ex. 3 at 4–5. The chronology of events "weighs heavily" upon the circuit court. *Id.* at 5. It would be impossible to resolve the claims in the manner required by statute and consistent with the demands of due process and equal protection. *Id.* The court placed no blame on Johnson for the fact that the special prosecutor's claims were not asserted until November 15, 2022. Nor could it have. The late timing of the special prosecutor's appointment on October 12 and the filing of the motion to vacate on November 15 may well be "inexplicable" and "disconcerting," as Judge Ott observed. *Id.* at 4. But they are no fault of Kevin Johnson.

To deny a stay under these circumstances would be fundamentally unfair. The prosecuting attorney is an entity of the state. That very entity now confesses that it engaged in racial discrimination in seeking and obtaining Johnson's conviction and death sentence. The same state entity received Johnson's request for relief in December 2021 and determined that it had a conflict of interest, but it failed to move for the appointment of a special prosecutor until October 12, 2022, or about six weeks before Johnson's execution date. Despite the special prosecutor's admirable efforts to investigate Johnson's case and to develop and assert the prosecutor's claims on November 15, there is insufficient time for the claims to be litigated, heard, and adjudicated before November 29.

Johnson seeks a stay based on meritorious claims supported by the sovereign's confession of error. The state should not be permitted to execute Johnson on the grounds that the state itself was tardy in asserting claims against the very criminal judgment that it admits to having obtained unconstitutionally. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1283 (2022) ("[R]espondents can hardly complain about the inequities of delay when their own actions were a significant contributing factor.").

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Court should grant a stay of execution pending resolution of the prosecutor's claims against Johnson's conviction and sentence, whether on appeal in this Court or in the Circuit Court of St. Louis County.

Respectfully submitted,

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Counsel for Appellant Kevin Johnson

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2022, 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.

/s/ Joseph W. Luby
Counsel for Appellant Kevin Johnson

Missouri Revised Statutes

Chapter 494
General Provisions as to Juries
Section *494.480*

August 28, 2006

Peremptory challenges--civil cases, multiple parties, allocation --criminal cases--qualification of juror as basis for new trial--costs for impaneling jury to be paid, when.

494.480. 1. In trials of civil causes each party shall be entitled to peremptorily challenge three jurors. When there are multiple plaintiffs or defendants, all plaintiffs and all defendants shall join in their challenges as if there were one plaintiff and one defendant. The court in its discretion may allocate the allowable peremptory challenges among the parties plaintiff or defendant upon good cause shown and as the ends of justice require. In all cases, the plaintiff shall announce its challenges first.

2. In all criminal cases, the state and the defendant shall be entitled to a peremptory challenge of jurors as follows:

(1) If the offense charged is punishable by death, the state shall have the right to challenge nine and the defendant nine;

(2) In all other cases punishable by imprisonment in the penitentiary, the state shall have the right to challenge six and the defendant six;

(3) In all cases not punishable by death or imprisonment in the penitentiary, the state and the defendant shall each have the right to challenge two.

3. In all criminal cases where several defendants are tried together, the following provisions shall apply:

(1) Each defendant then on trial shall be allowed separate peremptory challenges as provided in subsection 2 of this section;

(2) The number of peremptory challenges allowed the state by subsection 2 of this section shall be multiplied by the number of defendants then on trial in each case.

4. Within such time as may be ordered by the court, the state shall announce its peremptory challenges first and the defendants thereafter. The qualifications of a juror on the panel from which peremptory challenges by the defense are made shall not constitute a ground for the granting of a motion for new trial or the reversal of a conviction or sentence unless such juror served upon the jury at the defendant's trial and participated in the verdict rendered against the defendant.

5. If the defendant pleads guilty to a lesser or included offense other than the offense charged in the information or indictment in return for a specific lesser sentence than such defendant would likely have received if such defendant were found guilty of the crime charged, or makes any other plea bargaining

arrangement, at any time after the jury is impaneled such defendant shall be liable to the county for the costs associated with impaneling the jury.

(L 1989 S B 127, et al., A L 1993 S B 180, A L 1996 S B 869)

Effective 7-1-97

SEE RICHARDS STRIKE

To: Pat M.
From: Eugene T.
Re: Kevin Johnson—Jury Selection

As discussed the authority for the situation at hand is sparse, but there are a few cases, highlighted herein, that could be used to argue that Judge Wiesman's decision was erroneous.

Positive Cases:

State v. Paleo, 200 Ariz. 42, 22P.3d 35 (Ariz. 2001)

During jury selection in this case, the state used four of its six allotted peremptory strikes. Because the state did not use all of its strikes, the clerk struck two jurors at the end of the list. One of these jurors was the sole remaining Hispanic juror, the other Hispanic juror having been struck by the state earlier. Had the state used its remaining strikes, the juror would have been on the jury. The defendant was convicted and filed an appeal under Batson. The Arizona Supreme Court held that "The law does not presume wrongdoing without action of some kind or omission of a legally required act. The waiver of a strike (non-use) is different from the use of a strike. The latter operates to directly remove a juror who would otherwise sit; the former does not. Thus, in contrast to the use of a strike, waiver alone is insufficient to create an inference of discriminatory purpose." Id. at 44, 37.

In this case then, it can be argued that the Judge's decision to only strike white jurors claiming that the State was trying to circumvent Batson was an erroneous decision. Other state's Supreme Court's have held that waiving a strike is insufficient to establish discrimination. In this sense the judge should have followed normal procedure.

King v. State Roads Commission of State Highway Administration, 284 Md. 368, 396 A.2d 267 (Md.Ct.App. 1977)

This case might be of no use since it is a civil case, but it involves a similar factual situation. During jury selection, both plaintiff and defendant had exhausted their peremptory strikes, yet the jury panel was still at 17. The judge, himself, then made five peremptory strikes to trim the panel to twelve. The state Appellate Court found that, "This selection method impaired the effectiveness of these parties' peremptory challenges to the extent that the trial judge, with five strikes, had more to say about who would not sit on the panel than either of the parties." The Court also mentioned that in Maryland, a judge is only allowed to use a peremptory strike "upon the neglect or refusal of a party to exercise its peremptory strikes.

In the current case then, it could be argued that by striking five people, the judge had as much to say, if not more, than the State. While granted, peremptory strikes are not Constitutionally protected, there purpose is to allow the State to find an impartial and fair

jury. When the judge interjects himself into the process and allows himself more say than the state, the peremptory challenge fails its most basic purpose.

Negative Cases:

United States v. Esparza-Gonzalez, 422 F.3d 897 (9th Cir. 2005):

In this case, the prosecutor waived five of his six peremptory challenges, which resulted in the only Hispanic juror being removed from the jury. The Ninth Circuit disagreed with the standard established in Paleo and established that waiver could give rise to a prima facie Batson challenge. The Court stated, "When a waiver of a peremptory strike creates an inference of intentional discrimination, the party waiving the strike must provide a race-neutral explanation for its decision to effectively remove a specific juror." Id. at 904.

In essence this decision distinguishes Paleo into oblivion. However, this is the Ninth Circuit, which in the past has not had its decisions adopted by other districts. Indeed, this case has not been cited by any other court outside the Ninth Circuit, save a Pennsylvania District Court. Also in the backdrop of this case, it appears that the US Attorney's office had a penchant for using this technique to circumvent the Batson rule. In fact the US Attorney waived his peremptory strike concerning the alternate jurors, which resulted in the only Hispanic alternate juror being removed. In the present case, the State did not only use one strike and waive the rest like here, so in that sense it can be distinguished.

There is also an abundance of authority that suggests the judge's decisions in the voir dire stage of the trial are granted tremendous discretion—moreso in this stage than perhaps in any other. For that reason it may also be difficult to show error or abuse of discretion since the standard appears to be so high.

Westlaw.

200 Ariz. 42, 22 P.3d 35, 346 Ariz. Adv. Rep. 21
(Cite as: 200 Ariz. 42, 22 P.3d 35)

▷
State v. Paleo
Ariz.,2001.

Supreme Court of Arizona,En Banc.
STATE of Arizona, Appellee,
v.
Joseph PALEO, Appellant.
No. CR-00-0284-PR.

April 26, 2001.

After jury trial, defendant was convicted in the Superior Court, Maricopa County, No. CR-00-0284-PR,Jonathan H. Schwartz, J., of aggravated D.U.I., and defendant appealed. The Court of Appeals, 197 Ariz. 562, 5 P.3d 276, reversed. Upon grant of review, the Supreme Court, Martone, J., held that state's waiver of peremptory challenges, without more, was insufficient to establish *Batson* violation.

Court of Appeals vacated and conviction affirmed.
West Headnotes
[1] Jury 230 ⇐33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
To successfully challenge a peremptory strike under *Batson*, a party must set forth a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose; the burden of production then shifts to the opponent who must explain adequately the racial exclusion, and the court then evaluates the facts to determine whether a party engaged in purposeful discrimination; however, throughout the process, the burden of persuasion remains on the party alleging discrimination.

[2] Jury 230 ⇐33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
A defendant may establish a prima facie case of racial discrimination in jury selection solely on evidence concerning the prosecutor's exercise of peremptory challenges, because use of a peremptory strike on a minority juror is sufficient to raise an inference of discriminatory purpose; the trial court at all times is charged with assessing the adequacy of the requisite showing based on all relevant circumstances.

[3] Jury 230 ⇐33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
Waiver of peremptory challenges, without more, was insufficient to establish *Batson* violation, even though prosecutor's waiver of unused peremptory strikes resulted in minority juror not being seated on panel, as evidence of discriminatory purpose driving waiver had to be presented to establish prima facie case of discrimination. 17 A.R.S. Rules Crim.Proc., Rule 18.5, subd. g.

[4] Jury 230 ⇐33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right

230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
The law does not presume wrongdoing in selecting jurors without action of some kind or omission of a legally required act.

[5] Jury 230 ⚿33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
In contrast to the use of a peremptory strike, waiver of a peremptory strike alone is insufficient to create an inference of discriminatory purpose.

[6] Jury 230 ⚿57

230 Jury
230IV Summoning, Attendance, Discharge, and Compensation
230k57 k. Nature and Form of Proceeding in General. Most Cited Cases
The goal of the juror selection process is to seat a fair and impartial jury in a non-discriminatory way.

[7] Jury 230 ⚿33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
In selecting a jury, neither party has a duty to remove jurors to ensure that members of a specific racial or gender group are seated.

[8] Jury 230 ⚿33(1.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(1.2) Particular Groups, Inclusion or Exclusion
230k33(1.15) k. Race. Most Cited Cases
A person's race is unrelated to his fitness as a juror.

[9] Jury 230 ⚿33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
While waiver of a peremptory strike, without more, is insufficient to prove discrimination in jury selection, it could be a relevant circumstance in establishing a prima facie case of discrimination, because those of a mind to discriminate could manipulate the rules to prevent the seating of minority jurors.

[10] Jury 230 ⚿33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory Challenges. Most Cited Cases
Peremptory challenges are a matter of discretion for each party and may be used, or not, for any non-discriminatory reason.

****36*43** Janet Napolitano, Attorney General by Randall M. Howe, Chief Counsel, Criminal Appeals Section and Joseph T. Maziarz, Assistant Attorney General, Phoenix, Attorneys for the State of Arizona.
James J. Haas, Maricopa County Public Defender by Spencer D. Heffel, Deputy Public Defender, Phoenix, Attorneys for Joseph Paleo.

OPINION

MARTONE, Justice.

¶ 1 We granted review to decide whether the waiver of peremptory strikes during jury selection is sufficient alone to constitute a prima facie case of discrimination under *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). We conclude that, while waiver may be a relevant circumstance in establishing a prima facie case, it is insufficient standing alone.

I. BACKGROUND

¶ 2 A jury found Joseph Paleo guilty of aggravated D.U.I. He claims that the state violated the Equal Protection Clause of the Fourteenth Amendment by waiving two of the six peremptory strikes allowed under Rule 18.4(c), Ariz. R.Crim. P.

¶ 3 During jury selection, the state used four of its six allotted peremptory strikes, one on an Hispanic juror. Because the state did not use all of its peremptory strikes, the clerk struck the two jurors at the end of the list pursuant to Rule 18.5(g), Ariz. R.Crim. P.[FN1] One of those jurors was the sole remaining Hispanic juror. Had the state used one more of its peremptory strikes, the remaining Hispanic juror would have been on the jury.

> FN1. Following challenges for cause, the parties exercise their peremptory challenges by alternately striking names from the clerk's list. The failure to exercise a challenge operates as a waiver of the party's remaining challenges. "If the parties fail to exercise the full number of challenges allowed them, the clerk shall strike the jurors on the bottom of the list until only the number to serve, plus alternates, remain." Rule 18.5(g), Ariz. R.Crim. P.

¶ 4 Paleo challenged the striking of the Hispanic juror and the state's waiver of its peremptory strikes. The trial court heard argument on the struck juror and found no discrimination. Paleo does not contest that ruling. The trial court then heard argument on the issue of the juror who was not selected because she was at the bottom of the list. Paleo argued that the state discriminated by waiving two peremptory strikes so that application of Rule 18.5(g) would result in the removal of that juror from the panel. The prosecutor responded that he had no reason to strike any juror not already struck, thus he waived the remaining peremptory strikes. The trial court denied Paleo's motion. After conviction, Paleo appealed.

¶ 5 Relying on *State v. Scholl,* 154 Ariz. 426, 429, 743 P.2d 406, 409 (App.1987), which held that the *Batson* prima facie case for use of peremptory strikes also applies to the waiver of peremptory strikes, the court of appeals set aside Paleo's conviction and ordered a new trial. *State v Paleo,* 197 Ariz. 562, 5 P.3d 276 (App.2000). Because this is a case of first impression, we granted review. Rule 31.19(c)(3), Ariz. R.Crim. P.

II. THE *BATSON* STANDARD

[1] ¶ 6 The *Batson* decision makes it clear that racial discrimination is not acceptable in the exercise of peremptory strikes. Discrimination in jury selection not only violates a party's right to "the protection a trial by jury is intended to secure," but also violates the excluded juror's rights by "denying ... participation in jury service on account of his race." *Batson,* 476 U.S. at 86-87, 106 S.Ct. at 1718-19. To successfully challenge a peremptory strike, a party must set forth a "prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* at 93-94, 106 S.Ct. at 1721. The burden of production then shifts to the opponent who must "explain adequately the racial exclusion." *Id.* at 94, 106 S.Ct. at 1721; *see also Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 1770-71, 131 L.Ed.2d 834 (1995) ("The second step of this process does not demand an explanation that is persuasive, or even plausible."**37 *44). The court then evaluates the facts to determine whether a party engaged in purposeful discrimination. *Batson,* 476 U.S. at 98, 106 S.Ct. at 1724; *see also Reeves v Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 148, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000) ; *Purkett,* 514 U.S. at 767-68, 115 S.Ct. at 1770-71;

State v. Martinez, 196 Ariz. 451, 456, 999 P.2d 795, 800 (2000). Throughout the process, the burden of persuasion remains on the party alleging discrimination. *Reeves,* 530 U.S. at 143, 120 S.Ct. at 2106; *Purkett,* 514 U.S. at 768, 115 S.Ct. at 1771 .

[2] ¶ 7 While *Batson* does not state that use of peremptory strikes on minority jurors per se establishes a prima facie case of discrimination, "a defendant *may* establish a prima facie case ... solely on evidence concerning the prosecutor's exercise of peremptory challenges," 476 U.S. at 96, 106 S.Ct. at 1723 (emphasis added), because use of a peremptory strike on a minority juror is sufficient to raise an inference of discriminatory purpose. The trial court at all times is charged with assessing the adequacy of the "requisite showing" based on "all relevant circumstances." *Id.* at 96, 106 S.Ct. at 1723 .

III. WAIVER OF PEREMPTORY STRIKES

A. Waiver Alone

[3][4][5] ¶ 8 As the court of appeals and *Scholl* recognized, discrimination resulting from the exercise of peremptory strikes is the subject of *Batson.* But *Scholl* found, and the court of appeals agreed, that "[t]here is no reason to differentiate between use and nonuse of peremptory challenges." 154 Ariz. at 429, 743 P.2d at 409. We disagree. The law does not presume wrongdoing without action of some kind or omission of a legally required act.[FN2] The waiver of a strike (non-use) is different from the use of a strike. The latter operates to directly remove a juror who would otherwise sit; the former does not. Thus, in contrast to the use of a strike, waiver alone is insufficient to create an inference of discriminatory purpose.

> FN2. *See, e.g.,* A.R.S. § 13-201 ("The minimum requirement for criminal liability is the performance of ... conduct which includes a voluntary act or the omission to perform a duty imposed by law which the person is physically capable of performing. "); *Restatement (Second) of Torts* § 314 (1964) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.").

[6][7][8] ¶ 9 The goal of the juror selection process is to seat a fair and impartial jury in a non-discriminatory way. But neither party has a duty to remove jurors to ensure that members of a specific racial or gender group are seated. *See Batson,* 476 U.S. at 85-86, 106 S.Ct. at 1717. To find such a duty would implicate the equal protection rights of the jurors struck in favor of members of a specific group. "A person's race simply 'is unrelated to his fitness as a juror.' " *Id.* at 87, 106 S.Ct. at 1718 (quoting *Thiel v S. Pac. Co ,* 328 U.S. 217, 227, 66 S.Ct. 984, 989, 90 L.Ed. 1181 (1946) (Frankfurter, J., dissenting)). Our justice system cannot support a racial or gender " ranking" system, which favors seating one group over another depending on the case before the court. FN3

> FN3. This fear was realized in *Scholl.* The trial court ordered the prosecutor to strike a juror in order to seat a minority juror on the panel. *Scholl,* 154 Ariz. at 428, 743 P.2d at 408.

B. Waiver Plus

[9] ¶ 10 While waiver, without more, is insufficient, it could be a relevant circumstance in establishing a prima facie case of discrimination, because those " 'of a mind to discriminate,' " *id ,* at 96, 106 S.Ct. at 1723 (quoting *Avery v. Georgia,* 345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953)), could manipulate the rules to prevent the seating of minority jurors. Waiver, accompanied by something more, could support a prima facie case in various circumstances, for example: (1) when discriminatory statements are made by a waiving party; (2) when a pattern of strikes removing a specific group is shown and

waiver results in removal of other members of that group; or (3) where waiver bears on use, *see, e.g., Ford v. Norris,* 67 F.3d 162, 169 (8th Cir.1995)(" [F]ailure to apply a stated reason for striking [minority] jurors to similarly situated [non-minority] jurors may evince a pretext for excluding jurors**38 *45 solely on the basis of race."). Indeed, in some cases waiver of peremptory strikes will support the alleged discriminator's defense to the prima facie case, where waiver results in the seating of minority jurors. *See, e.g, Bousquet v State,* 59 Ark.App. 54, 953 S.W.2d 894, 899 (1997) (stating that leaving minority members on the jury by waiving peremptory challenges is "cogent evidence indicating the absence of discriminatory motivation" in striking of other minority jurors).

[10] ¶ 11 Under *Batson,* the party alleging discrimination must present a prima facie case and bears the burden of persuasion. Peremptory challenges are a matter of discretion for each party and may be used, or not, for any non-discriminatory reason. Simply stating that a party did not use all of the allotted peremptory strikes does not establish a prima facie case of discrimination, even if minority jurors will not make the final list. Something beyond just waiver is required. Evidence of a discriminatory purpose driving the waiver must be presented to establish a prima facie case.

IV. DISPOSITION

¶ 12 Paleo failed to present any evidence that the state waived peremptory strikes for a discriminatory purpose. We vacate the opinion of the court of appeals and affirm the judgment of conviction. To the extent *Scholl* is inconsistent with this opinion, we disapprove it.

CONCURRING: THOMAS A. ZLAKET, Chief Justice, CHARLES E. JONES, Vice Chief Justice, STANLEY G. FELDMAN, Justice, RUTH V. McGREGOR, Justice.
Ariz.,2001.
State v. Paleo
200 Ariz. 42, 22 P.3d 35, 346 Ariz. Adv. Rep. 21

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Westlaw.

284 Md. 368, 396 A.2d 267
(Cite as: 284 Md. 368, 396 A.2d 267)

King v. State Roads Commission of State Highway Administration
Md., 1979.

Court of Appeals of Maryland.
William Lawson KING et ux.
v.
STATE ROADS COMMISSION OF the STATE HIGHWAY ADMINISTRATION.
No. 79.

Jan. 22, 1979.

Condemnees appealed from a condemnation award rendered in the Circuit Court, Montgomery County, Philip M. Fairbanks, J. Pursuant to a grant of certiorari prior to consideration of the case by the Court of Special Appeals, the Court of Appeals, Digges, J., held that the trial judge's exercise of five peremptory challenges in order to reduce the jury to 12 persons was prejudicially erroneous, but a failure of the condemnees to object before the jury was sworn would waive the error.

Remanded.

West Headnotes

[1] Jury 230 ⚿135

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k134 Peremptory Challenges
230k135 k. In General. Most Cited Cases
Neither Federal nor State constitution requires that litigant be granted peremptory challenges in course of jury selection.

[2] Appeal and Error 30 ⚿1032(1)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)1 In General
30k1032 Burden to Show Prejudice from Error
30k1032(1) k. In General. Most Cited Cases
Importance of peremptory challenge requires that any significant deviation from prescribed procedure that impairs or denies privilege's full exercise is error that, unless waived, ordinarily will require reversal without necessity of showing prejudice. Maryland Rules, Rule 543 a 1, 3.

[3] Appeal and Error 30 ⚿1045(1)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)6 Interlocutory and Preliminary Proceedings
30k1045 Selection and Impaneling of Jurors
30k1045(1) k. In General. Most Cited Cases

Jury 230 ⚿135

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k134 Peremptory Challenges
230k135 k. In General. Most Cited Cases

Jury 230 ⚿142

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k142 k. Objections and Exceptions. Most Cited Cases
Trial judge's exercise of five peremptory challenges to reduce number of jurors to 12 was reversible error; however, if party did not object before jury was sworn, error was waived. Maryland Rules, Rule 543 a 1, 3.

[4] Jury 230 ⚿142

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k142 k. Objections and Exceptions. Most Cited Cases
Any dissatisfaction with jury selection procedure must be expressed for record before jury is sworn unless it can be shown that complaining party both did not know and, with reasonable diligence, could not have known of irregularity. Maryland Rules, Rule 543 a 1, 3.

[5] Appeal and Error 30 ⚿657(1)

30 Appeal and Error
30X Record
30X(J) Defects, Objections, Amendments, and Corrections
30k657 Remitting to Lower Court
30k657(1) k. In General. Most Cited Cases
Where appellate record was incomplete through no apparent fault of appealing party and there was some indication in record that tended to support that party's assertion that, in fact, timely objection was made, case would be remanded for certification by trial court as to what occurred. Maryland Rules, Rules 826 c, f, 871.

****268 *369** R. Edwin Brown, Rockville (Brown & Sturm, Rockville, on the brief), for appellants.
Frank W. Wilson, Sp. Atty., Gaithersburg (Francis B. Burch, Atty. Gen., and Nolan H. Rogers, Asst. Atty. Gen., Baltimore, on the brief), for appellee.

Argued before MURPHY, C. J., and SMITH, DIGGES, ELDRIDGE, ORTH and COLE, JJ.
DIGGES, Judge.
Coming before this Court pursuant to our issuance of a writ of certiorari, petitioners William L. and Cordelia E. King challenge the manner in which they were required to select the jury that was impaneled to hear their case. Although we agree with the petitioners' basic contention that the method of jury selection utilized here was improper as not conforming to the requirements of the Maryland Rules, because the trial transcript fails to reflect whether a timely objection was made, we will remand the case to the trial court without affirmance or reversal for resolution of this issue and then for such further appropriate action as is later indicated in this opinion.

This action was instituted by respondent State Roads Commission when it filed separate petitions of condemnation against two parcels of land owned by the Kings. A court order consolidated the two petitions for trial and the case was called for hearing on the merits in the Circuit Court for Montgomery County on March 13, 1978. A jury trial was requested and a panel of twenty-eight citizens, chosen from a properly selected array, was subjected to voir dire questioning by the presiding judge. As a result of their answers, three of the prospective jurors were dismissed for cause and a list containing the names of the remaining twenty-five veniremen was submitted to the parties for their consideration. From the persons named on that jury roster each side peremptorily ***370** challenged four as it was entitled to do under Maryland Rule 543 a 3. To reduce this list of seventeen veniremen to the required twelve who would constitute the special jury panel hearing the case, the trial judge struck five additional names. At this point, the record shows there were two bench conferences, the content of the second being unreported, and thereafter the panel was sworn and the trial commenced.

The evidence at trial consisted almost entirely of the expert testimony of several different appraisers as to the value of the ****269** parcels. The jury by its inquisition awarded what amounted to $1.10 per square foot for each tract. Following this verdict, petitioners filed a timely motion for a new trial in which their principal contention of error was the method by which they were required to select the jury. The trial judge denied the motion and the landowners filed a timely appeal to the Court of Special Appeals. We granted certiorari prior to that court's consideration of the matter.

[1][2] No citation of authority is needed to support the proposition, which is intrinsic to the American concept of justice, that when a jury trial is

authorized, the panel should be composed of fair and impartial individuals selected from among one's peers. In insuring that such an impartial jury is chosen, a reasonable peremptory challenge right plays a vital role because it permits a party to eliminate a prospective juror with personal traits or predilections that, although not challengeable for cause, will, in the opinion of the litigant, impel that individual to decide the case on a basis other than the evidence presented. See Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) . But see People v. Wheeler, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978). In so stating, however, we recognize that neither the federal constitution, Swain v. Alabama, supra, nor our State constitution requires that a litigant be granted peremptory challenges in the course of jury selection. Nonetheless, in light of the importance of the peremptory challenge, it is not surprising that this State, since at least 1797, See 1797 Md.Laws, ch. 87, s 9, has provided for such challenges and established orderly procedures to guarantee that litigants ***371** have a full opportunity to utilize the right.[FN1] Further, the importance of the peremptory challenge requires that any significant deviation from the prescribed procedure that impairs or denies the privilege's full exercise is error that, unless waived, ordinarily will require reversal without the necessity of showing prejudice. Swain v. Alabama, supra, 380 U.S. at 219, 85 S.Ct. 824.

> FN1. The present Maryland Rules dealing with peremptory challenges find their roots in statutory enactments, and thus we think it interesting that prior to 1800 the General Assembly, finding that "the integrity, experience and intelligence of jurors, is indispensably necessary for the due administration of justice," 1797 Md.Laws, ch. 87, preamble, provided for the use of peremptory challenges in a manner very similar to that found in the present Maryland Rules. Compare Md.Rule 543 a With 1797 Md.Laws, ch. 87, s 9.

Among the procedural requirements established by the Maryland Rules to govern the exercise of peremptory challenges, of particular moment in this case are those of subsections 1 and 3 of Rule 543 a. They provide:

a. Petit Jury.

1. Lists of Twenty.

In an action in which a jury shall be necessary, twenty persons from the panel of petit jurors shall be drawn by the clerk under the direction of the court, and their names shall be written upon two lists, and one of said lists forthwith delivered to the respective parties.

3. Peremptory Strikes Number.

Each party may peremptorily strike, without cause, four persons from the lists of twenty provided for in paragraph 1 of section a of this Rule, and the remaining twelve persons shall thereupon be immediately empaneled and sworn as the petit jury in the action. Several defendants or several plaintiffs shall be considered as a single party for the purpose of making such peremptory strikes.

As the trial judge himself recognized at the hearing on the motion for a new trial, the method used in this instance violated the mandate of these rules, an action that not only ***372** flies in the face of the established principle that the Maryland Rules are precise rubrics that are to be strictly followed, E. g., Robinson v. Bd. of County Comm'rs, 262 Md. 342, 346, 278 A.2d 71, 73 (1971); Brown v. Fraley, 222 Md. 480, 483, 161 A.2d 128, 130 (1960), but also diluted the full impact of the parties' participation in the selection of the jury.

****270** [3] In civil cases, the Rules contemplate the submission to the parties of a properly culled list of twenty eligible jurors, from which twelve will remain to be sworn as the jury panel after each side has exercised its four peremptory challenges. Here, however, seventeen prospective jurors remained after both parties used their peremptory strikes and five had to be eliminated by the trial judge to obtain a panel of twelve. Besides violating Rule 543 a 7, which allows the trial judge to strike jurors from the list of twenty only "(u)pon the neglect or refusal of a party to exercise peremptory strikes" or "in the event that one or more jurors stricken by the parties coincide," this selection method impaired the effectiveness of these parties' peremptory challenges to the extent that the trial judge, with

five strikes, had more to say about who would not sit on the panel than either of the parties. In our view, unless waived, the only adequate remedy for such a clear violation of Rule 543 is a new trial before a correctly selected jury.

[4] In so stating, however, we nonetheless find we are unable to discern if petitioners are entitled to this relief because the record leaves uncertainty as to whether a timely objection was made. The Kings contend they made two seasonable objections: one at an unrecorded bench conference before the jury was sworn and another at an unrecorded conference in the trial judge's chambers just prior to the judge returning to the courtroom to instruct the jury on the law applicable to the case. As to the latter, even if we assume that an objection was made when petitioners contend it occurred, we think that, while there is some authority to the effect that a protest to an irregularity in the selection of a jury can be made at any time prior to the return of an unfavorable verdict, See Lee v. Colson, 277 Md. 599, 601, 356 A.2d 558, 559 (1976), when, as here, a rule clearly sets forth the jury selection procedure to *373 be followed, any dissatisfaction with the technical procedure actually utilized must be expressed for the record before the jury is sworn unless it can be shown that the complaining party both did not know and, with reasonable diligence, could not have known of the irregularity. Here, with a knowledge of Rule 543 a, which all parties and their counsel are charged with having, and being furnished with a list that contained more than twenty names from which they were to exercise their peremptory strikes, petitioners necessarily were cognizant of the irregularity so as to require that, if they wished to register an objection, they do so before the jury was impaneled. Thus, the issue before us is relegated to an inquiry as to whether an objection was made prior to the jury being sworn. In this regard, the trial transcript reflects that immediately prior to the administration of the oath to the jury there was a bench conference, the content of which was not recorded by the court reporter. As a consequence, the record tells us nothing concerning what took place at that conference.[FN2]

FN2. The reporter's transcript indicates the unrecorded bench conference was the extension of a prior reported conference between the trial judge and Mr. Brown, petitioners' counsel. In full, the transcript records the following:

THE COURT: Strike your jurors.
MR. BROWN: May we approach the bench a moment?
THE COURT: All right.
(Whereupon, bench conference as follows:)
MR. BROWN: I would move, Your Honor, that (juror) Charles Ohl
THE COURT: He is gone (for cause).
MR. BROWN: (Juror) Tavel.
THE COURT: He is gone (for cause). I let him go, too.
MR. BROWN: I didn't understand it. Okay.
(Whereupon, bench conference concluded.)
MR. BROWN: Let me approach the bench once more.
(Whereupon, bench conference not reported.)
THE CLERK: Ladies and gentlemen, as I call your names, please come forward and be seated in the jury box.

[5] We have previously recognized that if a party thinks the record in this Court is incomplete or incorrect, the proper remedy is to file a motion here under Rule 826 f to correct that record. Harmon v. State, 227 Md. 602, 607, 177 A.2d 902, 905 (1962). The Kings have not explicitly made such a motion, but we think that when, as here, the **271 record is incomplete *374 through no apparent fault of the appealing party [FN3] and there is some indication in the record that tends to support that party's assertion that, in fact, a timely objection was made, [FN4] "the purposes of justice will be advanced by permitting further proceedings in the cause" to determine the issue, Md.Rule 871, and thus we will treat petitioners' assertions as a Rule 826 f motion and remand the case, as is provided in Rule *375 826 c, for certification by the trial court as to what occurred. On remand, if, after considering the record, the arguments of counsel, any trial notes he retained, or any other legitimate source, the trial judge's recollection is refreshed to the extent that he can certify as to what occurred with regard to the alleged objection, the following action should take place: If the court finds the petitioners did not make

a timely objection, as specified by this opinion, the judgments previously recorded on May 4, 1978, should be re-entered; however, if it finds such an objection was registered before the jury was impaneled, a new trial should be provided. On the other hand, if the trial judge is unable to reach a conclusion as to whether a timely objection was made, then, in that event, a new trial should be conducted

> FN3. It is, of course, a party's responsibility to insure that a proper record is made. Nonetheless, we do not think that each party should be forced to constantly keep an eye on the court reporter to make sure every word is being recorded, especially if, as this record appears to indicate, it was the local custom that all proceedings in open court, including bench conferences, were noted in full by the reporter without a specific request from either party. Thus, we do not think that petitioners' counsel was unreasonable in expecting, as he asserted at oral argument he did, that the bench conference was being recorded.
>
> FN4. The following exchange between the trial judge and Mr. Brown during the hearing on the motion for a new trial lends at least minimal support to petitioners' contention that they did object to the submitted jury list at the unrecorded bench conference:

MR. BROWN: . . . (T)he Court will concede that we didn't follow the Rule?
THE COURT: I will concede that we have not been following the actual we have not been sending up the two lists of 20, or it is one list of 20, but two little strips of paper like we used to do in the old days. Now, that I will concede.
MR. BROWN: And you will concede that you struck five?
THE COURT: I will concede that.
MR. BROWN: And you will concede that I made a timely objection?
THE COURT: Well, I am not going to concede that. I will concede that you complained about it.
MR. BROWN: That I complained about it?
THE COURT: I don't remember at what point you complained about it, but I do know, and obviously you are here complaining about it now.
MR. BROWN: You recall that I complained about it?
THE COURT: During the trial.
MR. BROWN: Before the trial began.
THE COURT: I really think you did, Ed, but I can't specify exactly when you did. That is going to be a matter of record, and if you take this up on appeal, it will show in transcript.
MR. BROWN: Well, it may; it may not. I don't have the transcript.
THE COURT: I am sure it will.
MR. BROWN: Well, we don't. I don't have the transcript.
THE COURT: I will concede whatever the transcript shows, Mr. Brown.
MR. BROWN: Well, naturally, and then
THE COURT: I am not going to have you push me into conceding something that I don't know for sure.
MR. BROWN: I don't want to do that.
THE COURT: I know that you complained about it. At what precise point, whether it was before or after the jury was sworn, I don't know.

CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY, WITHOUT AFFIRMANCE OR REVERSAL, FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID BY RESPONDENT IN THE EVENT, ON REMAND, A NEW TRIAL IS AWARDED; OTHERWISE TO BE PAID BY PETITIONERS.

Md., 1979.
King v. State Roads Commission of State Highway Administration
284 Md. 368, 396 A.2d 267

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422 F.3d 897, 05 Cal. Daily Op. Serv. 8075, 2005 Daily Journal D.A.R. 10,927

(Cite as: 422 F.3d 897)

C

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Osbaldo ESPARZA-GONZALEZ,
Defendant-Appellant.
No. 04-10267.

Argued and Submitted Feb. 14, 2005.
Filed Sept. 6, 2005.

Background: Defendant was convicted following a jury trial in the United States District Court for the District of Nevada, Howard D. McKibben, J., of being an alien unlawfully present in the United States after removal, and he appealed.

Holdings: The Court of Appeals, D.W. Nelson, Circuit Judge, held that:
(1) addressing an issue of first impression, defendant established prima facie case of discrimination under *Batson* based on prosecutor's waiver of peremptory strike under struck jury system of jury selection;
(2) once district court determined that defendant established prima facie case of *Batson* discrimination and prosecutor proffered race neutral explanation, court had to proceed to ultimate intentional discrimination determination;
(3) sentence enhancement based on prior conviction did not violate right to jury trial; and
(4) defendant was entitled to resentencing under advisory guidelines.
Reversed in part and remanded in part.

West Headnotes

[1] Criminal Law ⇐1139
110k1139 Most Cited Cases

[1] Criminal Law ⇐1158(3)
110k1158(3) Most Cited Cases
Court of Appeals reviews de novo the question of whether a district court must
apply *Batson* to a defendant's claim of intentional racial discrimination, but reviews a district court's findings of whether the defendant established a prima facie case for racial discrimination, and whether prosecutor had intent to discriminate, only for clear error

[2] Jury ⇐33(5.15)
230k33(5.15) Most Cited Cases
Under the struck jury system of jury selection, waivers of peremptory strikes are best viewed as effective strikes against identifiable jurors, and therefore, for the purposes of establishing a prima facie case of discrimination under *Batson*, such waivers should be treated the same as the exercise of peremptory strikes. U.S.C.A. Const.Amend. 5.

[3] Jury ⇐33(5.15)
230k33(5.15) Most Cited Cases
In prosecution for being in United States after removal, defendant established prima facie case of discrimination under *Batson* based on prosecutor's waiver of peremptory strike under struck jury system of jury selection, resulting in removal of only Latino among prospective alternate jurors; prosecutor effectively struck only potential Latino juror and only potential Latino alternate, suggesting pattern of discrimination, prosecutor declined to directly question venire panel, court's voir dire produced little distinguishing information on Latino panelists, and court noted prosecutor usually exercised most or all strikes. U.S.C.A. Const.Amend. 5.

[4] Jury ⇐33(5.15)
230k33(5.15) Most Cited Cases
To establish a prima facie case of intentional discrimination under *Batson*, a defendant must show that: (1) he is a member of a cognizable group; (2) the prosecutor has removed members of such a group; and (3) the totality of the

circumstances gives rise to an inference that the prosecutor excluded jurors based on race. U.S.C.A. Const.Amend. 5.

[5] Jury ⚖33(5.15)
230k33(5.15) Most Cited Cases
In prosecution for being in United States after removal, once district court determined that defendant had established prima facie case of discrimination
under *Batson* based on prosecutor's waiver of peremptory strike under struck jury system of jury selection, resulting in removal of only person of color with Latino surname among prospective jurors, and prosecutor proffered race-neutral explanation that he was waiving the rest of his peremptory strikes, court was required to proceed to ultimate *Batson* determination of whether prosecutor intentionally discriminated, rather than revisiting issue of prima facie case. U.S.C.A. Const.Amend. 5.

[6] Jury ⚖34(7)
230k34(7) Most Cited Cases
(Formerly 230k34(1))
In defendant's sentencing for being an alien unlawfully present in the United States after removal, imposition of sixteen-level sentence enhancement under sentencing guidelines based on defendant's prior drug trafficking conviction, which was not presented as evidence to jury, did not violate Sixth Amendment right to jury trial. U.S.C.A. Const.Amend. 6.; U.S.S.G. § 2L1.2(b)(1)(A)(i), 18 U.S.C.A.

[7] Criminal Law ⚖1181.5(8)
110k1181.5(8) Most Cited Cases
Defendant was entitled to remand for resentencing for being an alien unlawfully present in the United States after removal under advisory sentencing guidelines, since he was originally sentenced under mandatory guidelines. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.
***898** Cynthia S. Hahn (argued and briefed) and Michael K. Powell (briefed), Assistant Federal Public Defenders, Reno, NV, for the defendant-appellant.

Ronald C. Rachow, Assistant United States Attorney, Reno, NV, for the plaintiff-appellee.

Appeal from the United States District Court for the District of Nevada; Howard D. McKibben, District Judge, Presiding. D.C. No. CR-03-00226-HDM.

Before: D.W. NELSON, W. FLETCHER, and FISHER, Circuit Judges.

D.W. NELSON, Circuit Judge.

Osbaldo Esparza-Gonzalez, who is Latino, appeals from his conviction, under 8 U.S.C. § 1326(a), for being an alien unlawfully present in the United States after an earlier removal. Esparza-Gonzalez alleges that two Equal Protection violations under *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), occurred during jury selection and require that his conviction be overturned. In the alternative, Esparza-Gonzalez argues that the district court erred in applying a sixteen-level sentence enhancement pursuant to United States Sentencing Guidelines (USSG) § 2L1.2(b)(1)(A)(I) to his unlawful re-entry conviction based on a prior drug trafficking conviction, which was not presented ***899** as evidence to the jury. We hold that for purposes of determining whether a *prima facie* case of a *Batson* violation has been established, waivers of peremptory strikes in a struck jury system should be treated the same as exercises of peremptory strikes in an alternate system. Accordingly, we reverse in part and remand in part.

FACTUAL AND PROCEDURAL BACKGROUND
On December 17, 2003, Esparza-Gonzalez was indicted and charged with a violation of 8 U.S.C. § 1326(a) for being an alien found in the United States without permission after a prior removal. Esparza-Gonzalez pled not guilty and was tried by a jury on February 17, 2004.

The district court used what is known as the "struck jury" system to select jurors for Esparza-Gonzalez's trial. [FN1] Under this system, 32 venirepersons are initially selected, of whom 28 are potential

jurors and four are potential alternates. Beginning with the defense, each side exercises its challenges for cause and then its peremptory strikes on an alternating basis. Because Esparza-Gonzalez was charged with a felony, the defense had ten peremptory strikes and the prosecution had six. *See* Fed.R.Crim.P. 24(b)(2). Each side received one additional peremptory strike for the alternate jurors. *See id* at (c)(4)(A).

> FN1. The district court referred to the jury selection procedure used as the "modified Arizona system."

After the voir dire, neither side exercised a single strike for cause. If each side had used all its peremptory strikes, only a jury of 12 individuals and two alternates would have remained. [FN2] The defense exercised all of its ten peremptory strikes, but the prosecution only used one peremptory strike, waiving the remainder. Under the struck jury system, when either side waives a peremptory strike, this results in an excess number of potential jurors, and therefore, the juror with the highest juror number is removed from the jury panel. For this reason, a waiver of a peremptory strike under this system is properly viewed as the effective removal of an identifiable juror. In contrast, when a peremptory strike is waived under other jury selection systems, no juror is removed from the venire and the composition of the panel is left unchanged. Under these systems, it is only when a party exercises a peremptory strike or a strike for cause that the composition of the venire changes and a previously unidentified prospective juror is randomly selected to join the venire. [FN3]

> FN2. If either side had requested and been granted a strike for cause, the ideal number of jurors and alternate jurors would have been reached before each side had exercised all of its peremptory strikes.

> FN3. For example, under the "jury box" system 12 prospective jurors are seated and subjected to voir dire. When a party exercises any challenge--peremptory or for cause--a new juror is brought in to replace the excused juror. The jury box system, then, allows less manipulation of the entire composition of the jury than the struck jury system permits. *See* Bettina B. Plevan, *Jury Trial Issues, in Current Developments in Federal Civil Practice,* 706 PLI/Lit 443, 451-52 (2004).

Of the 28 potential jurors, only three were persons of color, one of whom had a Latino surname. Among the four potential alternates, there was one individual with a Latino surname and no other individual of color. With the one peremptory strike it exercised against the potential jurors, the prosecution removed a white juror. By waiving its second peremptory strike, the prosecution removed the only ***900** potential juror with a Latino surname, Ms. Martinez, who was juror number 28. [FN4] Defense counsel immediately challenged her removal under *Batson,* alleging that the prosecutor waived this strike with the discriminatory intent to remove the sole prospective Latino juror. The district court asked the prosecutor to respond to the challenge, and the prosecutor stated that he was waiving all his remaining strikes.

> FN4. The record does not reveal whether Ms. Martinez is Latina or Native American, which was the subject of speculation by the court. Voir dire revealed that Ms. Martinez works for a Native American tribe and has a Latino surname, which may be her maiden name or could be a name acquired through marriage.

The district court initially found a *Batson* violation with respect to the removal of juror Martinez and ordered the clerk to dismiss the next juror in line, number 27, instead of juror Martinez. When the prosecutor objected, the district court noted that it could "take judicial notice of the fact that [the prosecutor], in many cases, most cases," exercised all or most of his peremptory strikes and therefore that his failure to do so in this case permitted an inference of intentional discrimination.

After more discussion, the district court retreated

from its initial finding of intentional discrimination and asked defense counsel whether she had any evidence on "how often the government waived [peremptory] challenges in the past or exercised challenges." Defense counsel replied that during her last illegal re-entry case, another prosecutor from the same office waived a peremptory strike, resulting in the removal of a minority venireperson. The district court then ordered a short recess to research case law on whether waiver of a peremptory strike could constitute a *Batson* violation. When court resumed, the district court ultimately ruled that the defense had failed to establish a *prima facie* case of intentional discrimination. The district court relied on ***State v. Paleo*, 200 Ariz. 42, 22 P.3d 35 (2001)**, to conclude that the failure to use a peremptory strike, without other evidence of discriminatory intent, cannot constitute a *prima facie* showing.

After the 12 jurors were selected, each side was allowed to exercise a peremptory strike against the four alternate jurors. If each side had used its strike only two alternates would have remained. The same selection rules applied to the selection of the alternates, and when the prosecutor waived his peremptory strike, the only alternate with a Latino surname, Mr. Lopez, was removed. The defense also challenged this removal under *Batson,* and in response the district court asked the prosecutor to explain the only peremptory strike he exercised. (This was the peremptory strike previously exercised against a potential juror.) The prosecutor said he struck that potential juror because he was divorced, worked in maintenance, and "didn't strike [him] as the type of person that would be particularly attentive." Defense counsel pointed out that several of the remaining jurors were divorced and one worked in maintenance, yet the prosecutor had not used his remaining five peremptory strikes to remove these potential jurors. Nevertheless, the district court found that the defense failed to establish a *prima facie* showing of intentional discrimination. The court did, however, require the record to be certified so that other judges might determine whether a pattern existed at the U.S. Attorney's office of waiving peremptory strikes in order to unseat jurors of color. The jurors and alternates empaneled to hear Esparza-Gonzalez's case included one person of color, who did not have a Latino surname.

***901** The jury found Esparza-Gonzalez guilty of being an alien present in the United States without permission after a prior removal under 8 U.S.C. § 1326(a). On April 27, 2004, the district court applied USSG § 2L1.2(b)(1)(A)(I) to increase Esparza-Gonzalez's sentence due to his prior drug trafficking conviction, for which he was sentenced to over thirteen months in prison. Based on this enhancement, the district court sentenced Esparza-Gonzalez to 57 months imprisonment, the low-end of the applicable sentencing range and well under the 10-year statutory maximum set out in 8 U.S.C. § 1326(b)(4). Although no proof of his prior conviction was presented to the jury, Esparza-Gonzalez did not object to the accuracy or use of this conviction at the time of sentencing. Without this enhancement, the sentencing range would have been only four to ten months. *See* USSG ch. 5, pt. A, sentencing table (2004). Esparza-Gonzalez timely appealed his conviction and sentence to this court.

STANDARD OF REVIEW

[1] We review de novo the question of whether a district court must apply *Batson* to a defendant's claim of intentional racial discrimination. *See United States v. Alanis,* 335 F.3d 965, 967 & n. 1 (9th Cir.2003). But we review a district court's finding of whether the defendant established a *prima facie* case for racial discrimination only for clear error. *United States v. Steele,* 298 F.3d 906, 910 (9th Cir.2002). Similarly, we review for clear error the district court's decision on intent to discriminate. *Id.* To reverse under the clear error standard, we must have "a definite and firm conviction that a mistake has been committed." *United States v. Elliott,* 322 F.3d 710, 714 (9th Cir.2003) (internal quotation and citation omitted).

DISCUSSION

I. The* Batson *Challenges

A. Waiver of Peremptory Strikes Can Form the Basis of a *Batson* Challenge

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In *Batson,* the Supreme Court held that a "[s]tate's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause." [FN5] 476 U.S. at 89, 106 S.Ct. 1712. *Batson* and its progeny established a three-part test for determining whether the exercise of a peremptory strike violates equal protection. First, the challenging party bears the burden of establishing a *prima facie* showing of intentional discrimination. *Id.* at 93-94, 106 S.Ct. 1712. If the challenging party satisfies this burden, the burden of production shifts to the party exercising the strike to articulate a race-neutral reason for the strike. *Id* at 97-98, 106 S.Ct. 1712. The race-neutral reason provided does not have to "rise to the level justifying exercise of a challenge for cause," *id.* at 97, 106 S.Ct. 1712, nor does the explanation have to be "persuasive, or even plausible." *Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). But the reason must be tied to the particular case. *Batson,* 476 U.S. at 98, 106 S.Ct. 1712. Third, once the striking party provides a race-neutral explanation, the burden returns to the challenging party to show that the reason given was pretextual and that the striking party engaged in purposeful discrimination. *Id* Because a finding of intentional discrimination is a finding of fact, ***902** a reviewing court must give appropriate deference to the trial court's decision at this last stage. *Id* at 98 n. 21, 106 S.Ct. 1712.

> FN5. This analysis applies in federal criminal cases as well. *See Buckley v. Valeo,* 424 U.S. 1, 93, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); *United States v. De Gross,* 913 F.2d 1417, 1422 n. 7 (1990).

[2] Whether under the struck jury system waivers of peremptory strikes can form the basis of a *Batson* challenge is a question of first impression. In denying that they can, the district court relied on a case decided by the **Arizona Supreme Court. *Paleo,* 22 P.3d at 37**. The court in ***Paleo*** held that under the struck jury system waivers of peremptory strikes in combination with other factors can establish a *prima facie* case of discrimination under *Batson,* but that such waivers standing alone cannot. [FN6] *Id* Because under this particular method of jury selection waivers of peremptory strikes result in the removal of known jurors, we conclude that such waivers are best viewed as effective strikes against identifiable jurors, and therefore for the purposes of establishing a *prima facie* case such waivers should be treated the same as the exercise of peremptory strikes.

> FN6. Two Texas Appellate Courts previously considered, and rejected, the use of a peremptory strike waiver as a basis for a *Batson* challenge. *See Mayes v. State,* 870 S.W.2d 695, 699 (Tex.App.1994); *Russell v. State,* 804 S.W.2d 287, 290-91 (Tex.App.1991). In both cases the trial court appears to have used a version of the struck jury system for juror selection.

In ***Paleo,*** the Arizona Supreme Court incorrectly concluded that peremptory strikes and the waiver of these strikes differ because the former require action, while the latter simply inaction. **22 P.3d at 37**. Under the struck jury system, both the exercise of a peremptory strike and the waiver of a strike remove a single, clearly identified juror. If a peremptory strike is used, the striking party directly removes an identifiable juror, and no new juror is seated. Similarly, if a party waives a peremptory strike in the struck jury system, an identifiable juror (the one with the highest juror number) is removed and no new juror is seated. However, under other selection procedures, such as the jury box system, use of a peremptory strike results in the removal of a known juror who is replaced with an unknown, randomly selected juror. Under these systems, the waiver of a peremptory strike does not remove a juror or introduce a new juror. [FN7] It is only under selection systems like the jury box system that waiver of a peremptory strike amounts to inaction or preservation of the status quo. By contrast, under the struck jury system, a waiver of a peremptory strike is not merely passive, but is more properly viewed as an effective strike of an

identifiable juror.

> FN7. *See* Plevan, 706 PLI/Lit at 451-52 ("For good or for ill, the 'jury box' method focuses on the selection of individual jurors and does not allow the shaping of an entire jury. Counsel have no way of knowing ... who will replace the challenged juror. This means that counsel must decide who to strike based on the individual's qualities, rather than whether that person is better or worse than the replacement.").

For this reason, the struck jury system has long been criticized for allowing the racial engineering of juries. *See, e.g., United States v. Blouin,* 666 F.2d 796, 798 (2d Cir.1981) (noting that the struck jury system might "increase the opportunity to shape a jury along racial or other class lines"); James Oldham, *The History of the Special (Struck) Jury in the United States and its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges,* 6 Wm. & Mary Bill Rts. J. 623, 668 (1998) ("It may be easier, however, to camouflage discrimination with the struck jury model because the demographics of the entire panel will be known from the start, making it ***903** easier to pick and choose."); Jon M. Van Dyke, *Jury Selection Procedures· Our Uncertain Commitment to Representative Panels* 150 (1977) (observing that the "struck jury system[has been] employed to use [the peremptory challenge] power to eliminate entire races or classes of people from jury venires"). As the Second Circuit has noted, "[i]t is far from clear, however, that the right to challenge peremptorily should necessarily imply a right to shape a jury's profile" to the extent allowed by the struck jury system. *Blouin,* 666 F.2d at 798. Despite the power the struck jury system gives to parties to shape the composition of the jury, it has been held to pass constitutional muster, at least in the abstract. *See J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 144 n. 17, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (noting that Alabama is free to use the struck jury system so long as its actual use complies with the Constitution); *see also Amsler v. United States,* 381 F.2d 37, 44 (9th Cir.1967) (upholding the "Arizona system" of jury selection, which is similar to the struck jury system).

The Supreme Court recently held that jury selection procedures may give rise to an inference of discriminatory intent even though the prosecutor is not actively striking potential jurors. In *Miller-El v. Dretke,* --- U.S. ----, 125 S.Ct. 2317, 2332-33, 162 L.Ed.2d 196 (2005), the Court condemned the use of a practice called the "Texas jury shuffle." Under the Texas Criminal Code, either side may request shuffling of the venire panel such that a certain group of potential jurors (those shuffled to the back of the venire) will likely never be called for voir dire questioning because a jury will be formed before they reach the front of the list. *Id.* at 2332-33 & n. 12 (citing Tex.Code Crim. Proc. Ann., Art. 35.11 (Vernon Supp.2004-2005)). When used to exclude potential black jurors, this practice supported an inference of discrimination.

Similarly, the struck jury system allows parties who intentionally want to remove jurors for discriminatory reasons to camouflage these removals by unseating jurors through the waiver of peremptory strikes rather than resorting to direct removals by using peremptory strikes. It is clear that under the struck jury system, the waiver of peremptory strikes, just like the exercise of these strikes, allows those of "a mind to discriminate" to do so. *See Batson,* 476 U.S. at 96, 106 S.Ct. 1712 (observing that "the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate") (internal quotation and citation omitted). Failing to provide protection against removal of identifiable jurors, when such removal is achieved by waiver rather than exercise of a peremptory strike, would frustrate the essential purpose of *Batson*--to eliminate the race-based selection of jurors--and would violate the equal protection rights of both the defendant and prospective jurors.

The government correctly notes that it is not required to exercise all of its peremptory challenges

and that it was well within its rights to waive five of its six peremptory strikes in this case. In the abstract, this is of course true. The use of peremptory strikes has long been recognized as a capricious and arbitrary right used at the will of the striking party. *See Pointer v. United States,* 151 U.S. 396, 408, 14 S.Ct. 410, 38 L.Ed. 208 (1894) (observing that "[t]he right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused.... [H]e may exercise that right without reason or for no reason, arbitrarily and capriciously") (***904** internal quotation omitted). But even this capricious right is limited by equal protection requirements, and when a waiver of a peremptory strike creates an inference of intentional discrimination, the party waiving that strike must provide a race-neutral explanation for its decision to effectively remove a specific juror. The government argues that such a rule would grant the defendant the right to a jury composed in whole or part of persons of his race--a right to which no defendant is entitled. *Batson,* 476 U.S. at 85, 106 S.Ct. 1712. We disagree. Our holding simply requires the prosecution to provide race-neutral reasons for a waiver of a peremptory strike under the struck jury system when a defendant establishes a *prima facie* showing of intentional discrimination based on the challenged waiver.

B. The Challenge to Juror Lopez

[3][4] Having determined that, under the struck jury system, waivers of peremptory strikes should be treated as effective peremptory strikes, we begin our analysis of Esparza-Gonzalez's specific *Batson* challenges with the last juror challenged, juror Lopez. We conclude that Esparza-Gonzalez established a *prima facie* case of intentional discrimination with respect to juror Lopez's removal from the pool of alternate jurors. To establish a *prima facie* case, Esparza-Gonzalez must show that (1) he is a member of a cognizable group; (2) the prosecutor has removed members of such a group; and (3) the totality of the circumstances gives rise to an inference that the prosecutor excluded jurors based on race. *Fernandez v. Roe,* 286 F.3d 1073, 1077 (9th Cir.2002); *United States v. Chinchilla,* 874 F.2d 695, 698 (9th Cir.1989). In making this showing, the defendant is entitled to rely on the fact that peremptory challenges provide a useful vehicle for those intent on discriminating. *Batson,* 476 U.S. at 96, 106 S.Ct. 1712. Likewise, we hold that under the struck jury system, defendants challenging waivers of peremptory strikes may rely on the fact that these waivers also provide a handy means of discriminating. The Supreme Court has held that a defendant can make out a *prima facie* case "by offering a wide variety of evidence, so long as the sum of the proffered facts gives rise to an inference of discriminatory purpose." *Johnson v. California,* --- U.S. ----, 125 S.Ct. 2410, 2416, 162 L.Ed.2d 129 (2005) (internal citation and quotation omitted).

Although our precedent does not require a pattern of removing people of color to establish a *prima facie* case of a *Batson* violation, *see United States v. Vasquez-Lopez,* 22 F.3d 900, 902 (9th Cir.1994), such a pattern "provides support for an inference of discrimination." *Fernandez,* 286 F.3d at 1078 (internal quotation removed). At the time that Esparza-Gonzalez objected to juror Lopez's removal, the prosecution had effectively struck the only potential Latino juror as well as the only potential Latino alternate. This pattern suggested a general pattern of racial discrimination. However, "[b]ecause the numbers are so small (and, hence, potentially unreliable), two such challenges, standing alone, may not be sufficient to support an inference of discrimination." *Id. But see Chinchilla,* 874 F.2d at 698 (finding a *prima facie* case when the prosecutor struck the only prospective Latino juror and the only prospective Latino alternate using his first peremptory strike and his sole peremptory strike for alternate jurors).

Esparza-Gonzalez, however, has presented much more than this pattern of removal to support a *prima facie* showing. First, the prosecutor's actions during the jury selection process provide further support, when viewing the totality of the circumstances, for an inference of intentional ***905** discrimination. The prosecutor's effective strikes of potential alternate juror Lopez and potential juror Martinez after waiving his opportunity to pose *any* direct questions to the venire panel contributes to an

overall inference of discriminatory intent. *See Fernandez,* 286 F.3d at 1079 (relying partly on the fact that the "prosecutor failed to engage in meaningful questioning of any of the minority jurors" to establish the *prima facie* showing). The district court conducted the voir dire, which produced very little distinguishing information on jurors Lopez and Martinez. Jurors Lopez and Martinez each responded directly to one question posed by the district court. Ms. Martinez was one of six veniremembers to respond affirmatively to the district court's inquiry into whether any one had previously served on a criminal jury. She reported serving on an income tax evasion case, which resulted in a verdict. *Cf. Miller-El v. Dretke,* 125 S.Ct. at 2325 (engaging in comparative juror analysis and holding that "if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step"). Though here the prosecutor did not suggest that Ms. Martinez's effective exclusion was based on her prior service in a criminal jury, it is nonetheless relevant for the court to consider the differing treatment of similarly situated potential jurors.

Mr. Lopez was the only veniremember to respond affirmatively to the district court's question of whether anyone traveled to Mexico approximately once every two years. Mr. Lopez stated that he took leisure trips to places like Cancun. In addition, the judge asked each juror to state for the court "where [they] live and what [they] do for a living, if [they] work outside the home, if [they're] married ... [and] what [their] spouse does for a living." The record does not indicate that juror questionnaires were used for voir dire, and the prosecutor declined the opportunity to ask additional direct voir dire questions after the district court finished its questioning. At the time he waived the peremptory strike causing the removal of juror Lopez, the prosecutor had very little hard information to base this decision on. Although the prosecutor has no obligation to question all potential jurors, his failure to do so prior to effectively removing a juror of a cognizable group through a waiver may contribute to a suspicion that this juror was removed on the basis of race. This suspicion, along with other factors, may lead to an inference of intentional discrimination.

Second, the judicial notice taken, at least initially, by the district court of the prosecutor's usual practice of exercising all or most of his peremptory strikes further supports an inference of intentional discrimination, in light of the totality of the circumstances. Third, the defense counsel's statement that another prosecutor from the same office had recently waived peremptory strikes to remove minority jurors in another illegal re-entry case also buttresses the defendant's case that the totality of the circumstances created an inference of discriminatory intent.

Finally, while illegal re-entry is not necessarily a racially charged crime, in this case, Esparza-Gonzalez is a Mexican national and thus race is clearly involved in the proceeding. This fact is one that should also be considered when evaluating whether the totality of the circumstances gives rise to an inference of discriminatory intent. Presumably recognizing the racial element inherent in the trial, the district court asked all jurors during voir dire whether "the fact that the defendant is Hispanic, would ... in any way influence ***906** any of you in making a decision in this case." *See Simmons v. Beyer,* 44 F.3d 1160, 1168 (3d Cir.1995) (noting a similar question posed by the trial court when evaluating the defendant's *prima facie* case). Therefore, based on the pattern of exclusion of the only two Latino veniremembers as well as on the relevant circumstances surrounding the challenge to juror Lopez's removal, we conclude that the district court erred in finding that the defendant failed to make a sufficient showing to establish a *prima facie* case.

Because the district court never required the prosecution to articulate a race-neutral reason for juror Lopez's removal, we remand for an evidentiary hearing to allow the prosecution to present evidence of the actual reason for this removal. *See Paulino v. Castro,* 371 F.3d 1083, 1092 (9th Cir.2004) (citing *Batson,* 476 U.S. at

100, 106 S.Ct. 1712). After this evidence is presented, the district court should, in the first instance, evaluate the validity of any offered race-neutral explanations for juror Lopez's removal. *Id.*

C. The Challenge to Juror Martinez

[5] Initially, the district court determined that the defense established a *prima facie* case under *Batson* with respect to the removal of juror Martinez and asked the prosecutor for a response to the challenge. The prosecutor responded that he was "waiving the rest" of his peremptory strikes. The district court was not satisfied with this race-neutral explanation for the removal of juror Martinez and instructed the clerk to strike the next juror in line instead of juror Martinez. The prosecutor objected to the district court's conclusion that he intentionally discriminated against juror Martinez and eventually convinced the district court to reassess this *Batson* challenge.

The Supreme Court has held that when a party articulates a race-neutral reason for a challenged strike and the trial court proceeds to the last step of the *Batson* inquiry to determine whether the party intentionally discriminated in making the strike, the initial question of whether a *prima facie* showing was established is moot before the reviewing court. *Hernandez v. New York,* 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion). In reaching this holding, the Supreme Court relied on an earlier decision in the Title VII employment discrimination context. *United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 715, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983). In *Aikens,* the Supreme Court concluded that when "the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant." *Id*

In *Aikens,* as in the case at hand, the district court initially concluded that a *prima facie* case of intentional discrimination had been established, but later returned to this question instead of focusing on the ultimate inquiry of racial discrimination *vel non.* *Id* at 714-15 & n. 4, 103 S.Ct. 1478. The Supreme Court held that once the district court had found a *prima facie* case and required the challenged party to proffer a race-neutral explanation, "the factual inquiry proceeds to a new level of specificity" and the district court must decide the ultimate issue--the existence or not of discriminatory intent. *Id.* at 715, 103 S.Ct. 1478 (internal quotations and citation omitted). Esparza-Gonzalez argues that this holding applies with equal force to the *Batson* context and to his challenge to juror Martinez's removal. We agree. Once the district court found that the removal of juror Martinez violated *Batson,* it could not reevaluate this finding of intentional discrimination-- even during the ***907** same hearing--based simply on a reassessment of the strength of the initial *prima facie* case. *See Durant v. Strack,* 151 F.Supp.2d 226, 242 (E.D.N.Y.2001) (holding that once the trial court made a preliminary finding of discriminatory intent, the court could not revert to step one of the *Batson* analysis to reevaluate whether a *prima facie* case had been established). To allow juror Martinez's removal, the district court would have had to reverse its earlier conclusion that the prosecutor intentionally discriminated against her. Accepting anything less would run afoul of the Supreme Court's decisions in *Hernandez* and *Aikens*

We disagree with Esparza-Gonzalez's contention that this error on the part of the district court is structural and requires reversal of his conviction. As the Supreme Court did in *Aikens,* we remand to the district court for a determination of the ultimate *Batson* issue--was the removal of potential juror Martinez the result of intentional discrimination--with Esparza-Gonzalez bearing the burden of persuasion. We realize, of course, that the district court at one point did conclude that there had been intentional discrimination. However, because the court later withdrew that determination, we think the best course of action is to remand to the district court.

II. Sentencing Challenge

[6] Esparza-Gonzalez argues that his Sixth Amendment rights were violated when the district

court increased his sentence by sixteen levels based on his prior conviction for drug trafficking, a fact not found by the jury convicting him for illegal re-entry. The Supreme Court has made clear, however, that enhancements based on prior convictions need not be proven beyond reasonable doubt by a jury or admitted by the defendant to satisfy the Sixth Amendment. *United States v Booker,* 543 U.S. 220, 125 S.Ct. 738, 748-49, 160 L.Ed.2d 621 (2005).

[7] Esparza-Gonzalez seeks a remand based on the fact that he was sentenced under the mandatory sentencing regime. *See United States v. Moreno-Hernandez,* 419 F.3d 906, 916 (9th Cir.2005) ("We conclude that defendants are entitled to limited remands in all pending direct criminal appeals involving unpreserved *Booker* error, whether constitutional or nonconstitutional."). We therefore REMAND Esparza-Gonzalez's sentence in accordance with the limited remand procedures in *United States v. Ameline,* 409 F.3d 1073, 1084 (9th Cir.2005) (en banc).

CONCLUSION

Based on the foregoing discussion, we REVERSE the district court's finding that the defendant failed to establish a *prima facie* case of discrimination with respect to juror Lopez and REMAND to the district court to determine if a race-neutral explanation for the exclusion can be provided and if this explanation is merely pretext for discrimination. We also REMAND the challenge regarding juror Martinez for further proceedings to allow the district court to revisit its earlier determination as to whether intentional discrimination occurred contrary to *Batson* such that a new trial is merited. Lastly, we REMAND Esparza-Gonzalez's sentence to the district court.

Reversed in part and remanded in part.

422 F.3d 897, 05 Cal. Daily Op. Serv. 8075, 2005 Daily Journal D.A.R. 10,927

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Homicides, Capital Prosecutions, and Death Sentences in St. Louis County, Missouri, 1991-2018

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September 20, 2022

Introduction

I was asked by counsel for Kevin Johnson, a death row inmate, to explore the determinants of death sentencing in St. Louis County for the years 1991 through 2018, years which correspond largely to the tenure of a single prosecutor. The study examines 408 death-eligible cases,[1] and permits controls for statutory and non-statutory aggravating and mitigating factors, as well as illegitimate factors such as the race and gender of the defendants and victims. I examined the cases at each major procedural stage of the prosecution, in particular the decision to charge the crime as first-degree murder, the decision to give notice of intention to seek a death sentence, and the ultimate sentencing outcome. I conclude that defendants in White-victim cases faced a significantly heightened risk of progressing to the next stage, including ultimately receiving a death sentence. Further, these effects are principally driven by prosecutorial decisions that advance the case toward a first-degree murder conviction and penalty hearing. The effects persist after controlling for relevant aggravating and mitigating circumstances.

Qualifications

I am a political science professor with years of experience in the statistical study of public policy and criminal justice outcomes, including the death penalty in particular. I received my BA, MA, and PhD degrees from the University of Michigan (1980, 1983, and 1986). I have

[1] A case was included if the facts could have supported a conviction for first degree murder, whether or not charged as such, and at least one statutory aggravating circumstance.

been a faculty member since 1986 and have taught at the University of Iowa, Texas A&M University, Penn State University, and UNC-Chapel Hill, where I have held the Richard J. Richardson Distinguished Professorship in Political Science since my arrival in 2009. My research generally involves statistical analyses often based on originally collected databases. I have been fortunate to have received a number of awards for my work, including six book awards, awards for database construction, and so on. In 2017, I was inducted in the American Academy of Arts and Sciences.

In 2008, I published a book about the transformation in United States public attitudes and use of the death penalty based on the rise of the "innocence" argument about the possibility of errors in the system.[2] Since then, I have integrated the death penalty into my teaching and research. I regularly teach a course about the death penalty here at UNC-Chapel Hill; it enrolls over 300 students. In 2018, I published a book, *Deadly Justice: A Statistical Portrait of the Death Penalty*,[3] which presents a variety of statistical analyses of such things as the geographical concentration of the death penalty, its cost, the share of death sentences reversed or carried out, the time from death sentence to execution, public opinion, and other matters. This book draws from a database I constructed over many years, consisting of information about every execution in the United States since *Gregg v. Georgia* (1976). Since completing that book, I have also compiled a similar database of all US death sentences since *Furman v. Georgia* (1972), more than 8,000 observations. I have several published articles in scholarly journals and law reviews

[2] Baumgartner, Frank R., Suzanna L. De Boef and Amber E. Boydstun. 2008. *The Decline of the Death Penalty and the Discovery of Innocence*. New York: Cambridge University Press.

[3] Baumgartner, Frank R., Marty Davidson, Kaneesha R. Johnson, Arvind Krishnamurthy, and Colin P. Wilson. 2018. *Deadly Justice: A Statistical Portrait of the Death Penalty*. New York: Oxford University Press.

using this database and analyzing the same questions as I address in my report: why do some death-eligible homicides result in a death sentence while most do not? My work in this area generally is statistical in nature. In a statistical analysis the question is to determine which factors correlate with death sentencing outcomes in bivariate as well as in multivariate analyses. That is what I have done here.

Overview of Data Collection Efforts

Data collection and coding was undertaken by staff attorneys at the Federal Community Defender Office for the Eastern District of Pennsylvania, Capital Habeas Unit, under my supervision. One of the attorneys, David Zuckerman, had experience in a comparable study conducted in Philadelphia. The data collection and coding procedures are more fully described in Appendix 2. By a review of police and court records described in Appendix 2, this team identified 408 crimes that met the statutory requirements for possible capital prosecution. From these 408 cases, 29 eventually resulted in a death sentence.[4] My analysis focuses on what distinguishes the vast bulk of death-eligible cases that did not lead to a death sentence and the seven percent that did.

Description of dataset

During the period of study, 408 death-eligible crimes were committed in St. Louis County. The dates of the crimes range from January 5, 1977[5] to April 25, 2018 and the dates of death sentencing range from January 15, 1991 to January 3, 2020. These dates were selected to ensure that some aspect of the capital prosecution, or decision not to prosecute capitally, was

[4] This figure includes retrials where the initial conviction or sentence was reversed on appeal.

[5] In a few cases the defendants were not arrested until several years after the commission of the offense, thus falling within the period studied.

during the period from January, 1991 through December, 2018, the tenure of a single prosecuting attorney.

Of the 408 cases identified for study, 329 offenders were Black and 79 were White[6]; female offenders numbered 15, and males were 393. There were 461 victims in these crimes; 310 were Black and 145 were White;[7] 315 were male and 141 were female; by race and gender the numbers were: 226 Black males; 84 White males; 82 Black females, and 59 White females.[8] So, almost 80 percent of the offenders were Black, as were two-thirds of the victims. Black males constituted almost half of all the victims. Similarly, two-thirds of the victims were male. White female victims were just 13 percent of the total. Males represent 96 percent of the offenders.

Most offenders had just a single victim; 89 percent. There were 39 cases with two victims, four with three, and two cases with four victims. Two-thirds of all the cases had at least one Black victim (277 cases); one-third had at least one White victim (128 cases); a similar percentage had at least one female victim (131 cases); and 14 percent had at least one White female victim (57 cases).

Analysis

My analysis proceeds in several sections. First, I show the most important and simplest result: of the 408 eligible cases, 29 resulted in death, and these 29 cases were much more likely to involve White victims rather than Black victims. In fact, 14 percent of White-victim cases resulted in a death sentence compared to four percent of the Black-victim cases. Second, I look at

[6] Hispanic heritage is listed separately in the database, but only three offenders were clearly identified as Hispanic. Because of these low numbers, I have excluded the Hispanic heritage variable and concentrate only on race.

[7] Four victims were Asian.

[8] The race-gender counts exclude victims with races other than White or Black.

seven different stages of the capital punishment process, several of which are under the unilateral control of the prosecuting attorney's office. I document the number of cases that proceeded to each stage of the process, and the share of these cases involving Black v. White victims. This shows a consistent pattern, especially in those stages where many cases are filtered out. These results show that much of the filtering occurs at stages that are under the complete control of the prosecutor. Third, I assess the importance of various statutory aggravating and mitigating factors. The result demonstrates that certain aggravators are in fact connected with *reduced* odds of death, and some mitigators are in fact associated with *increased* odds of death, though others show powerful trends in the ways in which one would expect (e.g., aggravators adding to the odds of death, and mitigators reducing it). Thus, this section shows mixed and confusing results about how statutorily defined mitigating and aggravating factors work in practice. Fourth, I present the results of a multivariate statistical analysis in which I consider the weight of the statutory factors as well as race-of-offender and race-of-victim effects. These results show that the bivariate analyses are highly robust. Racial factors, particularly the presence of White victims, have an important influence on death sentence outcomes even in a model simultaneously considering relevant statutory factors as controls. Further, it shows that statutory mitigators and aggravators often do not work as the law suggests they might. Finally, I conclude with my overall assessment and interpretation of what this analysis shows.

White-victim Cases are 3.5 Times as Likely to Lead to a Death Sentence as Black-victim Cases

Table 1 displays the numbers and percentages of White- and Black-victim cases resulting in a sentence of death. The Table excludes four observations with no Black or White victims, and shows that 29 of the 405 remaining cases, or 7.2 percent, led to death. Among the 277 cases with

Black victims, this percentage was 4.0; among the 128 cases with White victims, it was 14.1 percent.

Table 1. Death-Eligible Crimes Leading to a Sentence of Death or Execution, by Victim Race

	Victims Black		Victims White		Total	
Death Sentence?	N	%	N	%	N	%
No	266	96.0	110	85.9	376	92.8
Yes	11	4.0	18	14.1	29	7.2
Total	277	100.0	128	100.0	405	100.0

Note: Chi-sq. (1) = 13.41, prob. < 0.000. The N here is 405 rather than 408 because three cases involved victims of other races and are excluded. White-victim cases are those where at least one victim is White. There were 145 White victims overall, but these came from 128 homicide incidents. Similarly, Black-victim cases are defined as those where no victims were White but there were any Black victims; there were 277 such cases, though there were 310 Black victims overall. There was only one case with both White and Black victims; this was coded as a White-victim case. (It did not lead to a death sentence.)

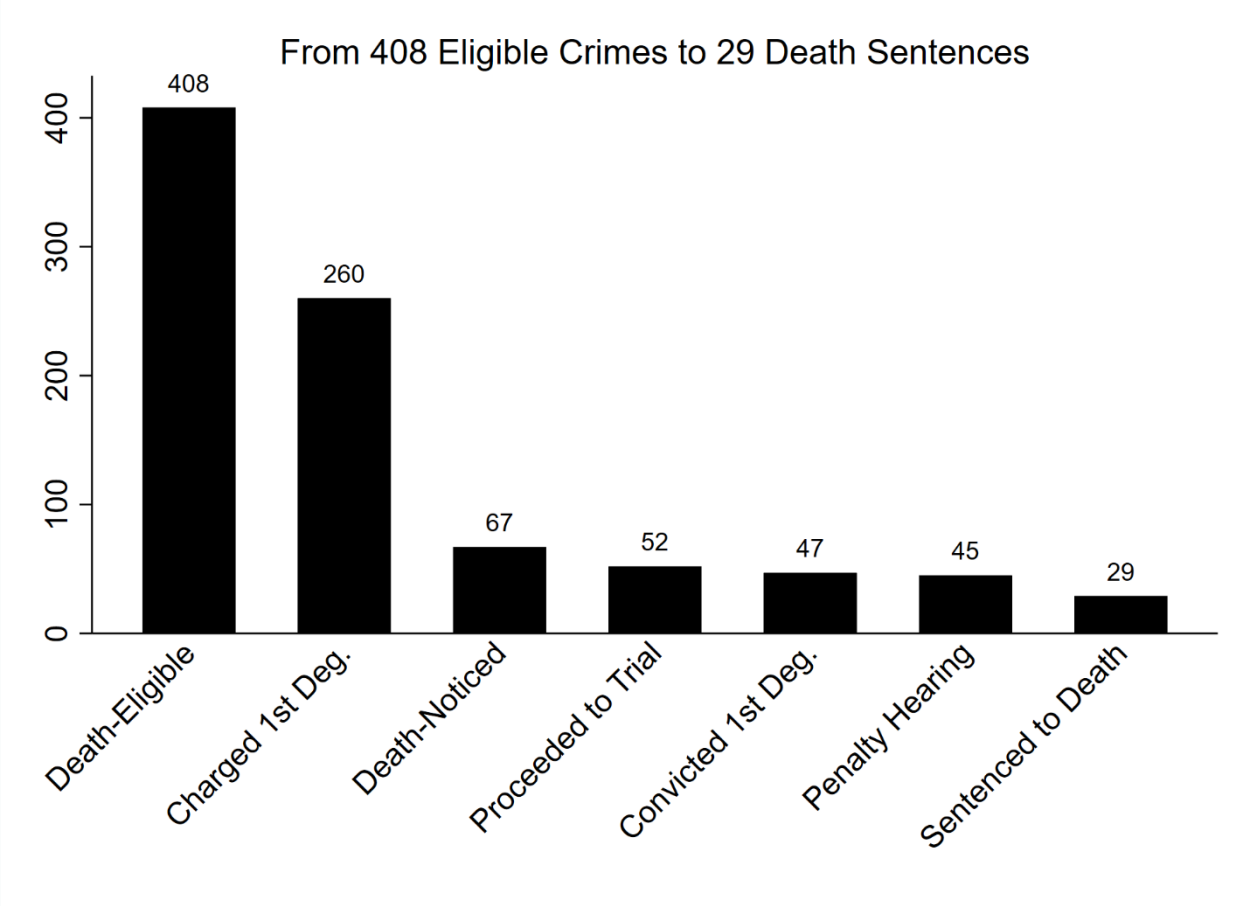
The cleanest comparison is simply this: Black victim cases have a 4.0 percent chance of leading to a death sentence; White-victim cases see a 14.1 percent chance. The ratio of these two rates is 3.5. White-victim cases are 3.5 times as likely to lead to a death sentence than Black victim cases.

Table 1 clearly shows the most important finding of this report. In the next section, I assess which stages of the capital punishment process may be contributing to these trends more than others, and in later sections I assess whether these findings can be "explained away" by other factors such as the facts of the crime that might simply happen to correlate with race of victims, rendering the relationship in Table 1 a spurious one. To foreshadow my conclusions, I do not find spuriousness. Table 1 is an accurate summary of a serious problem.

Stages of the Capital Punishment Process

Figure 1 shows how many cases proceeded down the capital prosecution path and how far.

Figure 1. The Stages of the Capital Punishment Process.

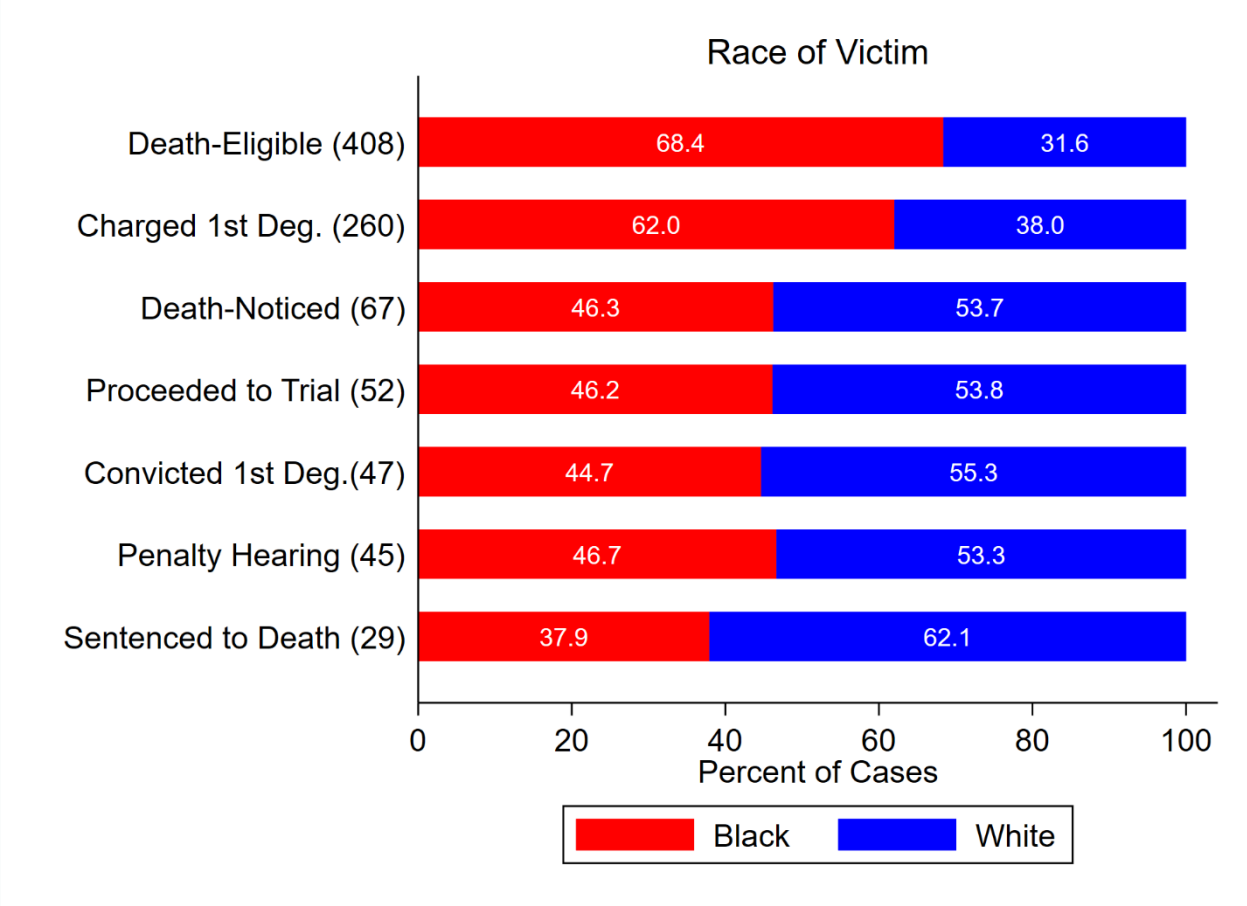


Beginning with 408 death-eligible crimes, we see 260 that were charged as first-degree murder; 67 that were the subject of a death notice, and so on until there were 29 cases that resulted in a sentence of death. The baseline rate of death sentencing is therefore 29 / 408, or 7.1 percent. (Many additional homicides occurred that were not death-eligible.)[9]

Figure 2 shows a powerful pattern. It compares, for each of the 7 stages identified in Figure 1, the shares of Black and White victims. As discussed in the previous section, just three individuals had unknown or other races, and these are excluded from Figure 2. Therefore, each stage sums to 100 percent of the cases and the colored bars clearly indicate the percentages of cases involving victims who were White and Black.

[9] Involuntary and vehicular manslaughter cases were excluded at the outset. Of the remaining non-negligent homicides, approximately 75% were coded as death-eligible.

Figure 2. Increasing Share of White-victim Cases across the Stages of Capital Prosecution.



The further we go down the path to a death sentence, the greater the share of cases with White victims. Figure 1 shows that the most dramatic reductions in the numbers remaining on the path toward capital punishment come in the first two stages: charging the case as a first-degree crime, and issuing a death-notice. Figure 2 shows that these two stages correspond as well with the greatest proportionate increase in the share of White-victim cases. Starting at the top, among all 408 death-eligible crimes in the database, White-victim cases constitute 31.6 percent of the total. At almost every stage of the process, however, their share increases until, at the end of the process, we see 62 percent White-victim cases. By the time we are at stage three, among the 67 death-noticed cases, this number is 53.7 percent. White-victim cases are a minority of the cases overall, and among those charged first-degree. However, they are a majority of those receiving a death-notice and at each following stage. In fact, the first two stages of the process,

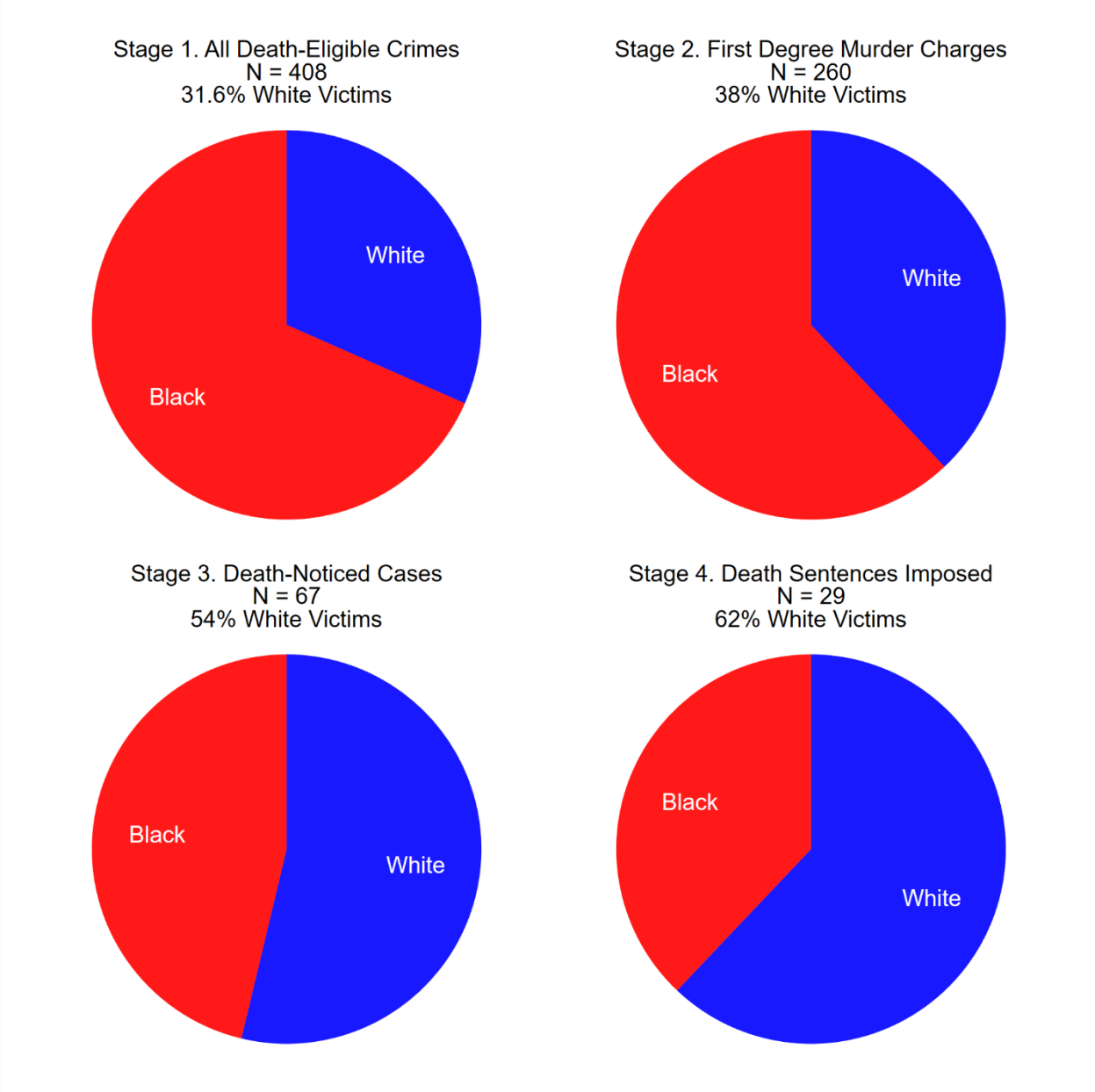
charging first-degree and issuing a notice of intent to seek death, which are under the unilateral control of the prosecuting attorney, show the greatest movement toward White-victim cases; these grow in share from 31.6 to 38 percent at the first stage, then again to 54 percent at the stage of death-noticing. (This is a 70 percent increase: 53.7 / 31.6 = 1.70.) These trends are then further accentuated in the last stage, but the vast majority of the filtering, from 408 cases down to just 67, has been done by the prosecuting attorney's office and has resulted in a pool of death-noticed cases that are distinct from the original pool because the White-victim cases are differentially selected for capital prosecution.

In the middle stages, from the 67 death-noticed cases to the 45 cases proceeding to a penalty hearing, there is little filtering, and the percentage of cases with White victims therefore remains relatively constant (around 55). However, in the final stage, there is much more filtering, and the White-victim effect becomes much more pronounced again. The 29 individuals sentenced to death differ from the 45 with a penalty hearing in that they have a higher share of White victims. The last stage moves us from 53.3 percent White victims to 62.1 percent, almost completely reversing the racial characteristics of the system in the first stage. From a racial split that starts out as approximately 68 percent Black / 32 percent White, the system produces a final result that is 38 percent Black and 62 percent White.

The steady progression of the White-victim percentages across all the stages of the process, and the more rapid increases in this share when the numeric filtering is at its greatest suggest that race-of-victim effects are constant throughout the capital punishment process from beginning to end. Wherever there is significant numeric filtering, the White-victim effect becomes stronger.

Figure 3 illustrates this filtering very clearly. It presents a series of pie-charts where the blue slice of the pie represents White-victim cases and the red slice represents cases with Black victims. The blue slices grow while the red slices diminishes as we move through the process. For simplicity, the Figure shows only four of the stages illustrated in Figure 2, those where the biggest changes occur both in numbers and in percentage White.

Figure 3. A Simplified Illustration of Race-of-Victim Effects across the Stages of Capital Prosecution.



In the first pie-chart, we see that the blue slice is 31.6 percent of the cases; it then grows to 38 percent, to 54 percent, to 62 percent at the sentencing outcome stage. If we look back at Table 1, which showed such powerful race-of-victim effects, then Figures 2 and 3 allow us to see that these biases are reflected in each of the most important stages of the capital prosecution system, with each successive stage adding to a system that, in its entirety, ends up with the

results so clearly summarized in Table 1, more than 3.5 times the odds of death for those who have White victims compared to those with Black victims.

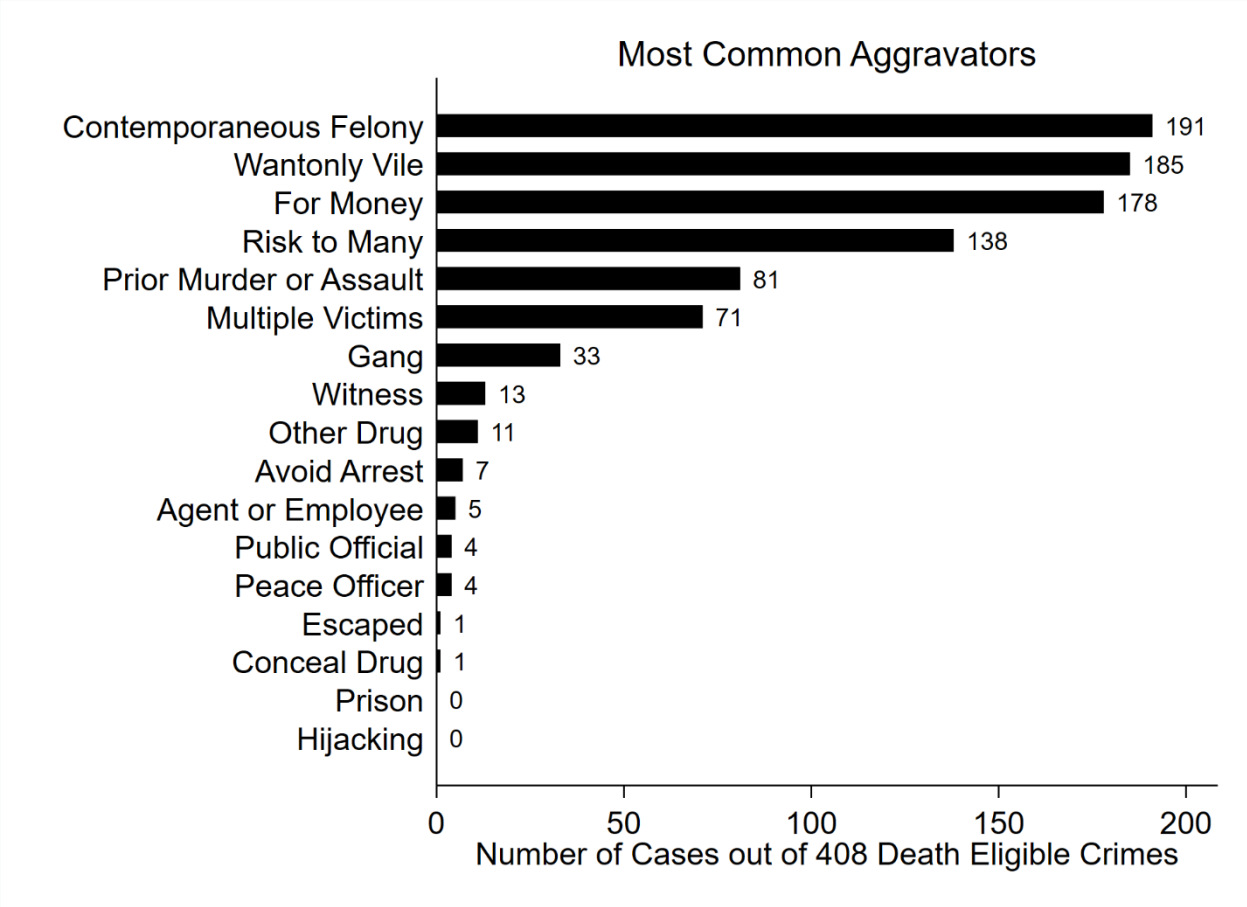
Possible Confounding Factors

It is possible, of course, that the crimes involving White victims differ in legally relevant ways from crimes associated with Black victims. Therefore, it is important to look at these issues in some detail.

One initial factor to consider is the number of victims. Table 1 showed that of the 29 death sentences imposed, 18 had White victims and 11 had Black victims. In the 11 cases with Black victims, 4 (36 percent) had multiple victims. In the 18 cases with White victims, just 2 (11 percent) had multiple victims. Having multiple rather than only a single victim is a significant predictor of a death sentence in Black-victim cases (just 3 percent of offenders with a single Black victim got death, whereas 17 percent of those with multiple Black victims did; chi-sq. = 11.9; prob. =.001). Among cases with White victims, on the other hand, 14 percent with a single victim got death and 18 percent of those with multiple White victims got death (chi-sq. = 0.17; prob. = .681, n.s.). This analysis suggests that the bar is higher in Black-victim cases. Black-victim cases rise to above the average death sentencing rate only if there are multiple victims whereas White-victim cases are higher than the 7 percent overall average even with only a single victim. In White-victim cases, there is no statistically significant pattern of increased odds of a death sentence for multiple-victim cases as compared to single-victim cases. A single White victim suffices. For Black-victim cases, there is a powerful pattern; multiple victims move the odds up substantially.

Missouri enumerates a number of statutory aggravating and mitigating factors, and we can look at each of these in turn.[10] Figure 4 shows the frequency of occurrence of each of the statutory aggravators.

Figure 4. Relative Frequency of Different Aggravating Circumstances.

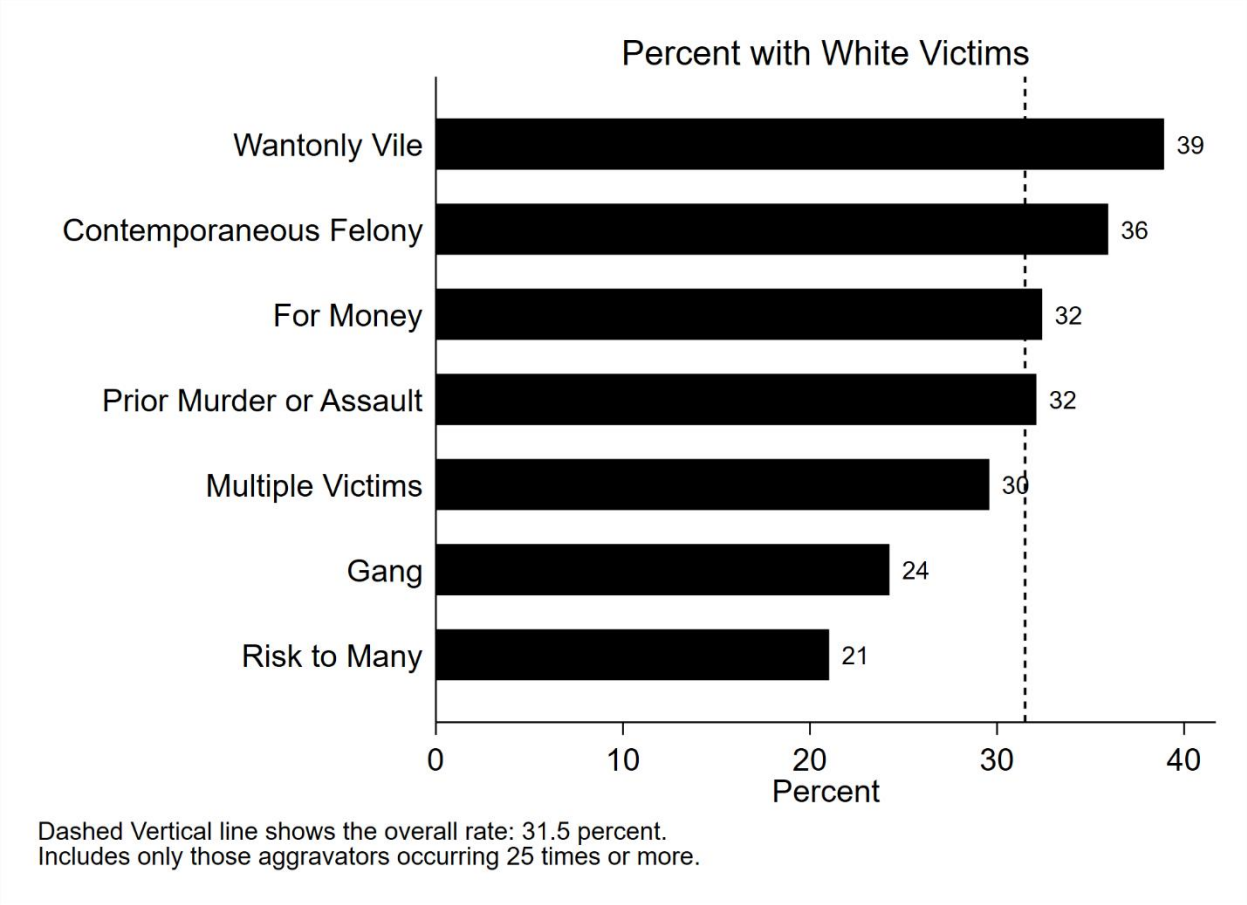


Of the 408 death-eligible cases, 191 had a contemporaneous enumerated felony; 185 had the "wantonly vile" aggravator; 178 had an aggravator associated with a monetary incentive for the crime, and so on. Note that several aggravators appeared not at all or only very rarely in the database. In the multivariate analysis section below, I focus my attention on those aggravators occurring more than 25 times, in order to ensure robust statistical results.

[10] See Appendix 1 for the full set of aggravating and mitigating factors.

Some aggravators are associated with White victims, and therefore could potentially affect the bivariate race-of-victim relationship shown above. Figure 5 shows, for each aggravating circumstance present in the database more than 25 times, the percent of those with that circumstance who had White victims. The Figure includes a dashed vertical at 31 percent, which represents the overall share of White victims. Bars that extend beyond that line show aggravating circumstances that are more likely than average to involve White-victim cases.

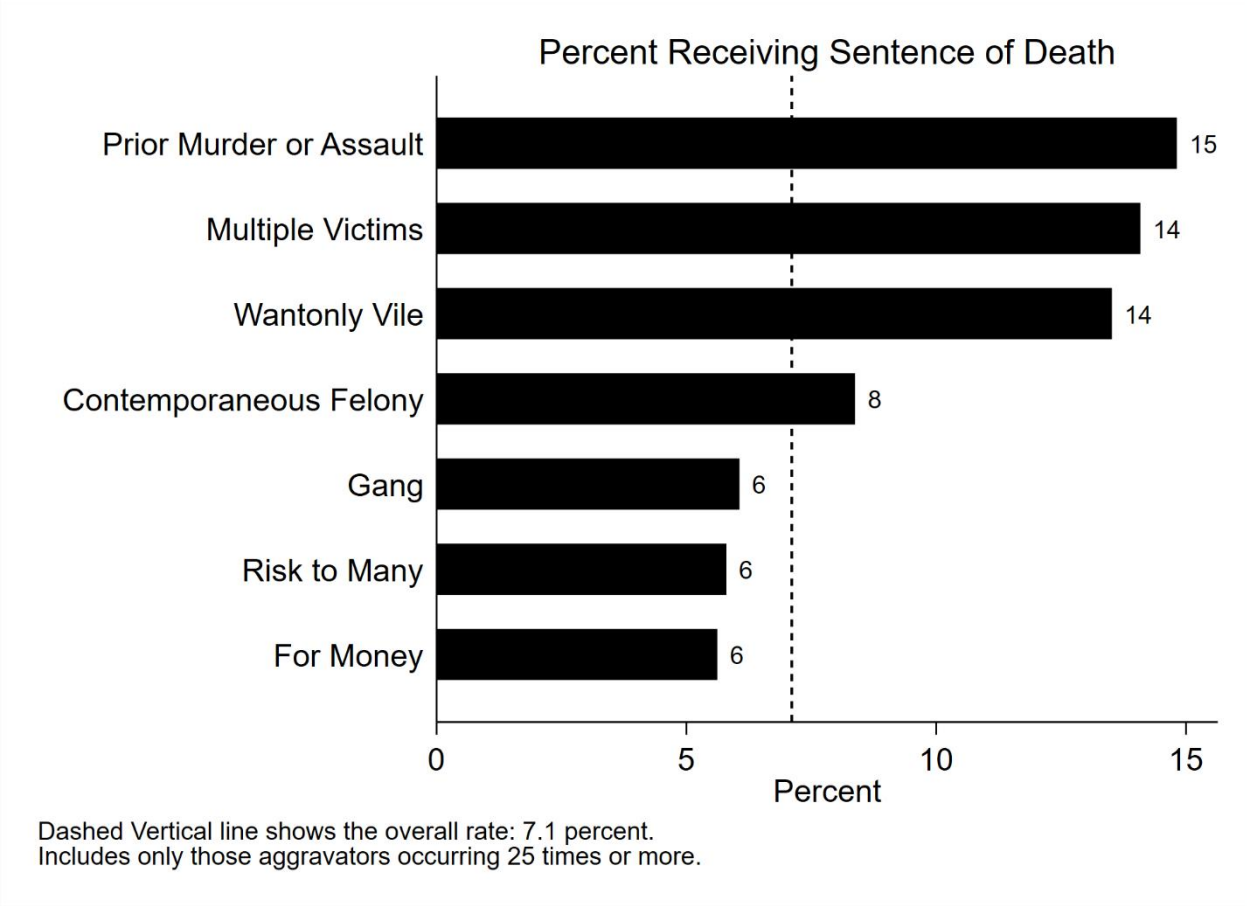
Figure 5. Percent of Cases with White Victims, by Aggravating Circumstance.



The wantonly vile and underlying felony aggravators are slightly more likely than average to include White victims. Gang-related and "risk-to-many" aggravators are more common in cases with no White victims.

Figure 6 shows the percent of cases receiving death in a similar format to Figure 5. The dashed vertical line at 7 percent represents the overall rate of death-sentencing.

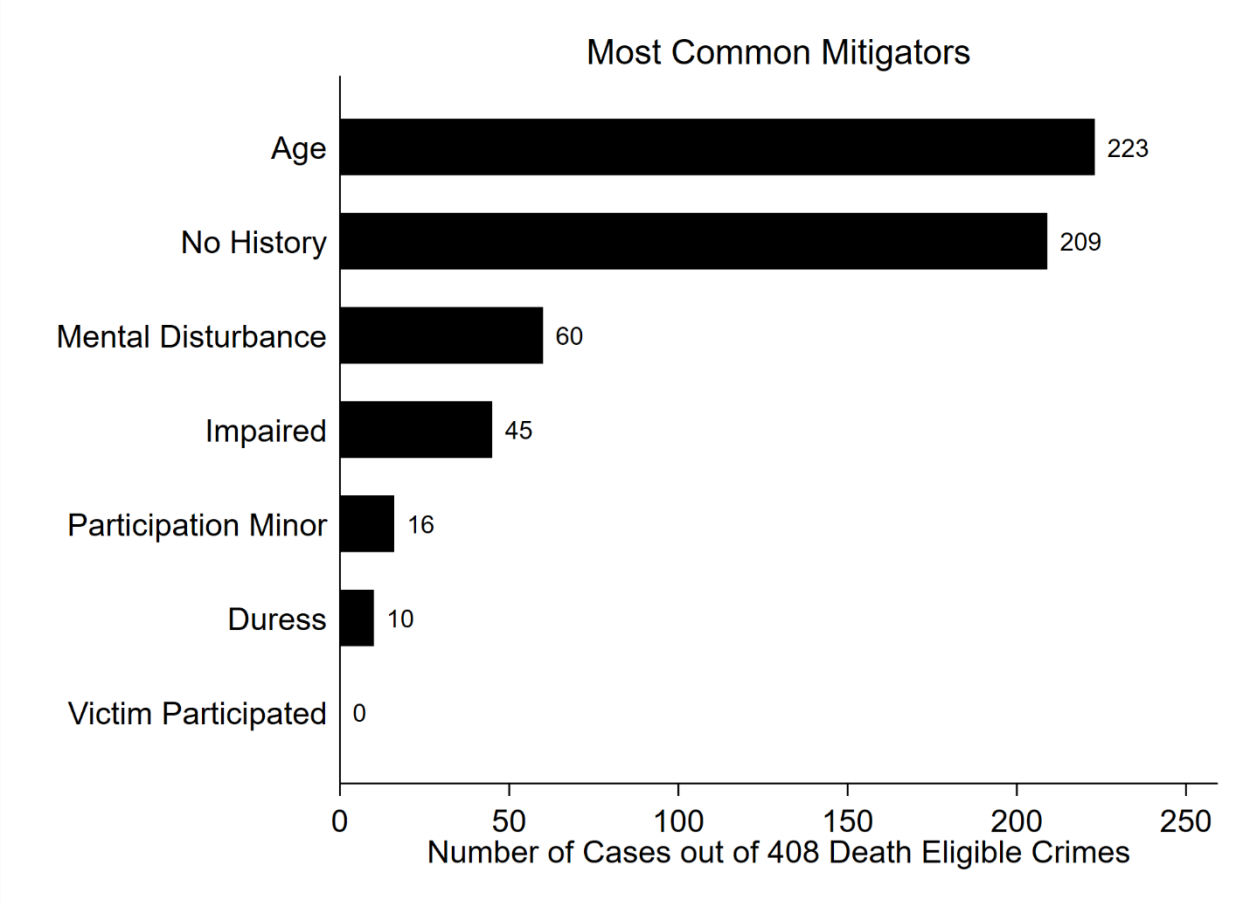
Figure 6. Percent of Cases Leading to a Death Sentence, by Aggravating Circumstance.



Cases with a prior conviction for murder or felony assault, multiple victims, and the wantonly vile aggravator are approximately twice as likely to lead to a death sentence as the average case. Recall from Figure 4 that these are also relatively common aggravators: 71 cases had multiple victims; 81 had a prior murder or serious assault; and 185 had the wantonly vile aggravator.

Figure 7 shows the frequency of different mitigators, and Figure 8 shows the percent of cases with each mitigator leading to a death sentence.

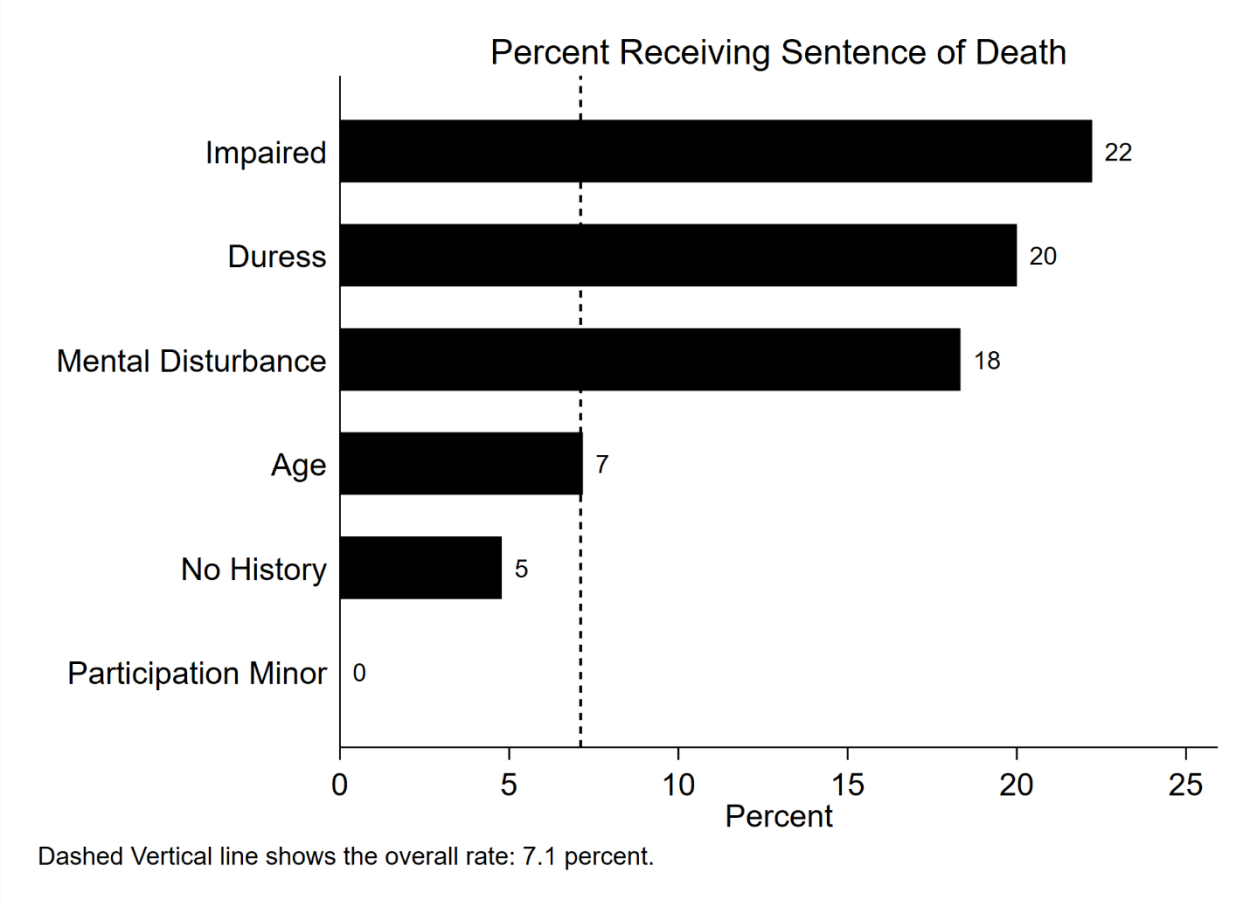
Figure 7. Relative Frequency of Different Mitigating Circumstances.



The youthful age mitigator is present in more than half the cases, as is "no significant criminal history."[11] Mental disturbance and impaired capacity are present in smaller numbers (60 and 45 cases, respectively), but note that evidence of such factors may not be developed until and unless the prosecution goes down the path toward a death sentence. For example, if a crime is not charged as first-degree murder, or if it is not death-noticed, funding for experts to establish these mitigating factors is typically less forthcoming. Therefore, we do not know the actual rate that these factors may be objectively present. Rather, we focus on factors *known* to the decision-makers.

[11] We exclude from Figure 7 the "catchall" mitigator, which is present in virtually every case.

Figure 8. Percent of Cases Leading to a Death Sentence, by Mitigating Circumstance.



Three mitigators, including two of those just discussed, are highly associated with death, but in the wrong direction. That is, even though they are legally identified as mitigating factors, they increase, rather than decrease, the odds of death in this empirical analysis. Impaired capacity, emotional duress, and mental disturbance are statutory mitigators, but they statistically correlate with up to three times increased likelihood of a death sentence compared to the typical case. Again, this is likely a consequence of these factors being over-represented in the late stages because they were previously undiagnosed, and thus do not appear in the record unless the case is death-noticed and funds for the full development of mental health mitigation becomes available. Nonetheless, they represent anomalous findings. Youthful age, a statutory mitigator, has no effect in a mitigating direction, though no significant criminal history has a slight mitigating effect. There were no cases sentenced to death where the "minor participation" in the

crime was evident in the case record. This would be an example of a mitigator working as the law intends.

Multivariate analyses

As described above, the unadjusted data shows a strong race-of-victim effect at virtually every decision-point in the process. The result is an ever-increasing pool of White-victim cases as they progress toward a potential death sentence. Some of these trends could potentially be explained by the legally relevant aggravating and mitigating factors described in the previous section, however. So, I turn to a multivariate logistic regression analysis to assess whether the White-victim effect remains powerful and statistically significant in a model that simultaneously considers the aggravators and mitigators just described. I first focus on death-sentence outcomes and second present models predicting which cases are charged first-degree and which receive a notice of intent to seek death. These are the three main filters in the process.

Table 2 presents four models assessing which cases lead to a death penalty. Coefficients in the model are odds-ratios, meaning that the number shows the degree to which the factor in question (e.g., White Victim, in the first row of the table) increases or decreases the odds of death compared to a baseline (e.g., no White victim). Odds-ratios of 1.00 indicate no effect (e.g., identical odds); a value of 2.0 would indicate that the variable in question doubles the likelihood of the outcome compared to the baseline, and a value of 0.5 would mean that it cuts the odds in half.

Table 2. Predicting Death Sentences.

	Model 1 All Aggs and Mits Occurring 20 Times or More	Model 2 Restricted Model	Model 3 White and Black Victims Counted Separately	Model 4 Simplified: Number of Aggs and Mits Only
White Victim	3.344**	3.717**		3.547**
	(1.489)	(1.577)		(1.469)
Prior Murder / Assault	3.539*	3.641**	3.021**	
	(1.887)	(1.580)	(1.254)	
Multiple Victims	25.84***	12.57***		
	(21.07)	(8.682)		
Great Risk	0.354			
	(0.214)			
Money	0.616			
	(0.336)			
Vile	9.394**	8.120**	3.377**	
	(6.419)	(5.291)	(1.455)	
Felony	1.690			
	(0.885)			
Gang	1.648			
	(1.418)			
No History	0.769			
	(0.413)			
Offender Age	2.093			
	(0.967)			
Number of White Victims			3.459**	
			(1.340)	
Number of Black Victims			1.848	
			(0.769)	
Number of Aggravators				1.682***
				(0.243)
Number of Mitigators				1.169
				(0.214)
N	408	408	408	408
pseudo R^2	0.231	0.198	0.117	0.128
Predicted Probabilities				
No White Victim	.044	.042	NA	.042
White Victim	.117	.125	NA	.127

Note: Predicted probabilities not calculated for Model 3. Exponentiated coefficients; Standard errors in parentheses. * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$. NA: Not Applicable.

The first model in Table 2 presents the White-victim variable as well as every aggravator that appears in the database more than 25 times and the two most common mitigators.[12] This can be considered a baseline model. The second model eliminates those aggravators and mitigators that appear to have little effect; this allows us to focus on the most important explanatory factors. The third model drops the "multiple victims" aggravator and adds instead separate counts for the numbers of White and Black victims. This allows an assessment of any racial differences in that crucial control variable, multiple victims. Finally, the fourth model presents a very simplified model, one including only the White-victim variable and simple numeric counts of how many aggravators and mitigators were present. Finally, at the bottom of the Table, I present a set of predicted probabilities. These illustrate the bottom-line results: Holding constant all the other factors in the model, what proportion of cases with and without a White victim would be expected to receive a penalty of death?

The key element to see in Table 2 is that the odds ratios in the top row of the Table, for White Victim, are both consistent and high, ranging between 3.3 and 3.7. Similarly, the predicted probabilities in the bottom row show consistent movement from approximately a four percent chance of death for cases without a White victim, to 11 or 12 percent for those with such a victim. This movement, from 4 to 12 percent, represents almost the same ratio that we saw in Table 1. Thus, the multivariate analysis results are highly consistent and confirm the simple comparisons laid out in Table 1. The most important result from this analysis is the very powerful White-victim effect, consistently leading to results suggesting 3 to 4 times the rate of use of the death penalty in such cases compared to those with Black victims. In effect, the

[12] Figure 7 shows a large drop-off in observations with the different mitigators, and inclusion of mitigators with few observations produces no substantive changes in the results but renders the analysis less stable. Note that most coefficients in Model 1 are insignificant. This pattern is even stronger in a version including additional mitigators.

presence of a White victim in a particular case acts as non-statutory and impermissible aggravating factor, with an influence on capital sentencing comparable to the defendant's status of having a prior conviction of first-degree murder or felonious assault.

Models 1 and 2 show the great impact of the multiple victim aggravator, and the wantonly vile aggravator is also an important predictor. Model 3 breaks out the victims by race, and it shows an important finding: The number of White victims has a higher odds-ratio than the number of Black victims (3.459 v. 1.848) and the White-victim coefficient is statistically significant whereas the Black-victim coefficient is not. The number of Black victims has less of an impact than the number of White victims, and indeed its coefficient is insignificant. This suggests that the results from the main model for the multiple victims aggravator are driven by the number of White victims, not Black ones. Finally, Model 3 is the simplest, including no particular aggravators or mitigators, but rather a simple count of how many such factors are present. This shows a consistent finding for the White-victim variable and reinforces the idea from the previous analysis that aggravators matter quite significantly, but mitigators do not. The coefficient for the number of aggravators is large (1.682) and highly significant; by contrast the coefficient for mitigators is wrongly signed, but not statistically significant. Note that if mitigators worked as one might expect (reducing the odds of a death sentence), then this coefficient would be less than 1.0. Similar to what was presented in Figure 8 above, some mitigators actually appear to drive up the odds of death, not reduce it. Overall, however, mitigators have little effect. Aggravators matter, but mitigators do not.

Table 3 presents two models each for the decision to charge with first-degree murder and to issue a death notice. In each case, I present a simple predictive model and then substitute

separate variables for the Number of White Victims and Number of Black Victims, rather than the Multiple Victims aggravator in the main model.

Table 3. Predicting Capital Charges and Death Notices.

	Model 1 Charged Capitally	Model 2 Charged Capitally, White and Black Victims Separate	Model 3 Death Noticed	Model 4 Death Noticed, White and Black Victims Separate
White Victim	2.176**		2.926***	
	(0.548)		(0.861)	
Multiple Victims	3.080***		8.892***	
	(1.002)		(3.788)	
Money	0.730	0.661		
	(0.164)	(0.146)		
Vile	2.669***	2.290**	6.800***	4.032***
	(0.692)	(0.579)	(2.624)	(1.234)
Offender Age	0.644	0.630*		
	(0.145)	(0.142)		
Number of White Victims		4.863***		5.802***
		(2.009)		(2.110)
Number of Black Victims		2.253*		3.118***
		(0.791)		(1.059)
Prior Murder/Assault			1.955*	1.643
			(0.660)	(0.544)
N	408	408	408	408
pseudo R^2	0.091	0.087	0.170	0.130
Predicted Probabilities				
Black Victim	.588		.117	
White Victim	.746		.254	

Exponentiated coefficients; Standard errors in parentheses. * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

Models 1 and 2 relate to the decision to charge the case as first-degree murder. Recall from Figure 1 that 260 cases out of the 408 were so charged. Results here show consistently significant White-victim effects. There are also consistently significant effects for the wantonly vile aggravator. Multiple victims matter as well, but Model 2 shows that this may be driven largely by the number White victims, not Black ones. Models 3 and 4 present similar models with similar results for the decision by the prosecuting attorney to issue a death notice in the case. (Figure 1 showed that there were 67 such cases.)

White victims again consistently drive the decisions, even controlling for legally relevant factors. When looking at White and Black victims separately, in Models 2 and 4, odds increase by 4.9 to 5.8 for each White victim, but only by about half that (2.3 to 3.1) for each Black victim. Predicted probabilities show a similar story: These go from 58.8 percent seeing first-degree murder charges with non-White victims to 74.6 percent in cases with White victims, and from 11.7 percent to 25.4 percent for the question of issuing a death notice. Thus, the results from Table 3 are largely consistent with those from Table 1 and suggest powerful and consistent White-victim effects at three important stages of the process: the decision to charge the case as a first-degree murder, the decision to give notice of intention to seek death, and the ultimate sentence.

Conclusions from data analyses

Table 1 shows that 4.0 percent of cases with Black victims and 14.1 percent of cases with White victims led to a sentence of death; White-victim cases are therefore 3.5 times as likely to be associated with a death sentence. After considering a range of legally relevant factors in a multivariate analysis, this disparity is confirmed. Depending on the precise specification of the model, results are consistently in the range of 3.3 to 3.7, almost exactly what they were in the simple presentation of Table 1.

I conclude:

- In the prosecution of death-eligible homicides in St. Louis County for the years studied there are strong race-of-victim effects at multiple key stages of the prosecution.

- The effects are particularly pronounced at two decision-points attributable solely to the prosecutor, the decision to charge the case as a first-degree murder and the decision to give notice of intention to seek death.

- The ultimate likelihood of receiving a death sentence if the victim is White is approximately 3.5 times the likelihood of a death sentence in cases where the victim is Black.

- These effects persist after the introduction of controls for aggravating and mitigating factors, meaning that these disparities cannot be explained by legitimate case characteristics.

Frank R. Baumgartner
University of North Carolina at Chapel Hill
September 20, 2022

Appendices

Appendix 1. List of Aggravating and Mitigating Factors

Aggravating Factors

Mo. Rev. Stat. § 565.032.2(1) ("The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions.") (prior felony assault).

Mo. Rev. Stat. § 565.032.2(2) ("The murder in the first degree was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide[.]") (multiple homicides)

Mo. Rev. Stat. § 565.032.2(3) ("The offender by his 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[.]") (great risk).

Mo. Rev. Stat. § 565.032.2(4) ("The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another[.]") (for money).

Mo. Rev. Stat. § 565.032.2(5) ("The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty[.]") (public official).

Mo. Rev. Stat. § 565.032.2(6) ("The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person[.]") (agent or employee).

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[.]") (wantonly vile).

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 official duty[.]") (peace officer).

Mo. Rev. Stat. § 565.032.2(9) ("The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement[.]") (escaped custody).

Mo. Rev. Stat. § 565.032.2(10) ("The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another[.]") (avoiding arrest).

Mo. Rev. Stat. § 565.032.2(11) ("The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195, RSMo[.]") (contemporaneous enumerated felony).

Mo. Rev. Stat. § 565.032.2(12) ("The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness[.]") (witness killing).

Mo. Rev. Stat. § 565.032.2(13) ("The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility[.]") (corrections officer or inmate).

Mo. Rev. Stat. § 565.032.2(14) ("The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance[.]") (hijacking).

Mo. Rev. Stat. § 565.032.2(15) ("The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195, RSMo[.]") (concealing drug crime).

Mo. Rev. Stat. § 565.032.2(16) ("The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195, RSMo[.]") (other drug crime).

Mo. Rev. Stat. § 565.032.2(17) ("The murder was committed during the commission of a crime which is part of a pattern of criminal street gang activity as defined in section 578.421[.]") (gang activity).

Mitigating Factors

Mo. Rev. Stat. § 565.032.3 ("(1) The defendant has no significant history of prior criminal activity") (no significant history).

Mo. Rev. Stat. § 565.032.3 ("(2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance") (extreme mental or emotional disturbance).

Mo. Rev. Stat. § 565.032.3 ("(3) The victim was a participant in the defendant's conduct or consented to the act") (victim participated or consented).

Mo. Rev. Stat. § 565.032.3 ("(4) The defendant was an accomplice in the murder in the first degree committed by another person and his or her participation was relatively minor") (participation minor).

Mo. Rev. Stat. § 565.032.3 (“(5) The defendant acted under extreme duress or under the substantial domination of another person”) (extreme duress).

Mo. Rev. Stat. § 565.032.3 (“(6) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired”) (capacity impaired).

Mo. Rev. Stat. § 565.032.3 (“(7) The age of the defendant at the time of the offense”) (age)

General mitigating circumstance instruction MAI CR 313.44B.8 (catchall)

Appendix 2. Data Collection Procedures

DATA SOURCES

There were two stages to the research / data collection stage. In a first stage, cases were reviewed to determine if the crime included facts that could have supported a capital prosecution. Cases that did not meet this criterion were eliminated from further review. In the cases that did have facts supporting a possible capital prosecution, the following sources were used to compile a full case record for statistical analysis. These are the same sources that were used to make the determination of whether a particular crime was death-eligible. Note that our review of court records and other sources included hundreds of cases not included in the final database. The final database included only those 408 cases where the crime was deemed to be death-eligible based on our review of the facts and record.

Trial Court reports

Trial judges are required to complete and submit reports on all cases resulting in a first degree conviction. We obtained a number of these by canvassing homicide practitioners. The balance we obtained from the Missouri Supreme Court. Although compliance was not 100% the reports were an important source for demographic information, such as age, race and gender, and presence of aggravating and mitigating circumstance. They also contained summaries of the defendant's family background, employment history, education attainment, prior criminal record, and mental health history, if any. Often, a presentence investigation report is attached which typically provides a detailed life history. It also reports aggravating circumstance instructed and found, and summarizes non-statutory aggravation. It similarly reports statutory and non-statutory mitigating factors. A number of questions about the victim are included as well.

Case.net

Missouri case.net provided a host of key procedural variables. For more recent cases, registered users have access to most of the pleadings, orders, and opinions. These included: the initial homicide charges and any contemporaneous offenses; whether notice of aggravating circumstances was filed; whether counsel was the public defender or court appointed, or privately retained, whether the case proceeded to trial (before a judge or jury), or by plea (negotiated or "blind"); charges convicted of; whether the case proceeded to a penalty hearing, and the ultimate sentence. The docket, and associated pleadings if available, often provided other important information such as motions to suppress confessions and identification, challenges to aggravating circumstances, and possible competency considerations. Case.net was also a principal source of prior record of the defendant for cases where no trial court report was prepared.

PACER

A number of defendants who opted for a trial sought habeas corpus relief in the federal district court if their state court appeals were unavailing. These filings and responses were available online through PACER (Public Access to Court Electronic Records)

Court files

For a subset of the cases we obtained the full court files, either hard copy including transcripts of the proceedings, or for the more recent cases, the pleadings as available through case.net (which did not include transcripts). These often augmented the procedural information otherwise reflected in the dockets, or helped clear up any ambiguities. Court filings were particularly useful for coding strength-of-evidence variables as they would expose vulnerabilities in the state's case. Some contained police reports and presentence investigations. They also often contained copies of exhibits. Transcripts of the penalty phase were consulted for the defendant's life history variables.

Hard-copy of appellate records were available through the Missouri State Archives. These files also included key portions of the trial record, filed by the appealing party. For a significant number of the trial cases, including those where the briefing was unavailable on Westlaw, we obtained copies of key documents from the Archive.

Police reports

The police reports were obtained through the Missouri open records provisions. St. Louis County has approximately sixty independent police forces, each with their own application procedures. Compliance was generally good. Some were unavailable because they could not be located, were subject to a statutory exemption. Certain of the smaller forces failed to comply in a timely manner.

The reports provided a host of useful data. The reports, while generated in individual police forces, were largely uniform in design. They provided the key demographic variables of race and gender of the defendants and victims. The reports allow for reporting of occupation and marital status, although reporting on these variables were inconsistent. They were a rich source of information for the strength-of-evidence variables. They contained summaries of witness statements, results of any identification procedures, statements by defendant to others or the police, results of forensic investigations such as fingerprints, DNA and ballistics. They also included a summary of the medical examiner's reports, which allowed a fine level of detail of the brutality of the homicide. The reports were particularly useful in cases which were resolved by plea as these cases rarely generate transcripts or appeals.

Westlaw

Virtually all the trial cases generated a record on appeal. The death cases resulted in reported opinions of the Supreme Court of Missouri, which usually summarized key facts. For the non-death cases; the majority were heard by the Missouri Court of Appeals, which has jurisdiction in non-death appeals. A large number were were resolved by summary denials, with opinions generated for distribution solely to the parties. However, in a significant number of cases, the briefs on appeal were available through Westlaw. These were a rich source of details as they typically include exhaustive procedural and factual histories.

Uniform Crime Reports

A useful secondary source was Uniform Crime Reporting Program Data: Supplementary Homicide Reports (SHR) data maintained by Joseph Kaplan. Although not reported in a case-specific manner, it was a relatively easy task to match the SHR observation to the study case. The SHR included the month and year of the incident (and a chronological counter of the homicides in that reporting month), the reporting police force, weapon used, and the ages and races of the defendants and victims. It also supplied, in broad categories, information on the nature of the dispute and the relationship between the suspect and victim. The UCR was particularly useful for race of victim in cases where we unable to obtain the police report.

Press releases

The St. Louis County Police maintains an archive of press releases for recent years. These were obtained through an open records request. These usually contained charging information and good summaries of the cases, and provided useful additional information such as the ages and socio-economic information on the defendants and victims.

St. Louis Dispatch

Almost every case in the study was covered in the *St. Louis Dispatch*. Usually these were summaries generated from press releases but often reflected independent reporting.