No. 22A463
Capital Case

IN THE SUPREME COURT OF THE UNITED STATES

Kevin Johnson,

Petitioner,

v.

State of Missouri,

Respondent.

Response Opposing Motion to Stay Execution

ERIC S. SCHMITT
Missouri Attorney General

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

Introduction

Kevin Johnson was sentenced to death for the "plainly horrifying" murder of Sgt. William McEntee. App. at 16. Johnson's crimes showed no regard for human life: he injured bystanders with his shots, he delivered the fatal shot while Sgt. McEntee was helpless on his knees with blood pouring from his mouth, and Johnson even mocked his cousin who vomited after witnessing the brutal scene. Twelve jurors, who Johnson admits were qualified and unbiased, unanimously found three aggravating circumstances and determined that Johnson deserved the death penalty for his crimes. App. at 16–17. The trial judge, who Johnson admits was fair, imposed the death sentence. On appeal, Johnson did not even allege that his death sentence was the result of passion, prejudice, or any other arbitrary factor, and the Missouri Supreme Court found that the sentence was fair and proportional to his crime. *Johnson v. State,* 284 S.W.3d 561, 577 (2009) (*Johnson I*). The record makes the reason for Johnson's sentence apparent: "[Mr. Johnson] committed an act for which the United States Constitution and [Missouri] laws permit imposition of the death penalty." *McCleskey v. Kemp*, 481 U.S. 279, 296–97 (1987).

Johnson's latest stay request—coming on the day of his execution—is a

transparent refusal to accept moral responsibility for his crimes. Despite his terrible crimes and the fair trial that led to his sentence, Johnson insists that his execution is solely because of his race and the race of his victim. Stay Mot. at 2. Johnson's claims[1], presented on his behalf by a special prosecutor under Missouri statute § 547.031, are completely baseless and are unsupported by any evidence or allegation that could state a constitutional claim. App. at 15–16. For those reasons, and several independent state-law reasons, the Missouri Supreme Court found the claims were meritless and declined to stay Johnson's execution. App. at 1–19.

This Court should deny a stay for three reasons. First, the Court has no jurisdiction to review the independent and adequate state-law grounds supporting the denial of Johnson's claims below. Second, Johnson's claims below have no chance of success on the merits because they fail to state a basis to overturn his death sentence. Third, a stay would be inequitable because of Johnson's delay in bringing his claims and because it would irreparably harm the interests of the State and the surviving victims of Johnson's crimes.

[1] Johnson's stay request is based on his appeal from the denial of the special prosecutor's motion under Mo. Rev. Stat. § 547.031 (2021). Though the special prosecutor has raised the claims on Johnson's behalf, Johnson authored the claims and has previously raised them on his own behalf.

Statement of the Case

In denying Johnson's request for a stay, the Missouri Supreme Court set out the factual and procedural background of the issues at App. 2–10. The State adopts the Court's findings there. To the extent that Johnson's recounting of the facts below differs from the facts found by the Missouri Supreme Court, this Court should defer to the state-court findings. *See* 28 U.S.C. § 2254(e)(1).

Standard for Reviewing a Stay Request

A stay of execution is an equitable remedy that is not available as a matter of right. *Hill v. McDonough,* 547 U.S. 573, 584 (2006). A request for a stay must meet the standard required for all other stay applications, including a showing of significant possibility of success on the merits of pending claims. *Id.*; *see also Hilton v. Braunskill,* 481 U.S. 770, 776 (1987).

In addition, in considering Johnson's request, this Court must apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* (citing *Nelson v. Campbell,* 541 U.S. 650 (2004)). "[L]ate-breaking changes in position, last-minute claims arising from long-known facts, and other 'attempts at manipulation' can provide a sound

basis for denying equitable relief in capital cases." *Ramirez v. Collier,* 142 S. Ct. 1264, 1282 (2022) (citing *Gomez v. United States Dist. Court for N. Dist. Of Cal.,* 503 U.S. 653, 654 (1992)). The "last-minute nature of an application" may be reason enough to deny a stay. *Id.*

Reasons for Denying a Stay

I. This Court does not have jurisdiction to review the independent and adequate state-law grounds supporting the denial of Johnson's claims below.

Johnson's request for a stay fails to properly invoke this Court's jurisdiction because the record below demonstrates that the Missouri Supreme Court's decision is necessarily and inextricably bound up with questions of state law, state court procedure, and concerns about this specific special prosecutor's role in the new state statute.

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

A. The Missouri Supreme Court's denial of the stay requests below rests on its reading of a newly-enacted state statute.

In August 2021, the General Assembly enacted Mo. Rev. Stat. § 547.031, which allows a prosecuting attorney to raise a post-conviction motion on behalf of a convicted defendant. While the statute has been in existence for a year, only one case has been tried to judgment under the statute since its enactment, and only three other cases have been filed under the statute. Before the Missouri Supreme Court's opinions below, only one published opinion discussed § 547.031. *State ex rel. Schmitt v. Harrell*, 633 S.W.3d 463 (Mo. Ct. App. 2021). The Missouri Supreme Court's decision below was bound up in its construction of this newly enacted statute—a matter of first impression for Missouri's highest court—and the state law questions raised by the construction of § 547.031 provide several adequate and independent state law grounds for the state court decision.

1. The Missouri Supreme Court found that the claims below were not cognizable under state law.

In denying Johnson's and the special prosecutor's motions for a stay, the Missouri Supreme Court indicated that, as a matter of state law, the claims raised by the special prosecutor were not cognizable or did not state a basis for relief under § 547.031 because they did not raise claims of constitutional error

"that undermine[ ] the confidence in the judgment." App. at 13–14 (quoting § 547.031). Specifically, the Missouri Supreme Court stated:

> 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." 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.

Id. at 14. Therefore, even if this Court could reach a federal question, it could not rule in favor of Johnson on the attendant state law question because the Missouri Supreme Court has already determined that the special prosecutor's claims did not state a basis for relief under Missouri law. Importantly, Missouri has always provided Johnson with a forum to raise his constitutional challenges including on direct appeal, during initial collateral review, or at any other time under Missouri's comparatively permissive state habeas rule. Mo. Sup. Ct. Rule 91.

2. The Missouri Supreme Court doubted that the special prosecutor was properly appointed.

The majority opinion of the Missouri Supreme Court expressed doubt about the existence of a disqualifying conflict within the elected prosecuting attorney's office:

> 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 disqualifying the entire office.

App. at 12–13 n.11. It then expressed that while the existence of a conflict was far from apparent, if a conflict did exist the appointment of a special prosecuting attorney handpicked by the office with a conflict was in error:

> 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.

Id. The Missouri Supreme Court's concern about the propriety of the appointment of special prosecutor under state law and Missouri's rules of

professional conduct provide an independent state-law basis for the Missouri Supreme Court's decision.

3. Lingering first-impression procedural questions preclude federal review.

The Missouri Supreme Court's denial of the motion to stay rests on a state statute for which nearly every question is a matter of first impression about Missouri state law. The Missouri Supreme Court acknowledged many of these in its opinion. For example, the Missouri Supreme Court recognized that Johnson's case is the first § 547.031 motion concerning a conviction "involving a death sentence," it is the first § 547.031 motion "triggered by a 'special prosecutor'" appointed under Missouri state law, and that Johnson's case presented the matter of first impression whether, as a matter of state law, the prosecuting attorney was even authorized to request a stay of the State's lawful execution warrant. App. at 13.

Further, the majority opinion demonstrates that the Missouri Supreme Court's decision rests, at least partially, on its understanding of § 547.031 as a new civil action that presents a host of state law jurisdictional and state-law court authority questions. App. at 10, n.10. The dissenting opinion does not appear to share this view and in deciding to grant any stay request, this Court would be required to consider open questions of state law—including the

nature of the remedy under § 547.031, the proper parties to the § 547.031 action, the parties' proper roles in a § 547.031 action, the division of authority between a state executive officer and a county executive officer in a § 547.031 action, the procedural rules that govern actions under § 547.031, whether summary denials are allowed under § 547.031, the right to appeal under § 547.031, the proper scope of the Missouri Supreme Court's exclusive appellate jurisdiction under the Missouri Constitution, and whether the Missouri legislature has given an inferior court the ability to overrule the Missouri Supreme Court—before even reaching a single federal question. Any one of those questions would be an independent and adequate state law basis for the decision and considering them together, it is apparent that the decision by the Missouri Supreme Court to deny Johnson's stay request is inextricably bound in difficult, unresolved, state-law questions. This Court should deny a stay and leave those questions to the state court.

II. Johnson's claims below have no chance of success on the merits.

A. In reviewing the Missouri Supreme Court's assessment of Johnson's claims, this Court should respect our system of dual sovereignty.

To the extent the Missouri Supreme Court's order below passes on federal questions, this Court should refrain from reviewing state post-conviction claims because this Court has federal habeas proceedings to provide a more appropriate avenue to consider federal constitutional claims. *Lawrence v. Florida,* 549 U.S. 327, 328 (2007); *Kyles v. Whitley,* 498 U.S. 931, 932 (1990) (Stevens, J., concurring in the denial of certiorari).

"To respect our system of dual sovereignty," this Court and Congress have "narrowly circumscribed" federal habeas review of state convictions. *Shinn v. Ramirez,* 142 S. C.t 1718, 1730 (2022) (citations omitted). The States are primarily responsible for enforcing criminal law and for "adjudicating constitutional challenges to state convictions." *Id.* at 1730–31 (quotations and citations omitted). Federal intervention intrudes on state sovereignty, imposes significant costs on state criminal justice systems, and "inflict[s] a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* at 1731 (quotations and citations omitted).

To avoid the harms of unnecessary federal intrusion, "Congress and federal habeas courts have set out strict rules" requiring prisoners to present their claims in state court and requiring deference to state-court decisions on constitutional claims. *Id.* at 1731–32; 28 U.S.C. § 2254(d), (e). Johnson petitioned for federal habeas review, his claims were denied, and that denial was affirmed by the United States Court of Appeals and this Court. Having found Johnson's conviction does not violate the Constitution, there is no reason for this Court to interfere in further State post-conviction review.

In deciding Johnson's stay application, this Court should be guided by the standards in § 2254(d)(1), and defer to the Missouri Supreme Court's assessment that Johnson's claims will not merit state post-conviction relief. To respect "Our Federalism," "finality, comity, and the orderly administration of justice," this Court should enforce the limits on federal review of state convictions and deny Johnson's request. *Younger v. Harris,* 401 U.S. 37, 44 (1971) (first quote); *Shinn,* 142 S. Ct. at 1733 (quoting *Dretke v. Haley,* 541 U.S. 386, 388 (2004)) (second quote).

B. Johnson's selective prosecution claim fails to state a basis for relief under *McCleskey v. Kemp*.

In the state courts, Johnson, through the special prosecutor, raised an equal protection claim challenging the State's decision to seek the death

penalty in Johnson's criminal case. Johnson's allegations failed to state a basis for relief under this Court's and the Missouri Supreme Court's precedent. Thus, a stay would be unjust and unnecessary.

To establish a violation of the Equal Protection Clause in the charging context, Johnson "must prove not only a discriminatory effect in his case, but also that the prosecutor's decision was motivated by a discriminatory purpose." *State v. Anderson*, 79 S.W.3d 420, 444 (2002). This standard is difficult to meet because "to prevail under the Equal Protection Clause, [Johnson, through the special prosecutor,] must prove that the decisionmakers in *his* case acted with discriminatory purpose." *McCleskey*, 481 U.S. at 293. Because judicial review of charging decisions risks intrusion into a core-executive-branch function—the prosecution of violent murderers like Johnson—courts "demand exceptionally clear proof" that the State has abused its wide charging discretion. *Id.* at 294; *accord Anderson*, 79 S.W.3d at 444.

In support of his equal protection claim, the special prosecutor relied on three broad categories of allegations: (1) a report completed by a professor at the University of North Carolina alleging a correlation between the race of victims and the use of the death penalty in St. Louis County between 1991 and 2018; (2) the special prosecutor's speculations about the contents of the

prosecution team's minds; and (3) an attempted comparison to another criminal defendant who did not receive the death penalty for killing a police officer in St. Louis County. None of these—either considered individually or collectively—is sufficient under *McCleskey* and its federal and state progeny.

1. The special prosecutor's equal protection claim demonstrates a fundamental misunderstanding about the directive of *McCleskey*.

The special prosecutor hoped to prove his claims below under the standards that apply in cases of employment discrimination brought under Title VII. *See* App. at 91–92 (asking the court to engage in the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). The *McCleskey* Court, however, specifically refuted the idea that Title VII was the proper reference point for selective prosecution equal protection claims. 481 U.S. at 294.

In *McCleskey,* this Court found that, "the nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection *or Title VII cases*." *Id.* (emphasis added). The "nature" of a capital prosecution is fundamentally different than a Title VII claim, in part, because "[p]rosecutors 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." *Taylor*, 18 S.W.3d at 377; *accord McCleskey,* 481 U.S. at 295, n. 15. Because of these differences, this Court rejected standards of proof that apply in other cases and instead required "exceptionally clear proof" that the State had abused its wide charging discretion. *McCleskey*, 481 U.S. at 294; *accord Anderson*, 79 S.W.3d at 444.

The special prosecutor failed to allege a claim under *McCleskey* below and his reliance on employment law standards tacitly admits that there is no "exceptionally clear proof" that the State acted "with discriminatory purpose" in Johnson's case. *McCleskey*, 481 U.S. at 293.

2. The statistical analysis of the race of crime victims is not sufficient to prove an equal protection violation under *McCleskey*.

In support of Johnson's equal protection claim, the special prosecutor provided a statistical analysis by Dr. Frank Baumgartner, a professor at the University of North Carolina at Chapel Hill. App. at 265. While the *McCleskey* Court recognized that a defendant was not prohibited from presenting statistical analysis evidence, this Court found that statistical evidence is insufficient to demonstrate a prosecutor acted with discriminatory purpose.

481 U.S. at 297.

In *McCleskey*, the capital defendant "proffered [the Baldus Study,] a statistical study . . . that purport[ed] to show a disparity in the imposition of the death sentence in Georgia based on the race of the murder victim and, to a lesser extent, the race of the defendant." *Id.* at 286. One of the Baldus Study models found that "even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks." *Id.* at 287. The model also found that "black defendants were 1.1 times as likely to receive a death sentence as other defendants." *Id.*

Nevertheless, this Court found that these statistics were insufficient to demonstrate an equal protection claim:

> But the nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases. Most importantly, each particular decision to impose the death penalty is made by a petit jury selected from a properly constituted venire. Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. *See Hitchcock v. Dugger*, 481 U.S. 393, 398–399, 107 S. Ct. 1821, 1824, 95 L.Ed.2d 347; *Lockett v. Ohio*, 438 U.S. 586, 602–605, 98 S. Ct. 2954, 2963–65, 57 L.Ed.2d 973 (1978) (plurality opinion of Burger, C.J.). Thus, the application of an inference drawn from the general statistics to a specific decision

> in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case. In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.

Id. at 295. The Court further stated that policy considerations affording prosecutors wide discretion in charging decisions "suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, 'often years after they were made.' " *Id.* at 296 (quoting *Imbler v. Pachtman*, 424 U.S. 409 (1976)).

Here, Johnson seeks a stay to force former Prosecuting Attorney Robert McCulloch to defend his charging decision in Johnson's case—years after it was made and hours before justice is finally served—based on a comparatively threadbare analysis. App. at 265. Like in *McCleskey*, "absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: [Johnson] committed an act for which the United States Constitution and [Missouri] laws permit imposition of the death penalty." *McCleskey*, 481 U.S. at 296–97. A stay is unjust and unnecessary because Johnson's statistical evidence is insufficient to demonstrate a discriminatory purpose. *Id.*

3. The St. Louis County Prosecuting Attorney's decision not seek the death penalty in another death-eligible case is not sufficient to prove a *McCleskey* claim.

In support of his equal protection claim, the special prosecutor also argued that Trenton Forster, an allegedly similarly-situated white defendant, received life without parole because the State refused to seek the death penalty while the State sought the death penalty in Johnson's case. At the outset, this Court's precedent teaches that, even when considered with statistical analysis, Johnson "cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty." *McCleskey,* 481 U.S. at 307–08. That is because the decision to impose the death sentence requires individualized consideration and allows for "discretionary leniency." *Id.* at 307. "Nothing in any of [this Court's] cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Id.* (citing *Gregg v. Georgia,* 428 U.S. 153, 199 (1976)). Indeed, decisions to seek the death penalty "necessarily are individualized and involve infinite factual variations." *Id.* at 295, n. 15. The special prosecutor's post-hoc analysis of the charges against Johnson presents no basis for relief below or a stay here.

4. A jury, a judge, and the Missouri Supreme Court all determined that Mr. Johnson's death sentence was appropriate.

At the core of the special prosecutor's claim is an assertion that, in the special prosecutor's view, Mr. Johnson's act of killing a police officer was not independently sufficient to warrant the death penalty, so the prosecuting attorney must have decided to seek the death penalty based on Mr. Johnson's race or the race of his victim. That argument inexplicably ignores Missouri's statutory aggravating circumstances. *See* Mo. Rev. Stat. § 565.032.

In considering the evidence presented, the jury found that Mr. Johnson's conduct satisfied three enumerated statutory aggravating circumstances: (1) that Mr. Johnson "'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' when he shot Sgt. McEntee multiple times and a bullet struck a juvenile standing next to the patrol car"; (2) that Mr. Johnson's murder of Sgt. McEntee "involved depravity of mind and the murder was 'outrageously and wantonly vile, horrible, and inhuman,' as the act involved two distinctly separate shootings within a short period of time and Sgt. McEntee was seriously injured and helpless at the time of the second shooting"; and (3) that Mr. Johnson committed the murder "'against a peace officer while

engaged in the performance of his official duty' as Sgt. McEntee was responding to a call and was in his patrol car." *Johnson I*, 284 S.W.3d at 587.

"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 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." App. at 16. Nothing in the Special Prosecutor's motion below, or Johnson's application before this Court, "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." App. at 16–17.

After the jury rendered its verdict, the sentencing court chose to impose the death sentence the jury recommended. Then the Missouri Supreme Court compared Mr. Johnson's case to other cases across the State, several of which involved white defendants, and found that the death sentence was not excessive or disproportional because this Court had upheld the imposition of the death penalty where defendants had killed police officers or where they had subjected their injured and helpless victims to a fatal blow. *Johnson I,* 284 S.W.3d at 577.

Johnson's baseless assertions of racism do not change the simple truth: "[Mr. Johnson] committed an act for which the United States Constitution and [Missouri] laws permit imposition of the death penalty," and the jury sentenced him to death. *McCleskey*, 481 U.S. at 296–97.

C. Johnson's *Batson* claim has been repeatedly rejected and fails to state a basis for relief.

The special prosecutor's *Batson* claim has already been rejected by the trial court; by the Missouri Supreme Court, *Johnson I,* 284 S.W.3d 561; by the Missouri Supreme Court again under an ineffective-assistance-of-counsel framework, *Johnson v. State,* 406 S.W.3d 892, 907–08 (Mo. 2013) (*Johnson II*); by a federal district court, *Johnson v. Steele,* 2018 WL3008307 (E.D. Mo. 2018) (Amended Order Denying Relief); by the United States Court of Appeals for the Eighth Circuit, *Johnson v. Steele,* 999 F.3d 584 (8th Cir. 2021) (opinion declining to issue certificate of appealability); and by this Court, *Johnson v. Steele,* 142 S. Ct. 1376 (2022) (order denying petition for a writ of certiorari). The standards that govern successive habeas petitions by State prisoners require that successive claims presented in prior applications "shall be dismissed." 28 U.S.C. §2244(b)(1). Informed by those standards, this Court should decline further review of Johnson's successive claim. *Felker v. Turpin,* 518 U.S. 651, 663 (1996).

At trial, Mr. Johnson objected to the prosecutor's peremptory strike of Cottman. Tr. at 1049. The State offered two reasons for its strike of Cottman: (1) that she was hesitant to answer questions about capital punishment; and (2) that Cottman worked for Annie Malone Children's Home, which had provided services to Mr. Johnson when he was a child. Tr. at 1051. When given a chance to show that the prosecutor's strikes were pretextual, defense counsel pointed out that another juror had also worked for a foster care program at one time, though it was not a program directly associated with Mr. Johnson. Tr. at 1052. Mr. Johnson did not direct the court to any other evidence or arguments that he wished the Court to consider as to the *Batson* challenge. Tr. at 1052–53. Specifically, Mr. Johnson did not make any argument suggesting that the history of the prosecutor's office called into question the prosecutor's credibility in its reasons for striking Cottman. Tr. at 1052–53. The trial court found that there was a racially neutral basis for the strike and overruled the *Batson* challenge. Tr. at 1053.

The Missouri Supreme Court found that the trial court did not err in accepting the State's racially neutral explanation for striking Cottman. *Johnson I,* 284 S.W.3d at 571. The record showed that no other venire member was involved with Annie Malone Children's Home, and that the prosecution's

decision to strike Cottman based on her involvement with Mr. Johnson's childhood foster service was race-neutral. *Id.* The Missouri Supreme Court found that "no evidence suggested the State engaged in improper behavior to constitute a *Batson* violation" involving Cottman. *Id.* "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." App. at 18.

While the special prosecutor attempted to repackage Johnson's often-rejected claim, his motion below does not change the claim "in any material way." App. at 18. The special prosecutor pointed to *Flowers v. Mississippi,* 139 S. Ct. 2228 (2019), and a work-product memorandum that showed the State researched whether the trial court erred during Mr. Johnson's first trial in exercising the State's unused peremptory strikes to strike only white jurors. These citations contain nothing new or relevant.

As Mr. Johnson admitted while pressing similar arguments that were rejected during federal habeas proceedings, *Flowers* "[broke] no new legal ground," but simply applied *Batson* to the "extraordinary facts" of the case before it. *Johnson v. Steele,* 999 F.3d 584, No. 18-2513, Appellant Br. at 21 (8th Cir. 2021). The Missouri Supreme Court applied the same legal standards in

Mr. Johnson's direct appeal, including considering arguments about the prosecutor's prior history and practice. *Johnson I,* 284 S.W.3d at 571. Even considering those arguments, the Court found "no evidence that the State engaged in improper behavior" in Mr. Johnson's case.

The comparison to *Flowers* does not help the special prosecutor's claim. There, in six combined trials, Mississippi struck 41 of 42 potential black jurors and was repeatedly reversed for prosecutorial misconduct and *Batson* violations in the same case against the same defendant. *Flowers,* 139 S. Ct. at 2235. The only relevance *Flowers* has here is to show the evidence of discrimination in that case that *is not* present here.

The special prosecutor's citation to the State's legal research is especially unpersuasive. App. at 240. At Mr. Johnson's first trial, the State did not use all of its peremptory strikes. The trial court decided that it would use the remainder of the State's strikes to strike only white males. The trial court reasoned that, if the State did not use all of its strikes, the court would normally have to strike jurors who had higher juror numbers, and the court believed that process may violate *Batson* if the higher-numbered jurors were black. The State objected to the trial court exercising the State's peremptory strikes and noted that the trial court's purposeful decision to strike only white

males may constitute race and gender discrimination

Between the first and second trial, the State apparently researched whether the trial court's ruling on peremptory strikes was erroneous. App. at 240. As it turns out, the trial court's application of *Batson* to unused peremptory strikes was erroneous, but the State may not have found those cases. *State v. Strong,* 142 S.W.3d 702, 714 (Mo. 2004) (no *Batson* violation where State does not use all of its peremptory challenges and trial court strikes surplus venire persons); *State v. Elder,* 901 S.W.2d 87 (Mo. App. W.D. 1995) (same). The State was also right to be concerned that the trial court's decision to strike only white male jurors was discriminatory. *See Sanchez v. Roden,* 753 F.3d 279, 292 n.7 (1st Cir. 2014) ("Equal protection applies, of course, to all individuals regardless of their race. Exercising peremptory challenges against white jurors on account of their race violates *Batson* just as surely as does striking black jurors because of theirs.") (citing *United States v. Walker,* 490 F.3d 1282, 1292 (11th Cir. 2007), *cert denied,* 552 U.S. 1257 (2008)).

But even if the prosecution's objections to the trial court's use of its strikes had not been legally correct, it is unreasonable to suggest that the prosecutor was racist for doing research about the trial court's decision. The legal memorandum contains a short summary of a few similar cases, and it

analyzes those cases in light of the trial court's ruling at Mr. Johnson's first trial. App. at 240. Nothing in the memorandum suggests that the prosecution had any motive other than wanting to know what law governed the trial court's decision regarding the use of peremptory strikes.

Ultimately, the special prosecutor's arguments about the work-product memorandum do not explain "what the supposed constitutional error was, who made it, or how it prejudiced Johnson." App. at 9. At the second trial, the court again decided to use any of the State's remaining peremptory challenges, this time by drawing juror names at random. Tr. at 1046–47. The State used four of its nine peremptory strikes for the jury panel, striking jurors 12, 30, 41, and 49. Tr. at 1048. If the trial court had simply struck the jurors with the highest number, it would have struck jurors 47, 50, 53, 56, and 58. None of those five jurors were black.[2] In addition, three of the jurors, 50, 53, and 58, were struck by defense peremptory challenges and the remaining two jurors, 47 and 56, sat on the jury that convicted and sentenced Mr. Johnson. Tr. at 1056–57, 63. Of course, the trial court did not strike the high-numbered jurors and instead

[2] The legal file from Johnson's direct appeal contains the jury questionnaire marked up by Johnson's defense team. The defense appears to have noted black jurors by placing a "B" to the right of their name. The defense does not appear to have similarly recorded other racial information.

struck jurors at random. The court randomly struck jurors 5, 11, 14, 19, and 28. Tr. at 1055. None of those jurors were black. L.F. at 516–547. All this to say, the State's objections to the trial court's ruling about peremptory strikes had no theoretical or actual impact on striking additional black jurors at Mr. Johnson's second trial. Again, "there is no evidence that the State engaged in improper behavior" during the jury selection at Mr. Johnson's trials. *Johnson I,* 284 S.W.3d at 571.

The special prosecutor's attempt to resurrect Mr. Johnson's meritless *Batson* claim fails to state a basis to set aside Johnson's death sentence. The *Batson* claim has no likelihood of success on the merits and offers no basis for further delay.

III. A stay would unfairly reward Johnson's last-minute delay tactics and irreparably harm the interests of the State and the victims.

As noted above, Johnson's current claims have both been previously raised and rejected. App. at 11–12. Johnson's *Batson* claim has been rejected by every state and federal court that has considered it, and Johnson previously raised a selective-prosecution claim that the Missouri Supreme Court rejected in 2017. App. at 4–5, n. 4. If Johnson wanted to raise new or repackaged versions of these claims, he could have done so at any time before his execution,

but he did not. *See* App. at 11–12, 14–15. Instead, Johnson waited until the last minute, presenting these claims in a transparent attempt to delay his execution. App. at 9–10. The fact that Johnson coordinated with the special prosecutor changes nothing. Johnson applied and asked the St. Louis Prosecuting Attorney's Conviction Integrity Review Unit to raise claims on his behalf and that unit, and later the special prosecutor engaged in another 11 months of delay. App. at 7–8.

Johnson's actions, and those of the special prosecutor on his behalf, fail to overcome the "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill,* 547 U.S. at 584 (citing *Nelson,* 541 U.S. at 650). Johnson's "last-minute claims arising from long-known facts" and "attempts at manipulation" counsel the court to deny the stay request here. *Ramirez,* 142 S. Ct. at 1282 (citing *Gomez,* 503 U.S at 654).

Johnson murdered Sgt. McEntee in 2005, and has had ample time to seek review of his convictions in state and federal court. As this Court knows, "the long delays that now typically occur between the time an offender is sentenced to death and his execution are excessive." *Bucklew v. Precythe,* 139 S. Ct. 1112, 1134 (2019). Johnson has long delayed in bringing his claims,

which amount to "little more than an attack on settled precedent" and prior decisions of the same claims *See id.* Given the strong state and federal precedent that require the denial of his claims, Johnson has no more legitimate interest in delaying the lawful execution of his sentence.

And, a stay would irreparably harm both the State and Johnson's victims. "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew*, 139 S. Ct. at 1133 (quoting *Hill*, 547 U.S. at 584).[3] Further litigation of Johnson's long-delayed, meritless claims "disturbs the State's significant interest in repose for concluded litigation[.]" *Shinn,* 142 S. Ct. at 1731. The surviving victims of Johnson's crimes have waited long enough for justice, and every day longer that they must wait is a day they are denied the chance to finally make peace with their loss. *Id.* ("[O]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out.") (quotations and citations omitted). "The people of Missouri, the surviving victims of [Johnson's] crimes, and others like them deserve better." *Bucklew,* 139 S. Ct. at 1134.

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

Conclusion

The Court should deny the motion for a stay of execution.

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

Shaun J. Mackelprang
Deputy Attorney General, Criminal Litigation
Andrew J. Clarke
Assistant Attorney General

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

Attorneys for Respondent