No. A22-A463

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.

Reply 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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REPLY ARGUMENT

I. The State's Arguments Regarding Jurisdiction are Meritless.

The State proffers a grab bag of jurisdictional arguments, all of which are meritless. The State errs in arguing that the ruling below rests on state law grounds in light of the Missouri Supreme Court's ruling that the claims in question do not undermine the court's confidence in the criminal judgment. *See* Opp. at 6–7. That question is not independent of federal law. It is true that the language comes from the statute. *See* Mo. Rev. Stat. § 547.031.3 ("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."). But the language is itself borrowed from operative federal constitutional authority. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). A state law ruling is not independent of federal law when, as here, it "fairly appears . . . to be interwoven with the federal law." *Michigan v. Long,* 463 U.S. 1032, 1040–41 (1983).

Second, while the state court "expressed doubt" about whether the special prosecutor was properly appointed, it manifestly did not deny the stay on that basis. Consequently, the state court's expression of doubt poses no jurisdictional bar to this Court's review.

Third, the fact that the state court had "lingering jurisdictional questions" also does not in any way affect this Court's jurisdiction. The court below did not attempt to

resolve those questions. Rather, it left those questions (like any ultimate resolution of the merits) for another day and simply denied the stay. Remarkably, the State says that this Court should "deny a stay and leave those [jurisdictional] questions to the state court." Response 10. But if this Court denies a stay, the court below will never address the jurisdictional questions in this case.

II. Johnson's Trial Did Not Cure Antecedent Racial Error

The State continues to argue that there can be no selective prosecution violation because, after all, the jury convicted Mr. Johnson and sentenced him to death. Response 19-21. This argument is meritless.

Under the State's theory no selective prosecution claim—however strong the evidence—could ever succeed, given that the defendant was convicted and, in most capital cases, sentenced by a jury. There is no question, however, that this Courts' precedent establishes that 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). If the defendant proves such selective prosecution the conviction and/or judgment is invalid, *Armstrong*, 517 U.S. at 464-65, despite the fact that a jury convicted the defendant. Neither the State nor the Missouri Supreme Court can negate this precedent.

III. Johnson's Claims as Advanced by the Special Prosecutor are not Repetitive of Those He Has Raised Previously.

The majority's dispositive ruling was that neither Mr. Johnson nor any other defendant can prove that selective prosecution on racial grounds establishes a

constitutional violation that affected their conviction or death sentence if a jury convicted the defendant and sentenced them to death. App. 16-17. Echoing non-dispositive portions of the majority's ruling, the State contends that a stay should be denied because the special prosecutor was purportedly relitigating claims that had already been raised by Mr. Johnson and denied. Opp. 27. In particular, the majority asserted that the only new thing relied on by the special prosecutor was a recently released study that could have been conducted earlier. App. 14-15.

Both the majority and the State have misconstrued the claim raised by the special prosecutor and the evidence proffered in support of that claim. The selective prosecution claim raised by the special prosecutor is not only or even primarily a claim under *McCleskey v. Kemp*, 481 U.S. 279 (1987), "based on a statistical study of charging decisions by then-prosecuting attorney McCulloch." App. 14. Rather, the selective prosecution claim proffers evidence that McCulloch treated African-Americans who killed white police officers differently from a white defendant who killed such an officer. And the difference was not just the fact that McCulloch sought death against all four African-Americans who had killed white police officers but not against the one white defendant who had done so. It was also the fact that McCulloch gave the white defendant (Forster) the opportunity to present mitigating evidence to McCulloch in order to persuade him not to seek death—an opportunity he never afforded to any of the four similarly situated African-American defendants. These facts set out a claim for selective prosecution under *United States v. Armstrong*, 517 U.S. 456 (1996). *See* App'n for Stay 14-16; *see also* App. 27–28 ((dissenting opinion discussing evidence supporting claim under *Armstrong*).

To the extent that the claim did rely on statistical evidence, that evidence related specifically to the charging decisions by the same prosecuting attorney who personally prosecuted Mr. Johnson, and was supported by additional, previously unavailable evidence of racial animus on the part of McCulloch. *See* App. 28–29 . Like the majority of the court below, the State in its response to the stay application completely ignores the differences between the claim presented below and any previously litigated claim.

The contention that the special prosecutor was relitigating previously raised claims was correctly rejected by the dissenters, as follows:

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

App. 29–30.

While it is true that Mr. Johnson raised a *Batson* claim on direct appeal, the claim raised by the special prosecutor is different in significant respects. The special prosecutor discovered additional evidence in support of the *Batson* claim, in the form of an internal memorandum suggesting that the prosecution sought to renew in the second trial a practice that at the first trial the circuit court found was intended to exclude Black jurors without facing any scrutiny under *Batson*. As the dissenting Justices explained, the prosecutor believed that if it refrained from exercising all of its peremptory strikes, the court would strike additional Black jurors without inquiring

into the prosecutor's motivation for the strikes. App. 30–31. In addition, the special prosecutor's claim should benefit from a different legal landscape, in that on direct appeal the state court ruled that the prosecutor's history of *Batson* violations is irrelevant, *State v. Johnson*, 284 S.W.3d 561, 571 (Mo. banc 2009), but a subsequent decision of this Court makes clear that a court must consider "relevant history of the State's peremptory strikes in past cases." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019). Again, based on all of the available evidence, the dissenting Justices recognized that the special prosecutor "has shown evidence that, if believed, establishes constitutional error at trial that undermines confidence in the judgment . . . ." App. 33.

IV. The State's Argument of Delay is Unfounded.

Leaving aside that Johnson sought relief from the prosecutor's office two months after the statute empowered that office to act, that Johnson bore no responsibility for the office's 10-month delay in seeking the appointment of a special prosecutor, and that Johnson exercised no control over when the special prosecutor would complete his investigation or move to vacate the judgment, the State now argues that Johnson should have asserted years earlier the "long delayed" claims brought by the Special Prosecutor. Opp. at 28–29. The State's argument is without merit.

The special prosecutor's claims go well beyond anything that Johnson could have asserted on his own. Those claims benefit from, and rely centrally on, facts that the special prosecutor discovered in his investigation of otherwise privileged materials to which Johnson lacked access. The special prosecutor discovered, for example, that

the prosecutor's office had invited counsel for Trenton Forster (the White defendant accused of killing a police officer) to lobby the office against seeking the death penalty, and gave the defense almost a year to develop and present the mitigating evidence with which to do so. App. 72–87. That same opportunity was not provided to the four Black defendants whom the office charged with killing police officers and against whom it sought death during the tenure of Robert P. McCulloch. App. 85–87. Johnson could not possibly know these facts without access to the files. Neither could Johnson know whether the files suggested any factual race-neutral basis for the office's more lenient treatment of Foster (they do not, the special prosecutor concluded), whether the prosecutor explained his charging decisions in the five cases (he did not, the special prosecutor reported), or indeed, whether the office had any objective policies or procedures to decide whether and when to seek the death penalty (it did not, the special prosecutor found).

Without the evidence to support his claim, beyond the bare fact of four cases in which the prosecutor sought death and one in which he did not, the claim would have failed for the very reason suggested by the State below: "The fact that the St. Louis County Prosecuting Attorney's Office did not seek the death penalty in another death-eligible case is not sufficient to prove a *McCleskey* claim." *State v. Johnson*, No. SC99873, Suggestions in Opp'n to Mot. for Stay of Execution 27–29 (Mo. filed Nov. 23, 2022). No such claim was even available to Johnson until December 2017, when the prosecutor announced his decision not to seek death against Forster. *See* 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."). If Johnson had brought a selective prosecution claim at some point after that, it would have failed for want of evidence. It would have left Johnson in the same position in December 2021, when he asked the prosecutor's office to investigate racial bias. And it would have left the special prosecutor with the same claim that he developed and asserted below.

The same is true of the prosecutor's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). Setting to one side the fact that Johnson asserted a *Batson* claim at trial, on direct appeal, on post-conviction review (as an ineffective-assistance claim) and in federal habeas proceedings, it was the special prosecutor who had access to the office's files and who revealed the prosecution's work product from between the two trials. That evidence revealed the prosecution's efforts to use "backdoor racial strikes" and then attribute those strikes to the judge instead of the prosecution. App. 87–88, 100–04. The State does not describe any remedy by which Johnson could have accessed this material, and there is none.

Neither is Johnson at fault for the fact that Prof. Baumgartner's study was not completed until earlier this year. The State does not explain how it would have aided Johnson to develop the study earlier and assert any claims based on it. Prior to December 2017, when the prosecutor's office decided to forgo death in the *Forster* case, the disparate-treatment claim would have proceeded on statistics alone and would have foundered on that basis. *See*, *e.g.*, *State v. Taylor*, 18 S.W.3d 366, 376 (Mo. 2000) (noting that "statistics alone [are] not enough to prove an equal protection violation."). Moreover, the State would have asserted that the claim was procedurally defaulted

due to its absence from trial, direct appeal, and post-conviction review, so that Johnson could not bring it for the first time on state habeas corpus. *See State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214–15 (Mo. 2001).

The same analysis, then, governs the race study: if Johnson had pursued the futile remedies years earlier as the State urges he should have, those remedies would have been dismissed, and Johnson would have been in the same position in December 2021. At that point, Johnson asked the prosecutor's efforts to investigate his case and bring appropriate claims – as Missouri law allowed the prosecutor to do here. *See* Mo. Rev. Stat. § 547.031.1 ("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") (emphasis added).

WHEREFORE, for all the foregoing reasons and those asserted in his Application, Petitioner Kevin Johnson respectfully requests that the Court stay his execution to allow full and fair litigation of his meritorious claims, and to preserve its authority to review those claims after the appeal.

Respectfully submitted,

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