THIS IS A CAPITAL CASE

EXECUTION SET FOR August 1, 2023

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY JOHNSON, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the Missouri Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Johnny Johnson was charged with the first-degree murder of six-year-old Casey Williamson. Mr. Johnson was diagnosed with schizophrenia as young as sixteen. It is undisputed that Mr. Johnson has been severely mentally ill his entire life – and was in the throes of psychosis at the time of this tragic crime. Mr. Johnson's guilt is likewise undisputed. What is in dispute is whether his psychosis was the result of drugs or schizophrenia, and whether it rendered Mr. Johnson unable to coolly reflect before committing this tragic crime.

At trial, Mr. Johnson presented a defense of diminished capacity, obviating his ability to coolly reflect during the crime. Making him guilty only of second-degree murder, Mr. Johnson would not have been eligible for the death penalty. To combat this defense, the prosecution used the reports and opinions of one court-appointed psychologist, Stephen Becker, and the testimony of another, Byron English. The prosecution, however, never disclosed to the defense that Becker had a criminal conviction prior to trial. During post-conviction, neither the prosecution nor the Attorney General disclosed this conviction, Becker's numerous subsequent felony convictions, nor English's workplace misconduct, all of which led to both men's professional licenses being revoked. Both the local prosecutor and the Attorney General relied on Becker and English's opinions to secure and maintain Mr. Johnson's death sentence at every stage of litigation.

Based on the foregoing facts, this case presents the following question:

Is the continuing duty to disclose material impeachment evidence regarding critical state's witnesses pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) violated when a defendant proves that the local prosecutor's office and the Attorney General withheld material impeachment evidence at trial, direct appeal, post-conviction, and habeas proceedings?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Johnny Johnson is the petitioner in this case and was represented in the Court below by Kent Gipson and the Capital Habeas Unit of the Federal Defender's Office for the Western District of Missouri.

David Vandergriff, Warden of Potosi Correctional Center, is the Respondent. He was represented in the Court below by Assistant Missouri Attorney General Andrew Clarke and Gregory Goodwin.

Pursuant to Rule 29.6, no parties are corporations.

RELATED PROCEEDINGS

United States Supreme Court:

Johnson v. Missouri, No. 06-10222 (May 29, 2007) (cert denied from direct appeal)
Johnson v. Blair, No. 22-5542 (Nov. 14, 2022) (cert denied from § 2254 proceedings)

United States Court of Appeals for the Eighth Circuit:

Johnson v. Blair, No. 20-3529 (Jan. 21, 2022) (§ 2254 proceeding)

United States District Court for the Eastern District of Missouri:

Johnson v. Steele, 4:13-cv-00278-HEA (Feb. 28, 2020) (§ 2254 proceeding)
Johnson v. Vandergriff, 4:23-cv-00845-MTS (July 17, 2023) (2254 *Ford* proceeding)

Supreme Court of Missouri:

Missouri v. Johnson, No. SC86689 (Nov. 7, 2006) (direct appeal)
Johnson v. Missouri, No. SC91787 (Nov. 20, 2012) (post-conviction appeal)
State ex. Rel. Johnny Johnson v. Vandergriff, No. SC100023 (Apr. 19, 2023) (*Brady* habeas corpus)
State ex rel. Johnny Johnson v. Vandergriff, No. SC100077 (June 8, 2023) (*Ford* habeas corpus)

Circuit Court of St. Louis County, Missouri:

Missouri v. Johnson, No. 02CR-003834 (Jan. 2005) (trial)
Johnson v. Missouri, No. 2107CC-01303 (Mar. 6, 2007) (post-conviction proceeding)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Johnny Allen Johnson respectfully petitions for a writ of certiorari to review the judgment of the Missouri Supreme Court entered on April 19, 2023.

OPINION BELOW

An April 19, 2023, order of the Missouri Supreme Court denied Mr. Johnson's petition for writ of habeas corpus and dismissed Mr. Johnson's motions to appoint a Special Master and for discovery as moot. The order is unpublished and appears in the Appendix at p. 1a.

JURISDICTION

The Missouri Supreme Court entered judgment on April 19, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a). This petition is timely under Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United Stated Constitution states in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Trial

In 2005, Mr. Johnson was convicted of first-degree murder for the July 26, 2002, murder of Casey Williamson. He was sentenced to death. The only disputed issue before the jury at trial was whether Mr. Johnson was able to and did coolly

deliberate during the killing, raising his culpability from second- to first-degree murder and thus making him eligible for the death penalty. The singular importance of this issue is beyond dispute. *See* Tr. 1901 ("The key in this case…is distinguishing the elements between murder first degree and murder second degree[.]"); *See also State v. Johnson*, 207 S.W.3d 24, 34 (Mo. banc 2006) (Missouri's highest court noting that the disputed issue at trial was whether Mr. Johnson deliberated as required for first-degree murder and mentioning the State's expert testimony on that issue). Mr. Johnson's counsel presented a diminished capacity defense based on evidence of Mr. Johnson's severe mental illness and longstanding documented struggles with auditory command hallucinations of the type that he was experiencing at the time of the offense, arguing that he lacked the requisite deliberation for first-degree murder. The defense argued that he was guilty of second-degree murder instead, citing the conclusions of a psychologist, Dr. Delany Dean, who evaluated Mr. Johnson over the course of four days.

The prosecution agreed that Mr. Johnson's mental state was the sole disputed issue for a first-degree murder conviction. Tr. 1910. In presenting their case on this issue at trial, the State relied exclusively on psychological evaluations written by Stephen Becker and the related testimony of Byron English,[1] to assert that Mr. Johnson did form the required mental state to commit first-degree murder despite his hallucinations.

[1] At the time of trial, both Becker and English were licensed psychologists. However, Mr. Johnson does not refer to the State's experts as "Dr." because neither Becker nor English currently have a valid Missouri license to practice psychology. Both lost their licenses for reasons suppressed from Mr. Johnson.

Before trial, on October 1, 2002, Mr. Johnson filed a motion for discovery requesting "[t]he criminal records and any list or summary reflecting criminal records of all persons the State intends to call as witnesses at a hearing or trial." Ex. 1 [First Discovery Motion], p. 2.[2] On October 8, 2004, Mr. Johnson filed another motion for arrest and conviction records of the State's anticipated witnesses and a motion for disclosure of impeachment information regarding the State's anticipated witnesses. Ex. 2 [Motion for Arrest and Conviction Reports], pp. 1-2; Ex. 3 [Motion for Disclosure of Impeaching Information], pp. 1-3; Ex. 4 [Kerry Affidavit] p. 2; Ex. 5 [Beimdiek Affidavit], p. 2. The court denied the defense request for arrest records but granted the motion as to conviction records. 12/10/2004 Hrg. Tr. 31-33.

The court also denied, with leave to renew, the request for impeachment information such as personnel records, explaining that it would entertain the motion later if specific allegations arose warranting the disclosure of such records. 12/10/2004 Hrg. Tr. 35-38. Nevertheless, the prosecution failed to disclose any conviction or personnel records related to Becker or English. Ex.4, p. 2; Ex. 5, p. 3.

At trial, the prosecution used English and Becker's conclusions to tell the jury that Mr. Johnson's hallucinations at the time of the offense were substance-induced, caused by alcohol and methamphetamine, rather than the product of Mr. Johnson's longstanding schizoaffective disorder. The State called only English to the stand to testify regarding the reports Becker had written, despite having noticed both as

[2] All citations are to the record that was before the Missouri Supreme Court.

witnesses before trial. Tr. 1797. English was the final witness in the guilt stage proceedings and the State's only witness called in rebuttal. *Id.*

English testified about his and Becker's opinions that Mr. Johnson coolly deliberated when he committed the offense, Tr. 1843-45, as well as their belief that drugs, rather than psychotic disorder, accounted for his hallucinations. Tr. 1825, 1838-41, 1863, 1883. The State offered no witnesses or evidence on the only disputed issue at trial—Mr. Johnson's mental state at the time of the offense—other than English's testimony based on Becker's reports.

Statements from jury members after trial repeatedly confirmed the decisiveness of the State's expert reports in the jury's rejection of the defense's argument that Mr. Johnson was responding to mental-illness-induced command hallucinations at the time of the offense and should not be convicted of first-degree murder under Missouri's diminished capacity defense. Kerry Affidavit, p. 3; November 2016 Juror Interview, "The Worst Crime".

Post-Conviction Proceedings

During Mr. Johnson's state post-conviction proceedings pursuant to Missouri Supreme Court Rule 29.15, as part of the obligation to raise all potentially meritorious constitutional issues that provided a basis for attacking Mr. Johnson's conviction and sentence, the defense again filed a request for discovery, including any prior criminal convictions of any person the State intended to call or called as witnesses at a hearing or trial. Ex. 9 [Movant's Request for Production], p. 2-3; Ex. 10 [Lundt Affidavit], p. 1; Ex. 11 [Hamilton Affidavit], p. 1. Again, the prosecution

did not turn over any criminal or other impeachment information related to either Becker or English. Ex. 10, p. 2; Ex. 11, p. 1.

The post-conviction hearing in Mr. Johnson's case was held before Judge Mark Seigel, the same judge who presided over Mr. Johnson's trial. The hearing began on November 30, 2009 and continued through December 2, 2009. The remainder of the hearing took place on July 23, 2010. Mr. Johnson presented two expert witnesses, Dr. Pablo Stewart and Dr. Craig Beaver, who disputed English and Becker's claims regarding Mr. Johnson's substance abuse and the nature of his hallucinations, as well as their effect on his commission of the offense. Dr. Stewart opined that Mr. Johnson's delusions stemmed from his brain damage and mental illness, rather than from drug use. The State continued to rely heavily on Becker and English's conclusions to defend the death sentence against Mr. Johnson.

Judge Seigel issued his decision denying Mr. Johnson post-conviction relief on April 5, 2011. In so doing, Judge Seigel relied heavily on the evaluations and reports by Becker and on English's testimony regarding those evaluation. *See e.g.,* Ex. 12 [Rule 29.15 Denial], p. 20.

On appeal from the state post-conviction proceedings, the Attorney General continued to rely on the evaluations and reports by Becker and English's testimony based on those evaluations to affirm the denial of Mr. Johnson's post-conviction motion. Doing just that, the Missouri Supreme Court affirmed Mr. Johnson's conviction and death sentence, concluding in relevant part that "the jury was

apprised fully of [Mr. Johnson's] mental condition." *Johnson v. State*, 388 S.W.3d 159, 167 (Mo. banc 2012).

The State's Disgraced Experts

Becker's Extensive Criminal Record

In the course of investigating Mr. Johnson's case in 2023, habeas counsel discovered that both Becker and English faced professional discipline and lost their licenses to practice psychology due to their histories of misconduct and criminal behavior. Counsel further learned that Becker's discipline was based on criminal behavior that started as early as 1999, years before trial, but Becker's convictions were never disclosed to trial counsel despite their specific request for such information. Ex. 13 [Franklin County Records], p. 3; Ex. 4, p. 2; Ex. 5, p. 2; *see also* Ex. 15 [St. Louis County Records], p. 14.

In the following nearly decade and a half, Becker amassed at least six additional DWI convictions, including at least three felonies resulting in prison sentences. Ex. 14 [St. Francois County Records], pp. 6-7; Ex. 15, p. 14; Ex. 16 [Butler County Records], p. 1. Becker has four DWI convictions from St. Francois County: June 8, 2006; November 13, 2007; July 11, 2008; and August 4, 2010, which resulted in a felony conviction as a persistent offender. Ex. 14, pp. 6-7. For the felony DWI conviction, he was sentenced to five years of incarceration. *Id.*

Becker's August 4, 2010 conviction stemmed from a troubling event occurring on October 9, 2008. Ex. 14, p 14. Becker went to the St. Francois County Sheriff's Department to see someone jailed there, but when asked who he wanted to see, he

could not remember their name. *Id.* During this interaction, the deputy on duty smelled alcohol on Becker. *Id.* Being unable to recall who he was there to visit, Becker gave up and attempted to leave the station. *Id.* First, Becker mistakenly tried to exit through the bathroom door, then finally stumbled out of the front door of the station. *Id.*

The deputy on duty followed Becker out to the parking lot, where he saw Becker get into his vehicle and attempt to back up. *Id.* The deputy asked Becker to stop the car, but instead Becker first put the car in drive and tried to drive forward, then tried to reverse. *Id.* Finally Becker exited the vehicle, unable to stand on his own, so the officer allowed him to lean on his vehicle. *Id.* Becker failed to keep his head still during the nystagmus test and asked if he could say his "ABG's" instead. *Id.* at 15. He got to letter C, skipped to G, and then quit. *Id.* The officer asked Becker to count backwards from 25 to 10; Becker asked the officer to do it first. *Id.* The officer obliged, but when Becker attempted, he could only get to 22. *Id.* Then Becker offered to count to ten but could only get to six. *Id.* Once arrested, the deputy asked Becker if he would take a breathalyzer, to which Becker answered, "Do you think I'm stupid, no I will not." *Id.* Becker also admitted to not having a valid driver's license. *Id.*

Between his last two convictions in St. Francois County, Becker was convicted on April 1, 2010, for felony DWI as a persistent offender in St. Louis County. Ex. 15, p. 3. For this he was sentenced to four years of incarceration. *Id.* Judge Seigel—the same judge who presided over Mr. Johnson's trial and post-

conviction proceedings—presided over this case, which was adjudicated while Mr. Johnson's post-conviction proceedings were ongoing.

Just twelve days after his conviction in St. Louis County, on April 13, 2010, Becker was again convicted of felony DWI as a persistent offender, this time in Butler County. Ex. 16, p. 1. He was sentenced to four years of incarceration, concurrent with the St. Louis County sentence. *Id.* The year prior, Becker had been arrested for another felony DWI in Navajo County, Arizona on May 21, 2009, but was extradited to Missouri on a fugitive warrant to face the three pending felony cases in June 2009. Ex. 17 [Navajo County Records], p. 2, 25.

During post-conviction proceedings in Mr. Johnson's case, neither the prosecution nor Judge Seigel ever acknowledged or informed Mr. Johnson's counsel that Becker's St. Louis County felony DWI case was before Judge Seigel himself and was taking place while Mr. Johnson's post-conviction proceedings were ongoing (or that it, or any of the other criminal cases, existed). Ex. 10, pp. 3-4; Ex. 11, p. 2. Becker's St. Louis County guilty plea took place on April 1, 2010—after Mr. Johnson's postconviction hearing began but before it was concluded. Ex. 15, pp. 3, 6-7; Ex. 16, p. 1.

Due to Becker's numerous DWI convictions, the State Committee of Psychologists sought to strip him of his license to practice psychology, opening an investigation into his criminal conduct in May 2009. After a lengthy investigation, in April 2012 the Committee, represented by the Attorney General's office—the same office simultaneously citing Becker's work to defend Mr. Johnson's death

sentence—filed a complaint with the State Administrative Hearing Commission. Ex. 22, pp. 23-28.

The Administrative Hearing Commission held a hearing on Becker's professional and criminal misconduct in March 2012—almost exactly six months before oral argument in the Missouri Supreme Court on Mr. Johnson's appeal from his post-conviction denial. The Committee of Psychologists was again represented by the Attorney General's Office. *State Comm. of Psychologists v. Becker*, Case No. 12-0407 PS (May 3, 2013), p. 3. On May 3, 2013, as a result of that hearing, Becker was stripped of his professional license. *Id.* at 3. The State did not inform Mr. Johnson's counsel of the professional discipline against Becker for illegal conduct ongoing during the pendency of Mr. Johnson's case, nor did they take any steps to notify Mr. Johnson that Becker had convictions prior to trial that were not disclosed despite multiple discovery requests.

Like the trial and post-conviction prosecutor and the post-conviction judge, the Attorney General was aware of the impeaching information about Becker. The records of Becker's St. Louis County and St. Francois County felony cases reveal that they were both provided to the Attorney General's Office, likely in connection with the Missouri State Committee of Psychologists' professional discipline case against him. Ex. 14, p. 3; Ex. 15, p. 4. The St. Louis County Clerk transferred the certified record of that case to the Attorney General's Office on July 14, 2010, and the St. Francois County Clerk sent the certified record of that case to the Attorney

General's Office on February 22, 2012, a month before the hearing on revoking Becker's license. Ex. 14, p. 3; Ex. 15, p. 4.

While the Committee, represented by the Attorney General's Office, was pursuing professional discipline against Becker, that office simultaneously relied on Becker's evaluations and conclusions about Mr. Johnson's mental state to defend Mr. Johnson's conviction and death sentence before the Missouri Supreme Court in a brief filed four short months after seeking to revoke Becker's license. *See* 2012-07-16 Respondent's Brief, *Johnny Johnson v. State of Missouri*, Case No. SC91787, at 20-21. And although counsel was appointed in early 2013 to represent Mr. Johnson in federal habeas proceedings, at no point during those proceedings did either the St. Louis County Prosecutor's Office or the Attorney General's Office independently disclosed to Mr. Johnson's counsel Becker's lengthy criminal record, including his pre-trial convictions, or the fact that he was stripped of his professional license by the State of Missouri.

English's Misconduct

In December 2017, while Mr. Johnson's federal habeas petition was pending, the Committee of Psychologists began an investigation into the conduct of English, the other state witness, while he was employed at the Southeast Missouri Mental Health Center. The Center received reports that English had been sexually harassing a secretary there for about two years, and that he had misused State resources by conducting personal psychological evaluations for colleagues who sought gastric bypass surgery, despite his lack of qualification to conduct such

evaluations—and he was using State resources to do so. Ex. 19 [English Settlement Agreement], pp. 2-5. The Committee's investigation revealed that the Department of Mental Health had previously conducted its own investigation and found the allegations against English substantiated. *Id.* at 4.

In addition to the misuse of state resources, English made inappropriate sexual comments to a female coworker, touched her in a way that made her uncomfortable, and gave her unwanted gifts. *Id.* He sent her inappropriate emails and left sexually harassing messages on transcription tapes, as well as the suggestive comments he made in person. *Id.* In September 2018, the Committee determined there was cause to discipline English and it entered into a settlement agreement with him in which he agreed to relinquish his professional license in lieu of discipline. *Id.* at 6-7.

The State—both the local prosecutor's office and Attorney General—failed to disclose any of this important impeachment information to Mr. Johnson's counsel at every stage of litigation throughout this case, yet they continued to reply on Becker's evaluation and English's testimony to support Mr. Johnson's conviction and death sentence. Mr. Johnson raised these repeated *Brady* violations in his Rule 91 petition for habeas corpus before the Missouri Supreme Court on March 31, 2023. The Missouri Supreme Court denied relief without an opinion on April 19, 2023.

REASONS FOR GRANTING THE WRIT

I: A continuing duty to disclose material impeachment evidence regarding critical state's witnesses pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) exists and is violated when a local prosecutor's office and the Attorney General withheld material impeachment evidence at trial, direct appeal, post-conviction, and habeas proceedings

This Court has long held that "suppression by the prosecution of evidence favorable to an accused…violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. "Impeachment evidence . . . falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985). Prosecutors must disclose exculpatory evidence, including evidence that may be used to impeach a government witness. *Id.* at 674-77; *Brady*, 373 U.S. at 86-89.

This Court has steadfastly counseled that heightened burdens of integrity and transparency are inherent in the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The judiciary has an important role in ensuring the endurance of these principles, and as such, "[p]rosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Banks v. Dretke*, 540 U.S. 668, 696 (2004), citing *Kyles v. Whitley*, 514 U.S. 419, 440 (1995). The Court's attention to this matter is necessary, as "judging by the number of cases overturned because of *Brady* violations, misconduct continues at an alarming rate." *See* Jason Kreag, *The Jury's Brady Right*, 98 B.U. L. Rev. 345, 355 (2018).

This well-established principle is even more salient now than it was when the Court made note of prosecutors' heightened burden in *Strickler* in 1999. The Court has, in the last decade, limited avenues for defendants seeking federal habeas relief

from state court decisions. *See, e.g., Shinn v. Ramirez,* 142 S. Ct. 1718 (2022); *Cullen v. Pinholster,* 563 U.S. 170 (2011). The narrowness of defendants' opportunity to seek relief in federal court makes the requirement that prosecutors play fair in the state courts all the more essential. Prosecutors may not be permitted to manipulate the state criminal justice process by withholding exculpatory or impeachment evidence in state court proceedings, and then reap the benefits of that manipulation when, even after discovering *Brady* evidence, defendants are precluded from developing their claims in future proceedings.

State prosecutors, including Attorneys General—whether at the trial level, on appeal, or during postconviction proceedings— must be steadfast in their pursuit of truth and justice, and not only their desire to "win" by any means necessary. *See Strickler*, 527 U.S. at 281 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). This is critical to protecting the integrity of a criminal justice system that is inherently based on trust and mutual belief in the rule of law, and it is all the more important in this present day of waning public confidence in the criminal justice system. *See Hill v. Mitchell*, 842 F.3d 910, 958 (6th Cir. 2016), (Cole, C.J. dissenting) ("[t]he willingness of federal judges to turn a 'blind eye,' will likewise incentivize 'prosecutors to avert their gaze from exculpatory evidence, secure in the belief that, if it turns up after the defendant has been convicted, judges will dismiss the *Brady* violations as immaterial,' or worse, on procedural grounds.") (citing *United States v. Olsen*, 737 F.3d 625, 633 (9th Cir. 2013) (Kozinski, J., dissenting

from denial of rehearing en banc) ("There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.")).

This Court can preserve these essential constitutional protections—and Americans' belief in the fairness of the criminal justice system—by clarifying that Attorneys General acting as prosecutors, whether during trial, appeal, or post-conviction proceedings, are governed by *Brady* and its progeny in the same manner as local trial prosecutors.

Mr. Johnson's conviction and death sentence have been impaired by a major failure by the State—represented first by the local prosecutor's office and later by the Attorney General—to disclose material impeachment evidence to the defense at every point throughout litigation. The prosecution at trial relied on Becker's evaluation to seek and obtain a death sentence at trial, and the prosecution at every stage thereafter has relied on his evaluation and reports to maintain that death sentence. For a petitioner to show a *Brady* violation, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler*, 527 U.S. at 281–82. Mr. Johnson's claim satisfies all three requirements.

A. The undisclosed evidence was favorable to Mr. Johnson.

Evidence is favorable if it is directly exculpatory or useful for impeachment purposes. *Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006). It is well established that impeachment evidence is favorable when it can "affect [the]

credibility" of a witness. *Giglio v. United States*, 405 U.S. 150, 154 (1972). The undisclosed evidence in this case squarely refutes the reliability and judgment of the state's expert witnesses. The prosecutor himself specifically told the jury at Mr. Johnson's trial that considering witnesses' prior criminal convictions and experts' biases were essential to assessing witness credibility in the course of the jury's deliberations. Tr. 1906-07.

Impeachment evidence is further favorable to the accused "[w]hen the reliability of a given witness may well be determinative of guilt or innocence." *Giglio*, 405 U.S. at 154. The reliability of Becker and English was central to whether Mr. Johnson was guilty of first-degree murder and thus eligible for the death penalty, or guilty of second-degree murder. While there was no dispute at trial that Mr. Johnson had committed the killing, the sole issue before the jury was whether Mr. Johnson had coolly deliberated before the act or whether the defense of diminished capacity applied, based on his mental illness-induced command hallucinations. Becker's evaluations and English's testimony were the only evidence presented by the state to rebut the defense expert's conclusion that Mr. Johnson did not coolly deliberate. Thus, Becker and English presented the most important evidence upon which Mr. Johnson's first-degree murder conviction and death sentence rests.

Becker's history of impaired driving would have been salient and weighty in the jury's appraisal of his credibility and, thus, the value of his professional opinion. That both experts lost their professional licenses due to misconduct and

malfeasance would have been notable in any reviewing Court's consideration of the value of Becker and English's conclusions compared to the conclusions of other experts, as such appraisals were required by Mr. Johnson's post-conviction claims and were in fact performed by Judge Seigel in denying post-conviction relief. Impeachment material that called into question Becker's or English's credibility would have worked in Mr. Johnson's favor, reducing the jury's reliance on their conclusions about Mr. Johnson's mental health at the time of the offense in comparison to the conclusions of the defense expert.

B. The undisclosed evidence was suppressed by the State.

Mr. Johnson's counsel submitted multiple specific requests seeking prior convictions or impeachment information regarding government witnesses, including Becker and English. *See* Ex. 1, Ex. 2, Ex. 3, Ex. 9. Even now, the State has never provided Mr. Johnson's current or former attorneys any of the impeaching information related to English or Becker. Remaining mum when impeachment evidence exists violated the State's constitutional and statutory duties. *Banks,* 540 U.S. at 696 ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process.").

Becker's criminal record prior to 2005 was suppressed at Mr. Johnson's trial. While the State's to-date unexplained and last-minute decision not to call Becker as a witness (instead calling English, who had not performed the evaluations of Mr. Johnson or written the reports) implies actual knowledge on the part of the prosecutor at trial of Becker's infirmities, such a showing is not required. *See Kyles*,

514 U.S. at 437 ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case"). In particular, a DWI conviction in a local county within five years of the commencement of Becker's work on Mr. Johnson's case was both accessible and typical impeachment evidence that the prosecution has no excuse for failing to either obtain or share.

Becker's malfeasance after trial and before—and during—post-conviction proceedings was also never disclosed to petitioner's defense counsel at any point before, during, or after (on appeal) the post-conviction litigation in which the reliability of the state experts' conclusions was a major and defining issue. While Mr. Johnson's Rule 29.15 proceedings were pending, the same local prosecutor's office was simultaneously prosecuting Becker for felony DWI as a persistent offender after he had accrued at least three other DWI convictions on top of the 1999 case. Ex. 15, p. 14. Mr. Johnson's post-conviction counsel's motion for discovery included a request for criminal information regarding the State's witnesses, including trial witnesses, but counsel did not receive any such information in response. Ex. 10, pp. 1-2; Ex. 11, p. 1. Becker's plea and sentencing hearing was held on April 1, 2010, sandwiched in the middle of Mr. Johnson's post-conviction proceedings, presided over by the same judge and prosecuted by the same prosecutor's office. Yet that information was never disclosed to Mr. Johnson.

The State indisputably was aware of this impeachment evidence given its involvement in prosecuting Becker. The Attorney General's office was notified of

Becker's criminal convictions and provided with those records, and then vigorously sought to have Becker's professional license taken away for crimes involving moral turpitude. At the very same time, the Attorney General's office was defending Mr. Johnson's conviction in the Missouri Supreme Court and later, in federal court, on the supposedly continued strength of Becker's un-impeached professional evaluations and conclusions.

C. The State's failure to disclose this evidence prejudiced Mr. Johnson.

Prejudice results when there is "any reasonable likelihood" the suppression of evidence could have "affected the judgment of the jury." *Giglio*, 405 U.S at 154; *Napue v. Illinois*, 360 U.S. 264, 271, (1959). The suppressed evidence "need not be sufficient to produce this [different] result but need only be such that if used effectively 'would have had some weight and its tendency would have been favorable.'" *State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 81 (Mo. 2015) (quoting *Kyles*, 514 U.S. at 451); *see also Smith v. Cain*, 565 U.S. 73, 75-76 (2012).

The only disputed question at trial was whether Mr. Johnson formed the required mental state to commit first-degree murder, or whether he was instead guilty of second-degree murder due to his severe mental illness and related auditory hallucinations. The opinions of the mental health experts involved in assessing Mr. Johnson before trial were paramount to this question, and their credibility was therefore a key issue. All parties at trial, and the Missouri Supreme Court on appeal, agreed and acknowledged the importance of that dispute. In voir dire, the prosecutor asked prospective jurors whether they would be able to consider mental

health-related evidence and emphasized that the jury was to determine the credibility of all the witnesses, including the psychologists and "mental health people" who would be called to testify. Tr. 562-63, 603-04, 674, 678, 683, 737, 756. In his closing argument, the prosecutor told the jury, "**The key in this case**, of course, and what you've heard an awful lot about, is distinguishing the elements between murder first degree and murder second degree." Tr. 1910 (emphasis added). In his rebuttal argument, the prosecutor again summed up the case by explaining, "What the issue is, is he able to coolly reflect." Tr. 1946. He also emphasized the importance of considering the credibility of the witnesses, including expert witnesses, asking whether the jury believed the defense expert, accusing her of being anti-death penalty and stating, "if you knock out cool reflection, you knock out deliberation, you knock out death." Tr. 1947-48.

Given that his mental state was the only disputed issue at trial, and that Becker and English provided the only expert evidence for the State on that issue, Mr. Johnson was prejudiced by the State's suppression of impeachment evidence. Even some impeachment evidence would have allowed defense counsel to make progress in puncturing the air of authority in the State's experts; they were otherwise entirely unimpeached in the eyes of the jury. The jury's determination hinged on whether to believe the defense witness, Dr. Dean, whose evaluation of Mr. Johnson concluded that he did not coolly deliberate because of the command hallucinations he was experiencing as a result of his schizophrenia; or the State's experts, Becker and English, who concluded that Mr. Johnson's hallucinations were

caused by his prior drug use and not his schizophrenia and that he formed the required intent for first-degree murder. The suppressed impeachment evidence was thus critical to any argument against a first-degree murder conviction and the resulting eligibility for the death penalty.

Had the defense had access to Becker's conviction records, counsel could have used it to discredit both Becker and English. While only English took the stand, the opinions he gave were based on reports and evaluations conducted by Becker. [English Deposition], p. 10 ("[Y]ou know, and understand that basically these are products of Dr. Becker."). The defense would have had the opportunity to question English about why Becker was not testifying about his own reports and whether the prosecution's decision not to put Becker on the stand was because of his criminal history.

The jurors themselves recognized that the question before them largely hinged on whether to believe the defense expert or the State's experts with regard to Mr. Johnson's mental state. Their perspective was evidenced by the feedback trial counsel received from a juror who approached them after trial to say that although he believed Mr. Johnson was mentally ill, he was swayed by the State's experts' conclusions regarding Mr. Johnson's mental state and the cause of his actions. Ex. 4, p. 3. Another juror spoke to a documentarian in November 2016 and explained that the case was "unique, I think, in the fact that [Mr. Johnson] admitted his guilt. He admitted he did it. So that really wasn't on the table. It was just the cool deliberation of premeditation to determine the first-degree charge." Ex.

8, p. 3. The deliberations centered around "[m]aking sure everybody was on the same page as far as the first-degree murder." *Id.* at 3. Even in the penalty phase, the jurors were swayed by the impression that Mr. Johnson "planned it out." *Id.* at 5. With regard to the expert testimony in the case, the juror explained that the defense expert's conclusion about Mr. Johnson's auditory hallucinations "was offset by the prosecution's expert witnesses." *Id.* at 6. The defense's ability to impeach the State's witnesses was paramount in overcoming the singular issue of Mr. Johnson's mental state at the time of the crime.

D. This Court should apply *Brady* to Attorneys General in post-conviction proceedings.

This Court has described the State's duty to disclose as "ongoing." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). This Court, however, has not yet directly imputed this ongoing duty to an Attorney General or defined what exactly it requires at post-conviction stages of criminal cases. Citing *Ritchie* and recognizing the "ongoing" duty of disclosure, the United States District Court for the Middle District of Alabama recently rejected an Attorney General's argument that the State is under no ongoing duty to disclose *Brady* evidence in a post-conviction posture. *Wilson v. Hamm,* No. 1:19-CV-284-WKW, 2023 U.S. Dist. LEXIS 51395, at 16-17 (M.D. Ala. Mar. 27, 2023). The Court determined that nothing in *Brady* suggests the duty to disclose ends at conviction, indicating its extension into post-conviction and habeas proceedings, and that due process required the Attorney General disclose the *Brady* material. *Id.* at 16, 27.

The Supreme Court of California even more directly set forth the Attorney General's constitutional duty to disclose *Brady* evidence during post-conviction. *In re Jenkins*, No. S267391, at 25-26 (Cal. Mar. 27, 2023). The Court there explained:

> [W]here a habeas corpus petitioner claims not to have received a fair trial because a trial prosecutor failed to disclose material evidence in violation of *Brady*—and where the Attorney General has knowledge of, or is in actual or constructive possession of, evidence that the trial prosecutor suppressed in violation of *Brady*—the Attorney General has a constitutional duty under *Brady* to disclose the evidence.

Jenkins, No. S267391 at 25-26; These rulings are entirely consistent with this Court's jurisprudence, but this principle has not yet been widely adopted by other courts. *See Banks*, 540 U.S. at 696 ("A rule…declaring a 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process") (quoting *Bracy v. Gramley,* 520 U.S. 899, 909 (1997)).

The procedural posture of the instant case makes it an ideal vehicle for this Court's intervention, to clarify the application of *Brady* to Attorneys General and prosecutors at post-trial stages of a criminal case. Because this petition arises directly from the denial of habeas corpus in state court, and not from the denial of habeas relief in federal court pursuant to 28 U.S.C. § 2254, AEDPA does not apply to restrict this Court's review of the Missouri Supreme Court's unreasoned decision.

The importance of this issue cannot be overstated, especially in light of the high level of deference this Court has said is due state court proceedings. When *Brady* evidence is withheld at trial and state post-conviction proceedings, a defendant may never have the opportunity to fairly litigate his conviction and

sentence, especially if the doors to the federal courts are all but closed to review. This Court's intervention is thus necessary to maintain the integrity of state court proceedings, such that the high level of deference this Court has mandated may be fairly given.

As previously detailed, the Attorney General in Mr. Johnson's case knew of Becker's undisclosed 1999 criminal conviction, Mr. Johnson's many requests for the criminal records of all the State's witnesses, the trial prosecutor's failure to turn anything over in response to the requests. Ex. 14, p. 3; Ex. 15, p. 5. The Attorney General used that conviction in conjunction with Becker's numerous subsequent DWI convictions to go after his professional license. At the very same time, the Attorney General's office was prosecuting Mr. Johnson's case on appeal from the post-conviction denial, during which they continued to rely on Becker's evaluations and English's testimony about them to counter Mr. Johnson's arguments.

The Attorney General's involvement in Mr. Johnson's case continued in federal court during habeas proceedings before the District Court, the Eighth Circuit Court of Appeals, and in opposing Mr. Johnson's 2022 petition for certiorari in this Court. At no point during that decade of involvement in the case did the Attorney General disclose to Mr. Johnson Becker's 1999 DWI conviction or the fact that it was seeking to revoke his license as a result. Mr. Johnson's severe mental illness, including the origination of his hallucinations, the impact of prior drug use, and his criminal responsibility for the offense, were important issues in his case

throughout the litigation, and the State's only expert evidence at trial on those issues were Becker's evaluations and English's testimony about them.

Moreover, while Mr. Johnson's federal habeas proceedings were ongoing, the Committee of Psychologists—the same entity that was represented by the Attorney General in Becker's case—began investigating English, the other State expert witness in Mr. Johnson's case. Given its role in representing the Committee, the Attorney General was in a position to know about the misconduct underlying the Committee's professional discipline against both Becker and English. And although the misconduct that ultimately led English to have to relinquish his professional license took place after Mr. Johnson's trial, his file from the State Committee of Psychologists reveals that similar sexual harassment allegations were reported two decades earlier, before trial. Ex. 23 p. 54. The Attorney General's office did not disclose any of that information to Mr. Johnson in accordance with its Brady obligations, despite continuing to rely on Becker and English in federal habeas proceedings.

In fact, the Attorney General turned over nothing. Instead, the Attorney General knowingly advanced the position that Mr. Johnson's first-degree murder conviction—based on Becker's evaluations and English's testimony—was sound, while simultaneously representing the Committee in pursuing professional discipline against both men.

The Attorney General's continued reliance on Becker's evaluations is all the more egregious when viewed in light of the facts of Becker's many arrests for DWI.

In one case, Becker drove to a sheriff's station so drunk he could not remember who he was there to visit; could not count, say his "ABG's," or even stand on his own; had no valid driver's license; and already had amassed at least five prior DWI arrests. Ex. 14, p. 14-15.

Somehow, this type of behavior was so outrageous the State decided to rescind Becker's license, but was not so bad as to warrant a *Brady* disclosure to Mr. Johnson's counsel. The same is true for English—his sexual harassment of a coworker and misuse of State resources warranted removal of his professional license, but was not pertinent enough for the Attorney General to alert Mr. Johnson's counsel. The Attorney General should not be allowed to engage in such duplicity when the content of the opinions and testimony was the basis for the jury's decision to sentence Mr. Johnson to death.

As noted above, this issue is particularly relevant in light of the high level of deference this Court gives state court proceedings. The basis for such deference must be fair play. Whether at trial or during post-conviction proceedings, the prosecutor's duty is to seek justice, not to win at all costs. *Strickler*, 527 U.S. at 281; *Berger,* 295 U.S. at 88. If a high level of deference is to be given to state court proceedings, it is all the more important that this Court enforce the standards of fair play that the Constitution requires in criminal proceedings—particularly ones involving the possibility of a death sentence. This Court has said that "death is different." *Woodson v. North Carolina*, 428 U.S. 280, 323 (1976); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). It cannot, however, be different by affording

fewer constitutional rights to defendants facing capital cases. If anything, capital convictions and death sentences warrant closer scrutiny, and prosecutors must be held to the highest standards. They cannot be permitted to proceed with unclean hands, even after the trial stage has concluded.

E. This Court should grant the writ of certiorari to clarify the application of *Brady* to post-conviction proceedings and an Attorney General's obligations under *Brady* at all stages of litigation

A death sentence ill-gotten is far from justice. Prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that cases doubt up the correctness of the conviction." *Imbler v. Pachtman,* 424 U.S. 409, 427 n.25 (1976). Mr. Johnson's death sentence was ill-gotten and ill-maintained by prosecutors who failed to disclose *Brady* impeachment evidence at trial, suppressed that evidence at every subsequent stage of litigation, and continued to rely on the State's disgraced experts while simultaneously seeking to revoke their professional licenses in another forum. The Attorney General continuously violated his ethical duty to disclose *Brady* impeachment evidence in post-conviction proceedings. Likewise, the Attorney General lacked candor to the court when it duplicitously relied on expert opinions from Becker and English in order to maintain Mr. Johnson's death sentence, while simultaneously pursuing revocation of both men's professional licenses.

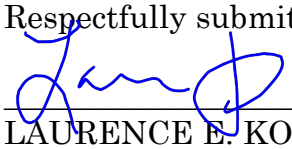
The Missouri Supreme Court's reluctance to impute *Brady* obligations to an Attorney General conflicts with the California Supreme Court's decision in *In re Jenkins*, where the Court clarified that "the Attorney General has a constitutional

duty under Brady to disclose the evidence." *Jenkins*, No. S267391 at 26. Pursuant to this Court's Rule 10 (c), this Court is urged to intercede to clarify a state's continuing *Brady* obligations and responsibility for fair dealing at ***all*** stages of a criminal case.

CONCLUSION

For the foregoing reasons, Mr. Johnson respectfully asks this Court to grant the petition for writ of certiorari.

Respectfully submitted,



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