THIS IS A CAPITAL CASE

EXECUTION SET FOR August 1, 2023 (CURRENTLY STAYED)

No. 23-5147

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

REPLY IN SUPPORT OF 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?

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Undoubtedly, a horrible tragedy unfolded when mentally ill Petitioner committed Casey's murder. It is beyond words and should not be minimized nor capitalized on as an argument in a proceeding.[1] But the through-line from the crime up to this very moment is and remains Petitioner's mental health.

The suppressed evidence relates to the mental health defense. 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. The trial prosecutor conceded: "if you knock out cool reflection, you knock out deliberation, you knock out death." Tr. 1947-48. Yet for over two decades, the trial prosecutor and the Attorney General suppressed evidence related to **the** factor that could "knock out death."

1. There Is No Impediment To This Court's Consideration.

The main thrust of Respondent's argument relates to accusations of delay and unusual interpretative efforts to construe a procedural bar that does not exist

[1] Respondent goes off the record and references Casey Williamson's family and implies their wishes support. BIO p. 12-13. Petitioner acknowledges there is an unbelievable sense of emotion for the entire Williamson family as the date comes close, and every filing can magnify that effect. However, it is unseemly that Respondent, in an effort to score points with this Court, marginalizes a family member who has opposing views and does not disclose to this Court those opposing views. Katie Moore, *Killer of 6-year-old Girl to be Executed. Victim's Father Wants his Life Spared*, Kansas City Star (Jul. 24, 2023), https://www.kansascity.com/news/state/missouri/article277306138.html.

to a timely and properly filed Petition for Writ of Certiorari. As explained below, each of these outlier arguments has no merit.

A. It Is Reasonable For Petitioner To Follow This Court's Rules.

When considering Respondent's unfounded allegations of delay, it is important to recall that Petitioner raises a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This claim is based on misconduct that occurred at the time of trial and during post-conviction and federal habeas proceedings, when Respondent failed to disclose impeachment evidence related to the now former psychologists who refuted the key defense. Thus, any delay in uncovering the underlying Constitutional violation rests with Respondent's twenty-plus year suppression of evidence – they had decades to come clean and did not.

Respondent first misrepresents the procedural history. BIO p. 14. Petitioner previously timely filed his petition for certiorari in *Johnson v. Blair*, Case No. 22-5532. The due date would have fallen on a national holiday, and by operation of the applicable rule (Sup. Ct. R. 30.1), it then fell to the next day. This Court did not deny the petition for untimeliness – it was reviewed via this Court's regular processes.

Respondent then faults Petitioner for utilizing the time provided by this Court's Rule 13.1. BIO p. 14. In essence, Respondent seeks a rule that complying with a rule of this Court--Rule 13.1-- is equivalent to a party acting with unreasonable delay. Complying with this Court's rules (or any court rule) should never be a basis to penalize a party – it would limit the efficacy of any rule.

As to the appendix, Respondent confuses what is the official record below versus what needs to be considered by this Court in determining the question presented. Contrary to Respondent's suggestion, attaching an appendix to a certiorari petition does not require a party to refile the entire record below. Petitioner filed the order to establish jurisdiction of this Court to act – the facts are not disputed, only the legal effect of those facts is in dispute. Petitioner complied with his obligation but is more than happy to provide to the Court any materials that would assist its consideration of the petition.

B. Congress Has Spoken And 28 U.S.C. 1257(A) Is The Law Of This Land.

Respondent raises a novel argument that this Court should vacate an act of Congress authorizing the filing of Petition's for Writ of Certiorari from a final judgment of the highest court of a state. BIO pp. 15-16. This Court should reject Respondent's outlier request to legislate from the bench; 28 U.S.C. 1257(a) provides this avenue to petitioners and it is not for this Court to modify an act of Congress.

C. *Teague* Is Not Implicated.

Petitioner does not ask for a new rule. Becker's 1999 DWI existed pre-trial – and *Brady* applied and there is no *Teague* problem. The disclosure should have occurred at trial – and the non-disclosure is subject to *Brady* at every stage of the proceedings.

As to Becker's string of DWIs and English's entanglements, Petitioner seeks application of principles enunciated by this Court in *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). In *DA's Office v. Osborne*, 557 U.S. 52, 69 (2009), this Court cited

with approval *Pennsylvania v. Finley*, 481 U.S. 551, 559, (1987), that due process principles apply in post-conviction. Prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v. Pachtman,* 424 U.S. 409, 427 n.25 (1976). All Petitioner asks for is consideration of a principle long recognized by this Court regarding the "special role played by the American prosecutor in the search for truth." *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

D. The Missouri Supreme Court Addressed the Merits.

Respondent ignores the principles of this Court to assert that the Missouri Supreme Court did not address the merits of his state habeas petition. BIO pp. 18-19. Respondent concedes that under *Harrington v. Richter*, 562 U.S. 86, 99 (2002), "this Court can generally presume that summary denials were on the merits." BIO, p. 18. Respondent's subsequent assertion that this presumption does not apply in this case lacks merit.

Respondent attempts to distinguish *Harrington* on the basis of thirty-year old pre-*Harrington* authority from the Eighth Circuit, *Byrd v. Delo*, 942 F.2d 1226, 1231 (8th Cir. 1991). But *Byrd* is distinguishable and completely undermines the state's attempted argument. There, the Missouri Supreme Court did initially issue an unexplained decision, but it then later issued a second order clarifying that the decision was procedural. *Id.* at 1227. There was a plain statement of default.

This Court requires a "plain statement" from the state court indicating clearly that its decision was based on adequate and independent state court

grounds. *Harris v. Reed*, 489 U.S. 255 (1989). In *Byrd*, the Missouri Supreme Court's second order explained that its earlier decision was based on state procedural grounds, and thus, *Harris*'s "plain statement" requirement was satisfied.

Respondent fails to mention any of this because the Missouri Supreme Court did not issue the requisite "plain statement." The court issued a checkbox denial which, under *Harrington,* is a presumptive merits ruling. Additionally, to the extent that Respondent argues that various Eighth Circuit cases "assume[] unexplained Missouri state habeas denials were denied on procedural grounds," BIO, p. 18, that argument bears little weight, as the cases Respondent cites all predate *Harrington*. Regardless of what rule the Eighth Circuit might have followed pre-*Harrington* in 1992, *Harrington* is now the controlling precedent.

Aside from the inapposite case law it cites, Respondent now tries to dispute this issue opportunistically. Just seven months ago in November 2022, in this Court in *Johnson v. Vandergriff*, No. 22-5947, BIO, p. 10-11, 14-19, Respondent argued, as it does here, that the unexplained Missouri Supreme Court decision in Mr. Johnson's case was not a merits ruling. But then in responding to the initial state habeas petition of another petitioner, Mr. Tisius, in the Missouri Supreme Court, Respondent argued that the Missouri Supreme Court's decision in *Johnson* **was** a merits ruling and asked the court to follow it for that reason. Response in Opposition, *State ex rel. Tisius v. Vandergriff*, SC99938, p. 21. This shameless about-face came in January 2023, just two months after Respondent argued the Missouri Supreme Court's *Johnson* decision was not a merits ruling. *See id.* Now,

six months later, Respondent shifts back. Respondent's history of ping-ponging establishes that the Missouri Supreme Court's unexplained order is a merits ruling because Respondent's arguments to the contrary are insincere and disingenuous—fluctuating depending on forum and case.

2. Reasons For Granting The Writ

The question presented is premised on expectations related to integrity and confidence. Simply put, the expectation is that those who are a part of the justice system act with integrity. Integrity begets confidence in the justice system.

This goes to the heart of this Court's recognition long ago in *Berger v. United States*, 295 U.S. 78, 88 (1935), that a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Respondent's arguments undermine both integrity and confidence. As will be explained, Respondent mischaracterizes both state and federal law to minimize and forgive transgressions committed by the prosecutor at the time of trial and during post-conviction, and by the Attorney General during the state post-conviction appeal and habeas proceedings. Respondent admits that in this case there is an

arguable question regarding the development of evidence relevant to the post-conviction action. BIO p. 17. The obvious ethical and legal answer to that question is not to remain mum when impeachment evidence exists and has not been disclosed. By doing just that, the State violated its constitutional responsibilities. *Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). A "[p]rosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation." *Id.*

Respondent's first assertion is a mischaracterization of Missouri law. BIO pp. 19-20. To be clear, the 1999 DWI was available and usable at the time of trial but for its suppression. The artificial distinction attempting to be drawn by Respondent ignores Missouri law and this Court's impeachment precedent.

To correct Respondent's misunderstanding of Missouri law, regardless of whether Becker's undisclosed 1999 DWI was a "conviction" or a "suspended imposition of sentence," it was valid impeachment evidence that was required to be disclosed under Missouri law. *State v. Moore*, 411 S.W.3d 848, 854 (Mo. App. 2013) ("the State was . . . constitutionally obligated, pursuant to *Brady*, to search, find and disclose" the witness's SIS); *see also State v. Lynch*, 679 S.W.2d 858, 861 (Mo. banc 1984) ("Thus, a suspended imposition of sentence now carries with it the stain of certain undesirable attributes of a conviction, such as use for . . . impeachment . . . .") (abrogated on other grounds); *State v. Brooks*, 694 S.W.2d 851, 852 (Mo. App. E.D. 1985) ("We therefore hold that a witness can be impeached by his prior guilty

plea, even though he had completed probation under a suspended imposition of sentence"); *State v. Urban*, 798 S.W.2d 507, 514 (Mo. App. W.D. 1990) (impeachment of a witness with an SIS is permissible) (overruled on other grounds); R.S.Mo. § 491.050 ("any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case."). As held by the Missouri Supreme Court, impeachment evidence includes criminal convictions of the State's witnesses as well as any prior pleas of guilty, pleas of nolo contendere, and findings of guilt—including an SIS. Impeachment inquiry regarding an SIS is permissible even though the witness has not been convicted of a crime. *Lynch*, 679 S.W.2d at 861.[2]

Respondent suggests that Mo. Rev. Stat. § 491.050 may be interpreted to "only allow[] admission of findings of guilt when they belong to the testifying witness and when they are used for impeachment." BIO pp.20-21. Respondent is wrong. Rather than a prohibition, the statute merely codifies the positive right to use convictions and guilty pleas to assess through impeachment witness credibility in criminal trials. *See* Mo. Rev. Stat. § 491.050. The statute does not give cover to a prosecutor for failing to disclose the criminal convictions and guilty pleas of

[2] Respondent used the exact same DWI as aggravating evidence in their own proceedings against Becker to successfully prove he engaged in conduct of moral turpitude to merit losing his license to practice psychology, and the post-conviction trial prosecutor also used the same to charge him as a persistent felony offender.

witnesses noticed as witnesses but not actually called to testify. It requires the production once the witness is **endorsed**. It is undisputed that Becker was endorsed.

There are situations where a non-testifying witness's criminal history is material to guilt or punishment, as it was in Petitioner's case. Neither *Brady* nor the Due Process Clause can be read to allow gamesmanship, including gamesmanship in the form of eleventh-hour changes to a witness list to insulate that expert witness from impeachment.

Seeking another avenue to excuse the non-disclosure, Respondent argues admissibility. BIO p. 19. While Petitioner does not necessarily agree with an admissibility standard, *see Wood v. Bartholomew*, 516 U.S. 1, 5 (1995) (explaining the application of Brady depends on whether there exists a "reasonable probability" the evidence would affect the outcome of trial); *see also Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 279 (3d Cir. 2016) (clarifying that *Wood* did not create a bright line rule attaching admissibility requirement to *Brady* evidence), Respondent is wrong to suggest the 1999 DWI does not fall into the category of admissible evidence. Respondent incorrectly asserts that Becker's 1999 DWI was inadmissible because "one witness cannot be impeached with the criminal history of another." BIO p. 19 (citing Mo. Rev. Stat. § 491.050). However, there is no statutory language supporting Respondent's position on the inadmissibility of evidence.

Furthermore, Respondent identifies no case that has held a party cannot question an expert on the accuracy of the information upon which they rely.[3] This is especially so when the report written by the non-testifying expert is being used for the truth of the matter asserted. At minimum, the testifying witness can be asked about his awareness or lack thereof of facts relevant to the materials upon which the testifying expert relies.

Respondent avoids Petitioner's key point: although English testified at trial, Becker was the psychologist who actually conducted the evaluations of Mr. Johnson and wrote the reports, and English relied on Becker's evaluations and reports in his testimony. Thus, evidence impeaching Becker's credibility also could have been used to impeach English's credibility because he was relying on Becker's work product.

Furthermore, the State **endorsed** both English and Becker as witnesses—and it therefore had a duty to disclose impeachment information, including Becker's DWI, regarding **both** endorsed witnesses. The fact that the State at the last minute decided to call only English to rebut the defense expert—in Petitioner's opinion, to avoid disclosing the DWI—does not mean that it no longer had a duty to disclose

[3] Becker lost his driver's license during the 1999 offense when he refused a breathalyzer. Pet. Ex. 24 [Becker Dep't of Revenue Record]. Trial counsel could have asked questions regarding the importance of developing a full factual record to determine a legal question. When English agreed, he could then have been cross-examined regarding his awareness of Becker's refusal to allow the collection of evidence in his own case for his own self-interest. To echo the prosecutor's closing argument to the jury, this would have shown how Becker "cooked" the evidence in his favor.

impeaching information. And by calling only English—who relied on Becker—the State thereby bolstered its rebuttal case with the imprimatur of two expert witnesses, instead of just one. And, because the State did not disclose the impeaching information, neither expert was subject to impeachment with the non-disclosed evidence. *See Bullcoming v. New Mexico*, 564 U.S. 647 (2011). The State may not evade its duties under *Brady* by having an alternate witness testify about evaluations primarily conducted by someone else.

Mis-citing to *Osborne*, Respondent proposes that the State has no obligation to disclose anything after trial and sentencing are over. BIO p. 21. However, *Osborne* provides that "due process [in post-conviction proceedings] is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial." *Osborne*, 557 U.S. at 69. Respondent ignores this Court's citing with approval *Finley*:

> The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. "[W]hen a State chooses to offer help to those seeking relief from convictions," due process does not "dictat[e] the exact form such assistance must assume." *Pennsylvania v. Finley*, 481 U.S. 551, 559, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).

Osborne, 557 U.S. at 69. Petitioner's rights do not end at the completion of sentencing. *See also Imbler*, 424 U.S. at 427 n. 25 (stating that "at trial" a prosecutor's duty to disclose evidence comes from the Due Process Clause, while "after a conviction the prosecutor **also** is bound by the ethics of his office to inform the appropriate authority of after-*acquired* or other information that casts doubt upon the correctness of the conviction") (emphasis added).

Petitioner's case is a prime example of why *Brady* principles described in *Osborne*, *Finley*, and *Imbler* apply to Attorneys General in post-conviction proceedings. At post-conviction, the State had information that Petitioner certainly would have received at trial under *Brady*. Instead of disclosing the information at any point, the State chose to proceed in defending against Petitioner's post-conviction allegations, relying on Becker's evaluations.[4] The State acted in such a manner while simultaneously revoking Becker's license as a psychologist--the expert they relied upon to render Petitioner death-eligible--due to his multiple DWIs that resulted in his lengthy prison sentence.

The credibility of Becker and English was central to whether Petitioner 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 Petitioner committed the killing, the sole issue before the jury was whether Petitioner 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 Petitioner did not coolly deliberate. Thus, Becker and English presented the most important evidence upon which Petitioner's first-degree murder conviction and death sentence rests.

[4] Mr. Johnson's post-conviction counsel's motion for discovery included a request for impeachment 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 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. Impeachment material that called into question Becker's or English's credibility would have worked in Petitioner's favor, reducing the jury's reliance on their conclusions about Petitioner's mental health at the time of the offense in comparison to the conclusions of the defense expert. 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 Petitioner's post-conviction claims and were in fact performed by Judge Seigel in denying post-conviction relief.

Becker's behavior was so outrageous the State decided to rescind Becker's license, but according to the State, was not so bad as to warrant disclosure to Petitioner. 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 Petitioner. 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 convict Petitioner of first-degree murder and sentence him to death.

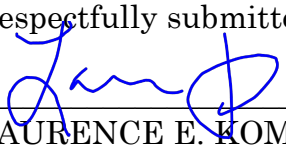
This case presents a proper vehicle for this Court's exercise of *certiorari* jurisdiction. It is necessary to protect the integrity of state court proceedings, and the rights of defendants. When *Brady* evidence is withheld at trial and state post-

conviction proceedings, a defendant's chance to fairly litigate his conviction vanishes as the doors to federal courts are all but closed to review, which results in the loss of both integrity and confidence in the justice system.

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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