THIS IS A CAPITAL CASE – EXECUTION SET FOR August 1, 2023

No. 23A-____

No. 23-5147 (connected case)

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

APPLICATION FOR STAY OF EXECUTION

APPENDIX

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INDEX

Supreme Court of Missouri

en banc

SC100023

State ex rel. Johnny A. Johnson, Petitioner,

vs.

David Vandergriff, Superintendent, Potosi Correctional Center, Respondent.

☐ Sustained

☐ Overruled

☐ Denied

☐ Taken with Case

☐ Sustained Until

☒ Other

Order issued: Petition for writ of habeas corpus denied. Petitioner's motion to appoint a Special Master overruled as moot; and Petitioner's motion for discovery overruled as moot.

By: _____ April 19, 2023

Chief Justice Date

IN THE SUPREME COURT OF MISSOURI

State of Missouri ex rel. JOHNNY A. JOHNSON,	)	
Petitioner,	)	**No. _____**
v.	)	
	)	**THIS IS A CAPITAL CASE**
DAVID VANDERGRIFF, Superintendent, Potosi Correctional Center,	)	
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS

Comes now Johnny A. Johnson, by and through undersigned counsel, and petitions this Court, under Rule 91, for a Writ of Habeas Corpus granting him relief from his conviction and death sentence.

INTRODUCTION

Petitioner Johnny A. Johnson is an inmate housed in Potosi Correctional Center in Mineral Point, Missouri. Respondent David Vandergriff is the Warden of Potosi Correctional Center. For the reasons explained below, newly discovered evidence regarding the State's expert witnesses, which calls into question their credibility, was suppressed by the prosecution at the time of trial and by the Attorney General when appearing before this Court. Because this evidence was concealed from Mr. Johnson by the prosecution and was only recently discovered by Mr.

Johnson's counsel, Mr. Johnson previously has not sought relief in any state court on the claims contained in this petition.

In 2005, Mr. Johnson was convicted of first-degree murder and other charges involving the July 26, 2002 murder of Casey Williamson and was sentenced to death. At trial, the only disputed issue before the jury was whether at the time of the offense Mr. Johnson deliberated as required for first-degree murder, or whether, due to his well-documented severe mental illness, a reasonable doubt existed as to whether he formed the requisite mental state for first-degree murder. Mr. Johnson presented a trial defense that he was not guilty of first-degree murder because, due to his schizophrenia and active auditory command hallucinations, a reasonable doubt existed as to whether he formed the required mental state to commit first-degree murder. The defense asserted that the jury instead should convict him of second-degree murder.

Prior to trial, the court appointed two psychologists, Stephen Becker and Byron English, [1] to evaluate Mr. Johnson, first to determine his competency to stand trial and again when his attorneys indicated they might present a defense of not guilty by reason of insanity ("NGRI"). His attorneys ultimately did not pursue an NGRI defense; instead they presented a diminished capacity defense. The testimony of Dr.

[1] Mr. Johnson does not refer to the State's experts as "Dr." because neither Becker nor English have a valid Missouri license to practice psychology. Both lost their licenses for reasons suppressed from Mr. Johnson.

Delany Dean, a psychologist, supported this defense. Dr. Dean evaluated Mr. Johnson and determined that he was responding to command hallucinations when the offense was committed. After Dr. Dean's testimony, the State called English to counteract the defense case and the expert testimony upon which it relied.

English had not conducted the two court-ordered evaluations of Mr. Johnson unrelated to the diminished capacity defense. Rather, the evaluations had been conducted by Becker under English's supervision. English's pretrial deposition disclosed that Becker had done the psychological testing and evaluation of Mr. Johnson in both instances and had written both reports. English only reviewed those materials. English and Becker did not dispute that Mr. Johnson suffered from a form of schizophrenia and experienced hallucinations. However, English disputed Mr. Johnson's defense and testified that Mr. Johnson could and did deliberate at the time of the offense. *State v. Johnson*, 207 S.W.3d 24, 34 (Mo. banc 2006) (noting that the only disputed issue at trial was whether Mr. Johnson deliberated as required for first-degree murder and that the State's expert rebutted this defense).

Later, in state post-conviction proceedings before Judge Mark Seigel, who had also presided over Mr. Johnson's trial, the defense presented additional expert witnesses. Dr. Pablo Stewart and Dr. Craig Beaver disputed English and Becker's claims regarding the nature of Mr. Johnson's hallucinations and their effect on his commission of the offense. Crediting the evaluations conducted by Becker and

English's testimony, Judge Seigel denied Mr. Johnson's post-conviction motion. On appeal from the state post-conviction proceedings, this Court also deferred to the evaluations and reports by Becker and English's testimony based on those evaluations in affirming the denial of Mr. Johnson's post-conviction motion. *Johnson v. State*, 388 S.W.3d 159, 164 (Mo. banc 2012).

Newly discovered evidence reveals that, due to illegal and unethical conduct of both expert witnesses the State, the jury, Judge Seigel, and this Court relied on, the State of Missouri stripped both English and Becker of their professional licenses. The State revoked Becker's license due to a series of DWI convictions, at least one of which took place before Mr. Johnson's trial and was not disclosed to his trial attorneys. English was forced to relinquish his license for (1) misusing state resources by conducting unsanctioned pre-surgical evaluations of co-workers while at work and (2) sexually harassing a co-worker over a period of years.

The only disputed issue in Mr. Johnson's case dealt with his mental state at the time of the offense. The basis for the State's position on that question rested on the evaluations, reports, and testimony of Becker and English. Given that level of importance, the prosecution's withholding of critical impeachment information regarding its mental health experts deprived Mr. Johnson of due process and a fair trial and rendered his conviction and death sentence invalid. On proof of his allegations that a *Brady* violation occurred, Mr. Johnson is entitled to a new trial,

sentencing, or post-conviction proceeding free of the corruption of the process that invaded his case thus far. Therefore, this Court should order a new trial or in the alternative a new post-conviction proceeding based on the evidence Mr. Johnson has uncovered. To the extent that additional factual development is necessary for a proper resolution of this claim, this Court should appoint a special master and order an evidentiary hearing to assess the evidence in support of Mr. Johnson's *Brady* claim and his claim that he was deprived of a fair and meaningful post-conviction process by the judge's simultaneous role in his case and the criminal case of the State's expert, Becker.

JURISDICTIONAL STATEMENT

This Court has original jurisdiction over this petition because it involves a prisoner under a sentence of death. Rule 91.02(b). "Habeas corpus is the last judicial inquiry into the validity of a criminal conviction and serves as 'a bulwark against convictions that violate fundamental fairness.'" *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. banc 2003) (quoting *Engle v. Isaac*, 456 U.S. 107, 126 (1982)). Habeas relief may issue when the prisoner's conviction or sentence violates the constitution or laws of Missouri or the United States. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001).

This Court may grant habeas relief on claims that were not asserted on direct appeal or in post-conviction proceedings pursuant to Rule 29.15 if the petitioner

demonstrates a manifest injustice, cause and prejudice, or a jurisdictional defect. *Jaynes*, 63 S.W.3d at 215; *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 125 (Mo. banc 2010).

"Cause" exists when "there is a factor at issue external to the defense or beyond its responsibilities" that caused the delayed revelation of the claim. *Engel*, 304 S.W.3d at 125. A petitioner must establish that the grounds for relief were not known to him during his direct appeal or post-conviction case. *Id.* at 126. In the context of a *Brady* claim resting on new evidence unknown to the petitioner during his direct appeal or post-conviction case, "prejudice is identical to" that necessary to warrant relief under *Brady*. *Id.* Similarly, where a judicial appearance of impropriety claim rests on new evidence previously unknown to the petitioner, the prejudice standard is identical that necessary to warrant relief under the appearance of impropriety standard. *See id.*; *Anderson v. State*, 402 S.W.3d 86, 92 (Mo. banc 2013) (explaining that the prejudice "burden does not require a movant to prove that the motion court was actually biased or prejudiced but rather that a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court.").

As shown below, Mr. Johnson raises a *Brady* claim involving impeachment evidence regarding the State's mental health experts, which was not disclosed to Mr. Johnson during his trial, direct appeal, post-conviction, or federal habeas

proceedings. Because the prosecution did not disclose at any point during any prior court proceedings, and because the post-conviction court did not disclose it during Mr. Johnson's post-conviction proceedings, it was unknown to Mr. Johnson, and Mr. Johnson's inability to raise this claim previously arises from reasons "external to the defense." Furthermore, in light of the importance of the experts' conclusions to the State's theory and Mr. Johnson's defense, Mr. Johnson readily meets the *Brady* prejudice standard.

The State's suppression of the impeachment evidence regarding Becker also prevented Mr. Johnson from raising potentially meritorious claims in post-conviction and deprived him of a fair and meaningful post-conviction process. The post-conviction judge's simultaneous role in Becker's criminal case, which took place during Mr. Johnson's Rule 29.15 proceedings, and the judge's reliance on Becker's credibility and conclusions without disclosure to Mr. Johnson of Becker's criminal convictions, created an appearance of impropriety. Because Becker's criminal convictions were never disclosed to Mr. Johnson, he had no prior opportunity to challenge the fairness of his post-conviction process and, in light of the post-conviction court's heavy reliance on the State's experts in denying Mr. Johnson relief, he meets the prejudice standard with regard to that claim.

STATEMENT OF THE CASE

A. Trial and Post-Conviction Facts

This Court previously recognized the only disputed guilt-phase question before the jury was whether Mr. Johnson formed the requisite mental state for first-degree murder. *See Johnson*, 207 S.W.3d at 34. Mr. Johnson's defense asserted that, due to his severe mental illness and the auditory command hallucinations he was experiencing at the time of the offense, a reasonable doubt existed as to whether he coolly deliberated as required for first-degree murder and he was therefore guilty of second-degree murder instead. The prosecution agreed Mr. Johnson's mental state was the sole disputed issue. In so doing, the State relied exclusively on the conclusions of Becker and English to assert Mr. Johnson did form the required mental state to commit first-degree murder.

Before trial, on October 1, 2002, defense counsel 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. On October 8, 2004, Mr. Johnson's trial counsel filed a 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. The motions

specifically requested arrest, charging, and conviction records of the State's anticipated witnesses. Ex. 2, pp. 1-2; Ex. 3, pp. 1-3; Ex. 4 [Kerry Affidavit], p. 2; Ex. 5 [Beimbiek 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. Indeed, the prosecution did not turn over any impeachment information to defense counsel related to either of the two expert witnesses. Ex. 4, p. 2; Ex. 5, p. 3.

At trial, the defense presented Dr. Delany Dean, a psychologist who evaluated Mr. Johnson over the course of four visits. Dr. Dean, consistent with English and Becker, found Mr. Johnson to be suffering from a form of schizophrenia. Mr. Johnson's longstanding schizophrenia produced active command hallucinations. Mr. Johnson experienced those at the time of the crime, and thus, Dr. Dean concluded that he did not coolly deliberate when he committed the offense. Tr. 1579, 1636-37.

Pretrial, the State had endorsed both Becker and English as witnesses. Ex. 20 [State's Endorsement of Witnesses], p. 4. After the defense rested, the prosecutor

announced he was only calling English to testify in rebuttal. The State offered no explanation as to why it chose not to call Becker, who had primarily conducted the evaluations and written the reports. Tr. 1793. English had admitted at his prior deposition that Becker was the one who interviewed and evaluated Mr. Johnson, reviewed the majority of the records, and wrote the reports. Ex. 6 [English Deposition], p. 11-12, 17, 22. At trial, however, English testified he and Becker "collaborated totally." Tr. 1806. English opined that Mr. Johnson did deliberate, refuting his diminished capacity defense. Tr. 1843-45. Thus, the State was able to avoid any possible cross-examination of Becker about his first DWI.[2]

The jury convicted Mr. Johnson of first-degree murder. After the trial was over, a juror approached the defense attorneys and explained that he believed Mr. Johnson suffered from a mental illness, but he believed the State's experts' conclusions regarding Mr. Johnson's hallucinations being caused by prior drug use and about his culpability in the case. Ex. 4, p. 3. Another juror spoke to a documentarian in November 2016 and explained that he felt the defense expert's conclusion about Mr. Johnson's auditory hallucinations "was offset by the prosecution's expert witnesses," leading the jury to conclude that he "planned it out"

[2] While bad faith is not a component of the *Brady* standard, the State's failure to also call Becker certainly creates an inference of knowledge of the DWI.

and coolly deliberated as required for first-degree murder. Ex. 8 [November 2016 Juror Interview, "The Worst Crime"].

During Mr. Johnson's state post-conviction proceedings pursuant to 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 before Judge Seigel. It began on November 30, 2009, and continued through December 2, 2009. The remainder of the hearing took place on July 23, 2010. 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 evaluations, emphasizing the credentials of both psychologists. The court dismissed the conclusions of the post-conviction defense expert, Dr. Pablo Stewart, who found that English and Becker's claims related to

Mr. Johnson's hallucinations being caused by his drug use rather than his mental illness were erroneous. Ex. 12 [Rule 29.15 Denial], pp. 2, 11-13, 19-20, 32-34.

B. Newly Discovered Evidence

In the course of investigating Mr. Johnson's case, counsel discovered in early 2023 that Becker and English both 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 criminal behavior started at least as early as 1999, but as mentioned above, Becker's 1999 convictions were never disclosed to trial counsel despite trial counsel's specific pretrial request for such information.[3] Ex. 13 [Franklin County Records], p. 1; *see also* Ex. 15 [St. Louis County Records], p. 14. Becker now has at least six additional DWI convictions, including at least three felonies. Ex. 14 [St. Francois County Records], pp. 6-7; Ex. 15, p. 14; Ex. 16 [Butler County Records], p. 1. The State Administrative Hearing Commission held a hearing in March 2012—almost exactly six months before oral argument in this Court on Mr. Johnson's appeal from his Rule 29.15 denial—at which the Committee of Psychologists was represented by the Attorney General's Office. Ex. 18 [*State Comm. of Psychologists v. Becker*, Case No. 12-0407 PS (May

[3] It is not clear from the records how many 1999 cases Becker had or what their ultimate dispositions were, but subsequent prosecutions list a 1999 DWI conviction. Case.net lists a 1999 conviction for failure to dim lights.

3, 2013)], p. 3. In May 2013, as a result of that hearing, Becker was stripped of his professional license. Ex. 18, p. 3.

English was investigated by the Department of Mental Health and the Missouri State Committee of Psychologists and was found to have misused State resources by conducting pre-surgical mental health evaluations at work for colleagues who were seeking gastric bypass surgery, which was outside his expertise and not part of his job duties. Ex. 19 [English Settlement Agreement], p. 4. He also was found to have sexually harassed a coworker over a period of about two years. Ex. 19, p. 4. After the Department of Mental Health and the Committee of Psychologists found the allegations against him to be substantiated, English entered into a settlement agreement with the Committee in 2018 in which he agreed to relinquish his professional license. Ex. 19, p. 7.

The State has failed to disclose any of this important impeachment information to Mr. Johnson's counsel at every stage of litigation throughout this case. The State's suppression violated due process and prevented the jury from considering the impeaching information as part of their credibility assessment of the State's experts; it deprived Mr. Johnson of his due process right to a fair post-conviction proceeding in light of Judge Seigel's involvement in Becker's criminal case; and it has precluded Mr. Johnson from raising this claim in prior stages of litigation. Even before this Court, the Attorney General asked this Court to credit

Becker's testimony over that of a non-persistently impaired defense expert, while simultaneously seeking to take Becker's license in another forum.

1. Becker's Many DWI Convictions

Despite trial counsel's specific request for impeaching information concerning the State's witnesses and the State's pre-trial assurances that it would disclose prior convictions, the State never provided any information related to Becker's 1999 convictions. Moreover, at no point during Mr. Johnson's Rule 29.15 proceedings did the prosecution disclose that, in addition to Becker's undisclosed 1999 convictions, the St. Louis County Prosecutor's Office—the same office that prosecuted Mr. Johnson at trial and in post-conviction—was prosecuting Becker for felony DWI as a persistent offender. Ex. 15, p. 14. Neither the prosecution nor Judge Seigel ever acknowledged that Becker's St. Louis County felony DWI case was before Judge Seigel himself and took place while Mr. Johnson's post-conviction proceedings were ongoing. Ex. 10, pp. 3-4; Ex. 11, p. 2. Becker pleaded guilty to felony DWI as a persistent offender on April 1, 2010—**after Mr. Johnson's post-conviction hearing began but before it was concluded**—and Judge Seigel sentenced Becker to four years in prison, concurrent with his prison sentence in yet another felony DWI case in Butler County. Ex. 15, pp. 3, 6-7; Ex. 16, p. 1.

In addition to the 1999 convictions and the 2009 felony DWI case in St. Louis County, Becker had at least three other DWI convictions by the time of the hearing on the Rule 29.15 motion.

Jurisdiction	Charge	Date of Crime	Date of Conviction
St. Francois County	DWI	November 21, 2005	June 8, 2006
St. Francois County	DWI	June 23, 2007	November 13, 2007
St. Francois County	DWI	August 1, 2007	July 11, 2008

Ex. 14, pp. 6-7.

On top of the above malfeasance and at the time of the Rule 29.15 hearing, Becker faced at least three pending cases. One, charging him as a persistent offender, was before Judge Seigel, demonstrating that both Judge Seigel and the prosecutor's office knew of Becker's prior DWI convictions. Ex. 15, p. 3.

Jurisdiction	Charge	Date of Crime	Date of Conviction
St. Louis County **(Judge Seigel)**	Felony DWI/ persistent offender	September 28, 2008	April 1, 2010 (4 years)
St. Francois County	Felony DWI/ chronic offender	October 9, 2008	August 4, 2010 (5 years)
Butler County	Felony DWI/ persistent offender	October 19, 2008	April 13, 2010 (4 years)

Ex. 14, pp. 6-7; Ex. 15, p. 3; Ex. 16, p. 1.

While the three felony cases were pending in Missouri, Becker was arrested for another DWI on May 21, 2009, in Navajo County, Arizona and was later indicted for felony DWI in that case for driving with a blood alcohol content of over .20% and with a suspended or revoked license.[4] Ex. 17 [Navajo County, Arizona Records], pp. 4-5. He was extradited to Missouri from Arizona on a fugitive warrant to face the three pending felony cases in June 2009. Ex. 17.

Like the trial and post-conviction prosecutor and post-conviction court, the Attorney General also 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

[4] The Arizona case was dismissed without prejudice in 2014. Ex. 17, p. 6.

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. Ex. 14, p. 3; Ex. 15, p. 4. One month later, the Missouri State Committee of Psychologists, represented by Assistant Attorney General Ronald Smith, held a hearing to determine whether to revoke Becker's professional license because of Becker's numerous DWI convictions. Ex. 18, pp. 1-2, 9-11. Becker's license was revoked by the Committee on May 3, 2013. Ex. 18, pp. 3-4.

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 his conviction and death sentence before this Court in a brief filed four short months after seeking to revoke Becker's license. *See* Response, Case 13-CV-00278-HEA, at 14-15.[5] And although counsel was appointed in early 2013 to represent Mr.

[5] In that brief, the Attorney General specifically argued against the credibility of a defense expert on the basis of licensure. *See* Response, Case 13-CV-00278-HEA, p. 88 n. 10. Notably omitted is any reference to the Attorney General seeking to revoke the license of their key expert. Undersigned counsel listened to the post-conviction argument to this Court. At no point during oral argument did the Attorney General disclose their pursuit of Becker's license.

Johnson in federal habeas proceedings, at no point between then and the present time has either the St. Louis County Prosecutor's Office or the Attorney General's Office 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.[6]

2. English's Misconduct

The State also never disclosed to Mr. Johnson's counsel at any point that Byron English, its other expert witness and the individual the State called to testify—even though Becker had primarily conducted the evaluations—was investigated for various types of professional misconduct. Like Becker, English also faced professional discipline by the Missouri State Committee of Psychologists, and he ultimately agreed to relinquish his license to practice psychology. Ex. 19, p. 7.

In December 2017, while Mr. Johnson's federal habeas petition was pending, the Committee began an investigation into English's conduct while employed at the Southeast Missouri Mental Health Center. The Center had 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 at work for colleagues who wanted to undergo gastric bypass surgery—even though he

[6] The St. Louis County Prosecutor's Office recently has permitted counsel to review its files upon counsel's request.

had never done pre-surgical evaluations as part of his psychological practice—and was using State resources to complete them. Ex. 19, pp. 2-5. English wrote letters to his coworkers' surgeons claiming to have evaluated them, but he was unaware of the guidelines providers were to follow in conducting such evaluations, which were not part of his job duties. Ex. 19, p. 3. His evaluations consisted only of administering a personality test (the MMPI) and interviewing his colleagues "to see if there was 'any symptomology present'" and he "didn't have to go any farther than that." Ex. 19, p. 3. He had his secretary at Southeast Missouri Mental Health Center type the reports he sent to his colleagues' surgeons. Ex. 19, p. 3. In addition to the misuse of state resources, English had made inappropriate sexual comments to a female coworker, had touched her in a way that made her uncomfortable, and gave her unwanted gifts. Ex. 19, p. 4. He sent her inappropriate emails and left sexually harassing messages on transcription tapes, as well as the suggestive comments he made in person. Ex. 19, p. 4.

The Committee's investigation revealed that the Department of Mental Health had already conducted its own investigation and found the allegations against English substantiated. Ex. 19, p. 4. 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. Ex. 19, p. 6-7.

3. The State's Reliance on Disgraced Experts

Despite the serious credibility concerns surrounding both Becker and English, the State has continually relied on their findings and conclusions about Mr. Johnson's mental state at the time of the crime. Moreover, the State has repeatedly urged this Court as well as the federal courts that have reviewed Mr. Johnson's conviction and death sentence to do the same. However, the State has done so without ever disclosing to Mr. Johnson's counsel or this Court the important impeachment information related to Becker and English.

Because of this continued failure to disclose, Mr. Johnson has never been able to present his *Brady* or judicial appearance of impropriety claims to any prior court. Furthermore, as to the claims Mr. Johnson was able to raise despite the State's suppression, the suppression has prevented this Court and others from evaluating Mr. Johnson's history of hallucinations and his capacity for cool deliberation at the time of the offense in their full context, one that includes the dubious credibility of the State's experts' conclusions.

REASONS THE WRIT SHOULD BE GRANTED

Claim I: Mr. Johnson's conviction was secured in violation of his right to due process of law because the State, contrary to its obligations under *Brady* and Rule 25.03, failed to disclose important impeachment information concerning its experts' conclusions regarding the only disputed issue in the case.

In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). "Impeachment evidence . . . falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985). Accordingly, this Court has recognized that "[p]rosecutors must disclose, even without a request, exculpatory evidence, including evidence that may be used to impeach a government witness." *State v. Robinson*, 835 S.W.2d 303, 306 (Mo. banc 1992) (citing *Bagley*, 473 U.S. at 674-77; *Brady*, 373 U.S. at 86-89; Mo. Sup. Ct. R. 25.03(A)(9)). This duty rests, in part, on the unique role of prosecutors in the criminal justice system. Indeed, this Court has recognized 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." *Engel*, 304 S.W.3d at 127-28 (internal quotations omitted); *Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("We have several times underscored the special role played by the American prosecutor in the search for truth in criminal trials.") (internal quotations omitted); *see also Robinson*, 835 S.W.2d at 306 (citing *Bagley*, 473 U.S. at 675 & n.6).

A *Brady* violation has three components: "The 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 v. Greene*, 527 U.S. 263, 281-82 (1999). Under *Brady*, "[e]vidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (internal quotations omitted). A petitioner "need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted." *Id.* (citing *Smith v. Cain*, 565 U.S. 73, 75 (2012)). Rather, "[h]e must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Id.* As this Court has explained, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial . . . resulting in a verdict worthy of confidence." *State ex rel. Koster v. Green*, 388 S.W.3d 603, 608 (Mo. banc 2012) (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Like the due process requirements of the *Brady* line of cases, Missouri Rule 25.03 requires the prosecution, upon written request of defendant's counsel, to disclose exculpatory evidence to the accused prior to trial. This rule "imposes an affirmative requirement of diligence and good faith on the state to locate records not

only in its own possession or control but in the control of other government personnel." *Merriweather v. State*, 294 S.W.3d 52, 55 (Mo. banc 2009).

Even when the suppressed evidence does not come to light until after the conclusion of a defendant's federal habeas corpus proceedings, the defendant may pursue a state habeas action asserting a *Brady* claim. *Engel*, 304 S.W.3d at 124-25. In *Engel*, the petitioner did not learn of the suppressed evidence until after the conclusion of his federal habeas proceedings and "nearly 26 years after the alleged crimes for which he was convicted." *Id.* If the defendant can establish that (1) the grounds for relief were not known to him during his direct appeal or post-conviction proceedings and (2) the suppression of the evidence prejudiced him, then he is entitled to vacatur of his conviction(s). *Id.* at 126.

A. The State Suppressed the Impeachment Evidence from Mr. Johnson, Precluding His Knowledge of the Grounds for Relief During his Direct Appeal or Post-Conviction Proceedings

As explained above, the prosecutor had a duty to disclose impeaching information even without a request, and despite the motions filed by trial and post-conviction counsel requesting that the State disclose any prior convictions or impeachment information regarding its witnesses, the State did not provide to any of Mr. Johnson's current or former attorneys such information related to English or Becker. Remaining mum when impeachment evidence exists violated the State's constitutional and statutory duties.

In *Merriweather*, this Court held that the prosecution's failure to disclose the victim's out-of-state conviction was an issue of "fundamental fairness" violating both Rule 25.03 and the defendant's due process rights. *Merriweather*, 294 S.W.3d at 55. Likewise, in this case, the State's failure to disclose Becker's criminal conviction before trial deprived Mr. Johnson of a meaningful opportunity to challenge the credibility of the State's experts, which was of the utmost importance in light of the main issue in the case—Mr. Johnson's mental state at the time of the crime. Although English ultimately testified for the State, it was Becker who primarily interviewed Mr. Johnson, conducted the evaluation, wrote the reports, reviewed the records, and reached an opinion. Ex. 6, pp. 10-12, 17, 22; Ex. 7 [Becker Deposition], p. 7. English "collaborated" with Becker, reviewed the reports, and gave feedback on Becker's conclusions. Ex. 6, p. 12; Ex. 7, p. 7.

Both experts were endorsed by the State as potential witnesses, and it was not until the State called English to the stand that Mr. Johnson's attorneys knew it would be he, and not Becker, who would ultimately testify. Ex. 5, pp. 3-4; Ex. 20, p. 4. Although the prosecution provided information regarding the prior convictions of other witnesses it had endorsed, it never provided any such information with regard to Becker or English, including the fact that Becker had been convicted of at least one criminal offense in 1999. Ex. 4, pp. 2-3; Ex. 5, pp. 3-5. The State's decision

not to also call Becker certainly creates an inference of knowledge about the DWI and an attempt to insulate their rebuttal witness from attack on cross-examination.

Had Mr. Johnson's trial attorneys known about Becker's convictions, they would have used the information to cast doubt on the credibility of English and Becker and their conclusions as to Mr. Johnson's mental state at the time of the offense. Ex. 4, p. 3; Ex. 5, p. 5. Trial counsel attempted to employ this strategy in cross-examining English by questioning him about discarding his notes and the lack of experience both he and Becker had with diminished capacity, as well as in the defense closing arguments where counsel again highlighted those deficiencies. Tr. 1869-70, 1874-75, 1935-36. But had they been equipped with the much more significant impeachment information that was withheld regarding Becker's criminal history, their strategy of discrediting the State's experts would have been considerably more effective. *See Engel*, 304 S.W.3d at 128 ("In determining whether the suppressed impeachment evidence was material, the reviewing court must evaluate not only the ways that the witness *was* impeached, but also the ways that he was *not* impeached that would have been available had the *Brady* claim evidence been disclosed.") (internal citations and brackets omitted).

Trial counsel also could have called into question the State's choice to call English to testify rather than Becker, especially given that Becker was the one who primarily conducted the evaluations and wrote the reports. Even if Becker's only

1999 conviction was for failure to dim lights, Mr. Johnson's attorneys would have known to look more deeply into that case since that would have been a "red flag" suggesting that the case originated as something more serious—and it was. Ex. 4, p. 2. Because the withheld information would have allowed trial counsel to call into question the credibility of the State's experts, it was impeachment evidence that was required to be disclosed under *Brady* and its progeny.[7] *Bagley*, 473 U.S. at 676 ("Impeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule"); *Strickler*, 527 U.S. at 280; *Engel*, 304 S.W.3d at 126.

Seriously compounding this *Brady* violation, during post-conviction, the prosecution also suppressed the fact that, while Mr. Johnson's Rule 29.15 proceedings were pending, their 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. 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

[7] The State's use of a peremptory strike to dismiss a prospective juror with prior DWI convictions further demonstrates the impeaching nature of such criminal history. Tr. 751-53, 766. If, in the State's estimation, an individual is not qualified to serve as a juror with a DWI history, one cannot credibly premise a first-degree murder conviction and death sentence on a similarly impaired expert's opinion.

proceedings. Ex. 15, p. 4. Yet neither the prosecutor's office nor Judge Seigel informed counsel that Judge Seigel had sentenced Becker to four years in prison for a felony at the same time that Judge Seigel was relying on Becker's evaluations of Mr. Johnson to deny him relief in his Rule 29.15 proceedings. Ex. 10, pp. 3-5.

This important impeachment information was never turned over to Mr. Johnson's attorneys at any stage. A review of the trial and post-conviction files from the Missouri State Public Defender's Office reveals no mention at all of Becker's criminal cases. In interviews with trial counsel, they each affirmed that they were never informed of any impeachment information related to Becker or English, including Becker's 1999 convictions. Ex. 4, p. 2; Ex. 5, p. 5. Post-conviction counsel likewise was never provided Becker's 1999 convictions or the numerous subsequent DWI cases in which he was arrested and convicted, including the St. Louis County case. Ex. 10, pp. 2, 4; Ex. 11, pp. 2-3.

If counsel had learned of this impeachment information during the post-conviction proceedings, not only would they have been able to cast doubt on the credibility of the State's trial experts during the post-conviction hearing, but they also would have had the opportunity to raise a *Brady* claim due to the State's suppression of the information before trial. Ex. 10, p. 4; Ex. 11, p. 3. And had post-conviction counsel been informed of Becker's pending case before Judge Seigel at that very same time, counsel could have moved to recuse Judge Seigel and argued

that the post-conviction court's reliance on Becker's evaluations and conclusions while also presiding over his criminal case created an appearance of impropriety. Ex. 10, pp. 4-5. *See, e.g.*, *Anderson*, 402 S.W.3d at 94 (finding in a post-conviction case that recusal is required when a reasonable person would have factual grounds to find an appearance of impropriety).

Moreover, despite its ongoing obligations to turn over such information, the State never disclosed to any of Mr. Johnson's attorneys the professional disciplinary actions taken by the State Committee of Psychologists against both Becker and English, which resulted in both men being stripped of their professional licenses. Ex. 4, pp. 2-3; Ex. 5, p. 5; Ex. 10, p. 3; Ex. 11, p. 2. This violation is particularly notable in light of the fact that the Attorney General's Office represented the State Committee of Psychologists in taking such disciplinary action against Becker, and was likely involved in the case against English as well.[8] Ex. 18, p. 2. The records of Becker's St. Francois County and St. Louis County felony convictions reveal that the Attorney General's Office was aware and in possession of Becker's criminal history information and was provided with his criminal records in 2010 and 2012. Ex. 14, p. 3; Ex. 15, p. 5. English's settlement agreement shows that the State

[8] It is not entirely clear from the records whether the Attorney General's Office was directly involved in the disciplinary action against English because the parties in his case waived a hearing and entered into a settlement agreement. Ex. 19, p. 1.

Committee of Psychologists, a state agency represented by the Attorney General's Office, was aware of at least some of English's misconduct by 2017, if not before. Ex. 19, p. 2.

Yet simultaneously, the Attorney General's Office was urging this Court and the Federal District Court to uphold Mr. Johnson's conviction and death sentence, relying in part on the testimony of the two State's experts, despite the fact that it knew or should have known of their credibility issues, and without disclosing that important information to Mr. Johnson's counsel.[9] The Supreme Court of California recently held that a state Attorney General has an obligation to comply with *Brady* in a case with similar circumstances. *In re Jasmine Jenkins*, No. S267391, at 25-26 (Cal. Mar. 27, 2023). There, the defendant was not informed that the victim and a key prosecution witness had a prior juvenile conviction. In state habeas proceedings, the California Supreme Court affirmed that the State's duty under *Brady* to disclose

[9] Only through independent investigation, including a review of the local prosecutor file, has Mr. Johnson's counsel become aware of the State's violation of its obligations under *Brady* and Rule 25.03 and of the underlying impeachment information that has been withheld from the defense. Having made this discovery in February 2023, counsel has only been able to discover a sliver of the existing impeachment information about Becker and English. Mr. Johnson's legal team has been continually requesting and reviewing records and speaking with witnesses about these matters, but still likely has not uncovered all the relevant information. For this reason, Mr. Johnson is also filing a request for discovery before this Court and requesting to fully litigate this issue before a special master in an evidentiary hearing.

impeachment information extends beyond trial to the postconviction and habeas context:

> [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; s*ee also Banks*, 540 U.S. at 696 ("A rule . . . declaring '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). This ruling is entirely consistent with this Court's jurisprudence.

Under all these circumstances, Mr. Johnson has demonstrated cause for his inability to raise this *Brady* claim on direct appeal or post-conviction, since it is based on information suppressed by the State. *Engel*, 304 S.W.3d at 126 (claims "rest on a collection of new evidence . . . unknown or unavailable when [petitioner] previously sought relief").

1. <u>The State also Violated its Obligations Under Rule 25.03</u>

Rule 25.03 imposes an affirmative duty on the prosecution to seek out and disclose criminal information that is in the control of other governmental entities, not just information that is actually known by the prosecutor. In *Merriweather*, this

Court found that the prosecution violated its duty to disclose impeachment information when it failed to obtain criminal conviction information from Illinois, even though it was from out of state. *Merriweather*, 294 S.W.3d at 55-56. Because Missouri officials had access to the Illinois records through the NCIC database, they had a duty to discover and disclose that information to the defense.

Here, the majority of Becker's DWI cases were prosecuted in Missouri, and one case was prosecuted by the very same office that prosecuted Mr. Johnson, in front of the very same judge. While Becker's cases were from a number of different counties, Missouri officials clearly knew of them because Becker was charged as a persistent—and later a chronic—offender due to the number of prior convictions he had, which were listed in the Felony Complaints and Informations filed by the prosecution. Ex. 14, pp. 6-7; Ex. 15, p. 14. Even Becker's Arizona arrest was undoubtedly within the Missouri officials' knowledge, including the St. Louis County Prosecutor's Office, as Becker was extradited back to Missouri on a fugitive warrant upon his arrest in Arizona for a separate felony DWI committed there. Ex. 17.

Finally, the Attorney General had knowledge of, or was in actual or constructive possession of, evidence that the trial and post-conviction prosecutor suppressed in violation of *Brady*. But the Attorney General took no corrective action before this Court.

Thus, in addition to violating its *Brady* obligations by failing to disclose Becker's criminal information to Mr. Johnson's counsel, the State also failed to abide by its duties under Rule 25.03 to diligently seek out and disclose such information to the defense.

B. The Suppression of Important Impeachment Information Prejudiced Mr. Johnson

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 in this case, and their credibility was therefore a key issue. All parties and this Court agreed and acknowledged the seminal nature of this dispute.

In *Merriweather*, this Court faced a similar circumstance and explained that where the case "hinged on which witness—[the victim] or Merriweather—the jury chose to believe," and thus the victim's prior Illinois conviction was important impeachment information relevant to the jury's determination of her credibility. 294 S.W.3d at 57; *see also Wearry*, 577 U.S. at 392-93 (2016) (finding prejudice due to the suppression of impeaching evidence when the State's case was "built on the jury crediting [the State's witness's] account rather than [the defense account.]"). Likewise, in Mr. Johnson's case, 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.

It was clear from the very beginning of the trial that both the State and the defense considered Mr. Johnson's mental state and the expert witnesses' conclusions in that regard to be the main question before the jury. 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. He asked one prospective juror whether he would be able to listen to the mental health experts and assess their backgrounds, training, and experience "and decide if you believe them" and whether they have any bias or prejudice "regarding what their test results may be." Tr. 737.

In opening statements, defense counsel explained to the jury that "[t]he question you as jurors will have to answer is whether what [Mr. Johnson] did was murder in the first degree, whether he coolly reflected on his actions, whether Johnny

Johnson was capable of coolly reflecting on his actions." Tr. 803. Counsel concluded her opening by explaining the defense case: "We'll ask you to find Johnny Johnson guilty but to find him guilty of the crime he committed and that is murder in the second degree," based on the evaluation and conclusion of Dr. Dean. Tr. 819.

The State made clear at the end of the guilt phase trial that the question of Mr. Johnson's mental state, and the experts' conclusions in that regard, was the main issue for the jury to consider. 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). He went on to note the difference: "that the defendant did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief." Tr. 1910. The prosecutor later again explained that the difference between first- and second-degree murder is "the distinguishing characteristics of cool reflection, the deliberation," and said the jury did not need to consider second-degree murder if it believed there was "deliberation involved in this case." Tr. 1912. Later, after explaining the other charges, the prosecutor again stated, "Now, we're talking solely about deliberation." Tr. 1916. In concluding his initial closing argument, the prosecutor argued that "everything he did is deliberation. . . . We're talking about the process of cool reflection, not necessarily the emotional status or state of the individual involved." Tr. 1921-22.

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 Dr. Dean, the defense expert, and stating that "one of the few honest things she told you, she was completely honest when she told you, she knows if you get him out of the deliberation, he's out of the death penalty range" and "if you knock out cool reflection, you knock out deliberation, you knock out death." Tr. 1947-48. After noting that the jury should consider the criminal convictions of one of the State's witnesses, the prosecutor urged the jury to "consider the interest, bias and prejudice" of Dr. Dean and "her anti-death penalty stance, her hundred and seventy-five bucks an hour, her cooking of her report." Tr. 1906-07. In fact, the prosecutor accused Dr. Dean of "cooking" her report six times in his rebuttal argument, further illustrating the importance of the jury's determination of the experts' credibility. Tr. 1907, 1947-48, 1956. The prosecutor reiterated that the question before the jury was whether Mr. Johnson's mental illness "prevent[ed] him from deliberating, did it prevent him from coolly reflecting on the matter before he did it." Tr. 1955-56.

Defense counsel's closing argument also reflected the importance of the question of Mr. Johnson's mental state and the conclusions of the experts in that regard: "It all boils down to this: Was this act an intentional act but an act done

without cool reflection. . . . That's the difference between murder in the first degree and murder in the second degree." Tr. 1939. She went on to conclude that Mr. Johnson's "mental illness, his hallucinations, his delusions, his disorganized speech, his disorganized behavior prevented him from coolly reflecting," and "[t]he voices prevented Johnny from coolly reflecting. He did not coolly reflect. He could not coolly reflect." Tr. 1940-41. She attempted to cast doubt on English's credibility by reminding the jury that he had destroyed his notes, had never before found that someone was unable to coolly reflect, and was not experienced in determining whether a defendant suffered from diminished capacity. Tr. 1935-36. Had defense counsel known about the even more serious credibility issues surrounding Becker and English, her argument would have been considerably more effective.

The jurors themselves recognized that the question before them was whether to believe the defense expert or the State's experts with regard to Mr. Johnson's mental state, as evidenced by the feedback trial counsel received from the juror who approached them after trial to say that although he believed Mr. Johnson was mentally ill, he believed the conclusions reached by the State's experts with regard to 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." Ex. 8, p. 3. Even in the penalty phase, the jurors were swayed by the impression that Mr. Johnson "planned it out." Ex. 8, p. 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." Ex. 8, p. 6.

The question of Mr. Johnson's mental state and the credibility of the experts was central on appeal, in post-conviction, and in federal habeas proceedings as well. On direct appeal, this Court detailed English's testimony "that Johnson was capable of deliberation and any hallucinations that he may have had were due to methamphetamine intoxication, not psychosis." *Johnson*, 207 S.W.3d at 34. The Court also acknowledged that Mr. Johnson's "true defense" was diminished capacity and, in discussing whether the death sentence was appropriate, held that "the jury rejected Johnson's mental illness defenses." *Id.* at 43, 51.

In his opinion rejecting Mr. Johnson's Rule 29.15 motion, Judge Seigel noted that the trial expert witnesses generally agreed that Mr. Johnson had schizophrenia or schizoaffective disorder, and that they only disagreed "as to the effect on his mental state." Ex. 12, p. 19. Judge Seigel emphasized Becker and English's credentials and experience, weighing heavily their professional qualifications and

conclusions that Mr. Johnson's "mental illness did not diminish or excuse his conduct." Ex. 12, p. 13. Of course, Judge Seigel utterly failed to reconcile this with Becker's multiple DWIs and the four-years in prison to which Judge Seigel sentenced Becker, concurrent to the prison sentences on his other persistent and chronic offender charges.

In contrast to this favorable view of English and Becker, whom he had just sentenced to four years in prison, Judge Seigel was highly critical of the defense experts who testified in post-conviction, dismissing their conclusions as less reasonable than those of Dr. Dean to the extent that her "diagnosis was consistent with that of Becker, English," and other mental health professionals who had evaluated Mr. Johnson prior to the offense. Ex. 12, p. 34. On appeal, this Court concluded that "the jury was apprised fully of [Mr. Johnson's] mental condition." *Johnson*, 388 S.W.3d at 167.

In federal habeas proceedings, the federal court recognized that "the point of [Dr. Dean's] testimony was that Petitioner could not deliberate which was a function of his mental illness rather than drug use" and that English's testimony rebutted that defense. *Johnson v. Steele*, 2020 WL 978039, at *28 (E.D. Mo. Feb. 28, 2020). The court cited approvingly the post-conviction court's reliance on Becker and English's conclusions and denied Mr. Johnson relief. *Id.* at *26-28.

Contrary to the findings by each of these Courts that the jury fully assessed and rejected Mr. Johnson's mental health defense at trial, the jury in fact was deprived of the opportunity to adequately assess the question of Mr. Johnson's mental state and the credibility of the experts who evaluated his mental health because of the State's failure to disclose important impeachment information about its experts. Had the jury been aware of the credibility issues surrounding both of the State's expert witnesses regarding Mr. Johnson's diminished capacity defense, it would have cast Mr. Johnson's defense and the testimony of the experts in that regard in a different light—one more favorable to Mr. Johnson. *See Banks*, 540 U.S at 701-702 (finding suppressed impeachment information relevant to the reliability of the jury's verdict); *Engel*, 304 S.W.3d at 128 ("In determining whether the suppressed impeachment evidence was material, the reviewing court must evaluate not only the ways that the witness *was* impeached, but also the ways that he was *not* impeached that would have been available had the *Brady* claim evidence been disclosed.") (internal citations and brackets omitted).

The fact that the jury was unaware of this important impeachment information—when it assessed the experts' credibility and considered the diverging conclusions of the State's and defense experts on the question of Mr. Johnson's mental state—renders its verdict on the primary issue in the case unworthy of confidence. *Kyles*, 514 U.S. at 434 (the question regarding materiality is whether,

in the absence of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence"); *Wearry*, 577 U.S.at 392-93 (findingin a witness credibility case that the newly revealed evidence undermined confidence in the defendant's conviction); *Koster*, 388 S.W.3d at 632 ("the undisclosed evidence would have allowed defense counsel to greatly undercut the credibility" of a witness whose testimony involved "a critical issue in the jury's assessment"); *Engel*, 304 S.W.3d at 128 (nondisclosure of impeachment evidence caused the verdict to be "not worthy of confidence"). Under the circumstances of the case, the State's suppression of impeachment information about its two trial experts prejudiced Mr. Johnson and deprived him of his due process right to a fair trial.

Claim II: Mr. Johnson was deprived of his right to a fair and meaningful post-conviction process by the post-conviction judge's simultaneous role in Mr. Johnson's case and the felony case involving the State's expert, and by the judge's continued reliance on the expert without disclosing his criminal record to Mr. Johnson.

In addition to being deprived of due process at trial, Mr. Johnson was also deprived of his right to a fair and meaningful post-conviction process. *See Case v. Nebraska*, 381 U.S. 336, 346 (1965) (Brennan, J., concurring) (discussing the need for fair and meaningful state post-conviction proceedings). Neither the State nor Judge Seigel disclosed to Mr. Johnson's post-conviction counsel that Becker's 2009 St. Louis County felony DWI case was before Judge Seigel himself, nor that it took

place in the middle of Mr. Johnson's post-conviction proceedings. Yet despite having the information before him that Becker had been convicted of enough DWIs to be charged with a felony as a persistent offender in the St. Louis County case, Judge Seigel still relied on Becker's evaluations and reports in denying Mr. Johnson's Rule 29.15 motion. And because of the State's suppression of Becker's criminal history information, Mr. Johnson never had the chance in post-conviction to challenge Becker's credibility or seek Judge Seigel's recusal due to his involvement in both cases. This, on top of the State's failure to comply with its *Brady* obligations and its responsibility pursuant to Rule 25.03, further deprived Mr. Johnson of his right to due process.

Due process requires a fair post-conviction hearing with an unbiased judge. *See Case*, 381 U.S. at 346 (Brennan, J., concurring); *Anderson*, 402 S.W.3d at 91 ("a judge shall recuse himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned"); *see also Thomas v. State*, 808 S.W.2d 364, 367 (Mo. banc 1991) ("due process concerns permit any litigant to remove a biased judge," including in proceedings pursuant to Rule 29.15). The test for whether a judge must recuse him- or herself is "whether a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court." *Anderson*, 402 S.W.3d at 93 (quoting *State v. Smulls*, 935 S.W.2d 9, 17 (Mo. banc 1996)); *see also Aetna Life Co. v. Lavoie*, 475 U.S. 813, 825 (1986)

(holding that due process required judge's recusal because "justice must satisfy the appearance of justice"). The benefit of any doubt is accorded to the litigant, and the defendant's burden is only to show that there was an appearance of impropriety, not that the judge was actually unfair. *Anderson*, 402 S.W.3d at 93; *Smulls*, 935 S.W.2d at 26-27.

Here, a reasonable person would have factual grounds to find an appearance of impropriety and doubt the impartiality of the court. Judge Seigel presided over Becker's St. Louis County felony DWI case while at the same time presiding over Mr. Johnson's post-conviction proceedings, at which Becker's credibility and conclusions were essential factors. While the responsibility to disclose Becker's criminal history rested with the State, the judge's failure to inform Mr. Johnson that one of the State's key experts in the case had an ongoing felony case and enough prior DWI convictions to render him a persistent offender creates an appearance of impropriety. Had the judge informed Mr. Johnson's post-conviction counsel of Becker's case, counsel would have been able to raise a *Brady* issue for the State's failure to disclose the 1999 conviction and could also have moved to recuse Judge Seigel in light of his role in both cases. But by failing to disclose the information about Becker and continuing to rely on Becker's conclusions and credibility in denying Mr. Johnson's Rule 29.15 motion, Judge Seigel deprived him of an opportunity to raise potentially meritorious claims in post-conviction and of a fair

and meaningful post-conviction proceeding. *Case*, 381 U.S. at 346 (Brennan, J., concurring); *Anderson*, 402 S.W.3d at 91; *Smulls*, 935 S.W.2d at 17; *Thomas*, 808 S.W.2d at 367.

Like his *Brady* claim, Mr. Johnson was precluded from raising this claim at prior stages of litigation by factors external to him, as the State never disclosed Becker's ongoing St. Louis County felony DWI case and the fact that Judge Seigel presided over that case while also presiding over Mr. Johnson's Rule 29.15 proceedings. Nor did the State disclose any of Becker's other criminal convictions. Thus, for the same reasons Mr. Johnson has met the requirement to show cause for his inability to raise his *Brady* claim at prior stages, he also has met his burden to show cause for not raising his claim regarding the fairness of his post-conviction process at prior stages. *See Engel*, 304 S.W.3d at 125-26.

In light of the importance of Becker's evaluations and conclusions to the State's case against Mr. Johnson, and Judge Seigel's heavy reliance on Becker and English's credibility in denying Mr. Johnson post-conviction relief, as demonstrated above, Mr. Johnson has met his burden of showing that he was prejudiced by both the State's suppression of the impeachment information and by Judge Seigel's failure to disclose that information while continuing to rely on Becker's credibility in Mr. Johnson's post-conviction proceedings. *Engel*, 304 S.W.3d at 128; *Anderson*, 402 S.W.3d at 93.

Finally, the Attorney General has trampled upon the decorum and integrity of this Court. The Attorney General had knowledge of, and was in actual or constructive possession of, evidence that the trial and post-conviction prosecutor suppressed in violation of *Brady*. But the Attorney General took no corrective action before this Court. Proceedings before this Court must not lose their integrity by the State's failure to disclose evidence. *See Jenkins*, No. S267391 at 25-26; *see also Banks*, 540 U.S. at 696 ("A rule . . . declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process.") (citing *Bracy*, 520 U.S. at 909).

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner Johnny A. Johnson respectfully requests that this Court, after examining the evidence and the applicable law, issue a writ of habeas corpus vacating his conviction and death sentence and grant him a new trial. In the alternative, Petitioner requests that the Court appoint a Special Master to take evidence of the claim raised here and grant such other and further relief as the Court deems fair, just, and equitable under the circumstances. Petitioner further requests that this Court deny the State's motion to set the execution date in *State v. Johnson*, SC86689 (Mo.) in order for his *Brady* and judicial appearance of impropriety claims to be fully and properly adjudicated.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March 2023, the foregoing was filed via the Case.net system and was sent via email to Gregory Goodwin at gregory.goodwin@ago.mo.gov.

/s/ Kent E. Gipson
Counsel for Petitioner

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI	)	
	)	
Respondent,	)	
	)	
v.	)	**No. SC86689**
	)	
JOHNNY JOHNSON	)	
	)	
	)	
Appellant.	)	

MOTION FOR LEAVE TO FILE SUR-REPLY SUGGESTIONS IN OPPOSITION TO THE STATE'S MOTION TO SET AN EXECUTION DATE

COMES NOW Johnny Johnson, a Missouri prisoner under a sentence of death, by and through the undersigned CJA appointed co-counsel Kent Gipson and Laurence Komp, and respectfully requests that this Court moves the Court for leave to file sur-reply suggestions in opposition to the state's motion to set an execution date. The following reasons support this request:

On November 15, 2022, the State moved the Court to set an execution date against Mr. Johnson. Mr. Johnson filed suggestions in opposition on February 13, 2022. On February 22, 2022, the Court granted the State's request for leave to file reply suggestions and accepted the State's reply.

The State's reply includes matters and arguments that are not fully addressed in Mr. Johnson's opposition. Mr. Johnson wishes to address in a brief sur-reply to ensure that the Court reaches a fully informed determination of the pending motion.

For example, the State suggests that, but for a claim asserting Mr. Johnson's incompetency to be executed, because Mr. Johnson completed his state post-conviction and federal habeas proceedings, he should not need any "additional time to prepare for 'possible future litigation' and to prepare a clemency application." Reply at 4. However, Mr. Johnson has just learned (upon information and belief) that prior to trial, the State of Missouri suppressed from trial counsel impeaching information regarding the credibility of at least one of the State's experts, even though trial counsel specifically requested such information prior to trial. This information was material because the only disputed issue at trial was Mr. Johnson's mental state at the time of the offense. *See State v. Johnson*, 207 S.W.3d 24, 34 (Mo. banc 2006) (noting that the only disputed issue at trial was whether Mr. Johnson deliberated as required for first-degree murder and that the State's expert rebutted this defense).

Mr. Johnson has further learned (upon information and belief) that even though post-conviction counsel specifically requested such information as part of their investigation of the case and development of claims for relief, the State again suppressed the information. In fact, even though (during the period Mr. Johnson's post-conviction case was pending) the State was prosecuting one of their trial experts for felony DWI as a persistent offender, before the same judge who presided over

Mr. Johnson's trial and postconviction proceedings, the State *still* failed to disclose this information to Mr. Johnson's legal team. Rather than disclosing these serious credibility issues to Mr. Johnson's legal team so that they could fully investigate any potential claims for relief, the State instead suppressed the information and encouraged the post-conviction court and this Court to reject any claims related to Mr. Johnson's mental status at the time of the offense.

This Court should consider the State's failure to disclose the impeaching information as part of this Court's determination of whether it is proper to immediately issue a warrant of execution. This Court should not ignore that the State suppressed this evidence until after the conclusion of Mr. Johnson's trial, direct appeal, post-conviction proceedings, and federal habeas proceedings. Furthermore, this Court should not permit the State of Missouri to execute Mr. Johnson without providing due process to be heard on any claims arising out of the State's suppression of this impeaching evidence regarding the only disputed issue at trial.

For all the foregoing reasons, Mr. Johnson respectfully requests that this Court grant him leave to file, on or before March 1, 2023, sur-reply suggestions in opposition to the State's motion to set an execution date.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23th day of February 2023, the foregoing was filed via the case.net system and was sent via email to Gregory Goodwin at Gregory.goodwin@ago.mo.gov.

/s/ Kent E. Gipson
Counsel for Appellant

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI	)	
	)	
Respondent,	)	
	)	
v.	)	**No. SC86689**
	)	
JOHNNY JOHNSON	)	
	)	
	)	
Appellant.	)	

APPELLANT'S SUR-REPLY SUGGESTIONS IN OPPOSITION TO THE STATE'S MOTION TO SET EXECUTION DATE

COMES NOW Johnny Johnson, a Missouri prisoner under a sentence of death, by and through the undersigned CJA appointed co-counsel Kent Gipson and Laurence Komp, and respectfully requests that this Court overrule the State's motion to set an execution date or in the alternative refrain from ruling on the motion until the conclusion of Mr. Johnson's state habeas proceedings asserting a due process violation under *Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Johnson recently has learned of new evidence supporting a potentially meritorious *Brady* claim, and if such a violation did occur, then the State's motion to set an execution date will become moot. Because Mr. Johnson intends to file a state habeas petition asserting such a claim within 30 days, this Court's adjudication of it prior to issuing a warrant for execution will not cause unwarranted delay. Good cause supports this request, and this request is consistent with Rule 30.30 and due process of law.

ARGUMENT

I. Mr. Johnson's request is consistent with Rule 30.30.

Contrary to the State's contention, Mr. Johnson's request is consistent with the plain language of Rule 30.30 and the history behind recent amendments to it.

Implicit in the State's reply is the notion that this Court must agree to issue a warrant of execution once the State requests it. However, Rule 30.30(e) contemplates this Court's independence from the executive branch and that "the Court [may] overrule[] the state's motion to set an execution date." Thus, a request brought under Rule 30.30 does not automatically entitle the State to an execution date. Rather, upon good cause, this Court may overrule the State's motion. *See* Rule 30.30(e).

Furthermore, the 2018 amendment to Rule 30.30 increasing the time that must elapse before an execution can occur supports Mr. Johnson's request. This amendment did not eliminate the Court's ability to overrule the State's motion to set an execution date. Rather, the amendment demonstrates the Court's recognition that the need for zealous and thorough representation of a death-sentenced individual continues even after the conclusion of his federal habeas corpus proceedings. The State does not dispute that Mr. Johnson is entitled to adequate representation.

II. Good cause supports Mr. Johnson's request.

Mr. Johnson's legal team first uncovered the impeachment information supporting the *Brady* claim on February 11, 2023. Once his counsel assessed this information and determined that they had uncovered a potential *Brady* violation, counsel brought it to the Court's attention on February 23, 2023, in Mr. Johnson's request for leave to file sur-reply suggestions in opposition to the State's request to set an execution date.

This discovery shows that the State's position lacks merit. Under the State's view, because Mr. Johnson's counsel has "known [since November 15, 2022,] that the State had requested an execution date[,]" Mr. Johnson cannot possibly justify any request for any "additional time to prepare for 'possible future litigation' and to prepare a clemency application." Reply at 1, 4.

However, although Mr. Johnson has known since November 15, 2022, that the State had requested an execution date, Mr. Johnson did not know until February 2023 that the State of Missouri suppressed from trial counsel, post-conviction counsel, and current counsel impeaching information regarding the credibility of at least one of the State's experts. For example, although the State knew or should have known that Dr. Stephen Becker had a DWI prior to trial, the State did not disclose

that to trial counsel.[1] This suppression occurred even though trial counsel specifically requested such information prior to trial and Rule 25.03 required the State to disclose it.

Nor did Mr. Johnson know that even though post-conviction counsel specifically requested such information as part of their investigation of the case and development of claims for relief, the State again suppressed the information. During the period Mr. Johnson's post-conviction case was pending, the State prosecuted Dr. Stephen Becker for felony DWI as a persistent offender. The *same* judge presided over Mr. Johnson's trial, Mr. Johnson's post-conviction proceedings, and this felony DWI prosecution of Dr. Becker. Rather than disclosing these serious credibility issues to Mr. Johnson's legal team so that they could fully investigate any potential claims for relief, the State instead suppressed the information and encouraged the post-conviction court and this Court to reject any claims related to Mr. Johnson's mental status at the time of the offense.

This Court has recognized that a prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern

[1] This Court has previously recognized that Dr. Becker filed a report in this case. *Johnson v. State*, 388 S.W.3d 159, 164 (Mo. banc 2012). Dr. English relied on Dr. Becker's evaluation and report to rebut Mr. Johnson's defense that he did not deliberate as required for first-degree murder. *See id.*; *State v. Johnson*, 207 S.W.3d 24, 34 (Mo. banc 2006).

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." *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 127-28 (Mo. banc 2010) (internal quotations omitted). Particularly because of this unique role of prosecutors in the criminal justice system to ensure that justice be done, the State's failure to disclose impeaching evidence may violate due process under *Brady*. *Id.* at 126-28; *State v. Robinson*, 835 S.W.2d 303, 306 (Mo. banc 1992).

Even when the suppressed evidence does not come to light until after the conclusion of a defendant's federal habeas corpus proceedings, the defendant may pursue a state habeas action asserting a *Brady* claim. *Engel*, 304 S.W.3d at 124-25. In *Engel*, the petitioner did not learn of the suppressed evidence until after the conclusion of his federal habeas proceedings and "nearly 26 years after the alleged crimes for which he was convicted." *Id.* If the defendant can establish that (1) the grounds for relief were not known to him during his direct appeal or post-conviction proceedings and (2) the suppression of the evidence prejudiced him, then he is entitled to a vacation of his conviction(s). *Id.* at 126.

Here, as in *Engel*, after the conclusion of his federal habeas proceedings, Mr. Johnson learned of new evidence establishing a potentially meritorious *Brady* claim. The grounds for relief were not known to him during his direct appeal or post-

conviction proceedings. Furthermore, the suppressed information was material because the only disputed issue at trial was Mr. Johnson's mental state at the time of the offense. *See Johnson*, 207 S.W.3d at 34 (noting that the only disputed issue at trial was whether Mr. Johnson deliberated as required for first-degree murder and that the State's expert rebutted this defense); *Merriweather v. State*, 294 S.W.3d 52, 57 (Mo. banc 2009) (explaining that due to the suppression of the criminal record of a State's witness, "[p]rejudice doubtlessly ensued . . . because credibility was pivotal and the convictions probably would have affected the jury's assessment of [the witness's] credibility.").

This new information also highlights the inaccuracy of the State's argument that all "Johnson's mental health claims were presented to and rejected by a jury" and rejected by this Court on appeal from the post-conviction proceedings. Reply at 4-5. Due to the State's suppression of this information, Mr. Johnson has never been able to raise this claim to any court. And for the claims and arguments he did present, the trial jury and this Court were not apprised of the credibility issues relating to the state's mental health experts.

Because Mr. Johnson just recently learned of this evidence, he has not had time to fully investigate the circumstances surrounding it nor all the potential claims arising out of these circumstances. Mr. Johnson's counsel are working as diligently

as they can on this matter (in addition to their duties and responsibilities to their other clients). Mr. Johnson intends to file a state habeas petition asserting a *Brady* claim within 30 days.

As part of the investigation Mr. Johnson's legal team already has conducted, it has come to light that the Attorney General's office represented the State Committee of Psychologists in revoking the licenses of both the state's experts, Drs. Becker and English. According to the records from one of Dr. Becker's subsequent criminal prosecutions as a persistent offender, of which Mr. Johnson's counsel has recently become aware, information related to his convictions was turned over from the county prosecutor's office to the Attorney General's office in 2010. The State of Missouri has an ongoing duty to provide impeachment information to Mr. Johnson, and Mr. Johnson requests that the State disclose any *Brady* material—including any impeachment —to his current legal team. Doing so in a timely manner will facilitate Mr. Johnson's ability to file his state habeas petition asserting a *Brady* claim as expeditiously as possible.

As the foregoing shows, good cause supports Mr. Johnson's request that this Court overrule the State's motion or decline to issue a warrant of execution at this time. This Court has consistently upheld both the due process rights of criminal defendants and their ability to assert such rights once suppressed impeaching

information comes to light. *See*, *e.g.*, *Engel*, 304 S.W.3d at 126; *Merriweather*, 294 S.W.3d at 54-57. If Mr. Johnson establishes that a *Brady* violation occurred, then the State's motion to set an execution date will become moot. Because Mr. Johnson intends to file a state habeas petition asserting such a claim within 30 days, this Court's adjudication of it prior to issuing a warrant for execution will not cause unwarranted delay. Thus, before issuing a warrant of execution, this Court should permit Mr. Johnson to present and have adjudicated any claims arising out of the State's suppression of this impeaching evidence regarding the only disputed issue at trial.

CONCLUSION

For all the foregoing reasons, Mr. Johnson respectfully requests that this Court find that good cause supports Mr. Johnson's request for this Court to overrule the State's motion to set an execution date or in the alternative to refrain from ruling on the motion until the conclusion of Mr. Johnson's state habeas proceeding asserting a due process violation under *Brady v. Maryland*. Mr. Johnson further requests that this Court order the Attorney General's office to disclose any impeachment information regarding Drs. Stephen Becker and Byron English including any information regarding the State of Missouri's revocations of these witnesses' professional licenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March 2023, the foregoing was filed via the case.net system and was sent via email to Gregory Goodwin at Gregory.goodwin@ago.mo.gov.

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