

No. 22-5947

IN THE SUPREME COURT OF THE UNITED STATES

This is a capital case
Execution scheduled November 29, 2022 at 6 p.m. CT

KEVIN JOHNSON,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

EMERGENCY APPLICATION FOR STAY OF EXECUTION
PENDING PETITION FOR WRIT OF CERTIORARI

Joseph W. Luby*
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928-0520
joseph_luby@fd.org

Rebecca E. Woodman,
Attorney at Law, L.C.
1263 W. 72nd Ter.
Kansas City, MO 64114
(785) 979-3672
rewlaw@outlook.com

Counsel for Petitioner

*Counsel of Record for Petitioner, Kevin Johnson
Member of the Bar of the Supreme Court

To the Honorable Brett M. Kavanaugh, as Circuit Justice for the United States Court of Appeals for the Eighth Circuit:

Petitioner Kevin Johnson respectfully requests a stay of his execution pending this Court's disposition of his petition for writ of certiorari. Johnson seeks review of the Missouri Supreme Court's order overruling his motion to recall the mandate and denying his petition for writ of habeas corpus. The court below denied Johnson's motion and petition on August 30, 2022. App. 1 (Attachment A). Six days earlier, it entered an order scheduling Johnson's execution for November 29 at 6:00 p.m. App. 2–3 (Attachment B). On October 31, 2022, Johnson moved the Missouri Supreme Court for a stay of execution pending his petition for writ of certiorari. (Attachment C). The Missouri Supreme Court overruled the motion for stay on November 7, 2022. (Attachment D).

Johnson's petition for writ of certiorari presents the following questions:

1. In light of a court's duty to issue a remedy that "neutralize[s] the taint of a constitutional violation" while avoiding the grant of "a windfall to the defendant," *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), did Johnson's retrial before a second jury that convicted him of first degree murder and sentenced him to death remedy the constitutional violation from the first trial, at which two racist jurors prevented a unanimous verdict on a lesser offense?
2. Does the Eighth Amendment forbid the death penalty for crimes committed by offenders under the age of 21, or, at the least, in the case of a 19 year old offender who suffered from significant mental impairments?

REASONS WHY PETITIONER IS ENTITLED TO A STAY

The standard for granting a stay of execution was articulated in *Barefoot v. Estelle*, 463 U.S. 880 (1983). That standard requires the applicant to show (i) a

reasonable probability that four Members of the Court will consider the issues raised in the petition sufficiently meritorious for a grant of certiorari, (ii) the significant possibility that the Court will reverse the decision below, and (iii) that irreparable harm will occur if the execution is not stayed. *Id.* at 895. These factors are established by the contents of the pending petition for writ of certiorari itself, which are incorporated here. Irreparable harm will occur if the execution is not stayed until the petition is considered. *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (recognizing that the requirement of irreparable harm is “necessarily present in capital cases”).

Johnson has shown a “reasonable probability” that the Court will grant certiorari and reverse the rulings below. *Barefoot*, 463 U.S. at 895. The first question presented challenges the state court’s complete denial of relief despite clear evidence that two White jurors at Johnson’s first trial made racist statements and prevented the jury from reaching a unanimous verdict of second degree murder, as opposed to the charged offense of death-eligible first degree murder. App. 67, 70–71. The two holdout jurors “kept loudly repeating that they couldn’t vote for 2nd degree because Kevin would get out and hunt them down,” and one of them “kept yelling things about ‘your neighborhoods,’ and ‘you people,’ when talking to Black jurors.” App. 67. Racial bias prevented a unanimous verdict: the terms “you people” and “your neighborhoods” are familiar “codewords” that reflect an “othering” process through which White people are “generally perceived as superior” while the Black people being described are “perceived as inferior.” App. 102–03 (per Prof. Jason

Okonofua, Dept. of Psychology, University of California-Berkeley).

The jurors' bias violated Johnson's rights to equal protection, a fair and impartial jury, and ultimately, a reliable determination of his capital or noncapital sentence. "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). Our system of law "punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). That system plainly failed at Johnson's first trial, and a second trial did not remedy the failure. A proper judicial remedy must "neutralize the taint of a constitutional violation." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). But, rather than neutralizing the racism-induced mistrial that prevented a lesser conviction for which ten non-racist jurors had voted, Johnson's retrial allowed a different jury to convict him of the greater offense and sentence him to death. "Far from curing the error, the trial caused the injury from the error." *Id.* at 166. Johnson's conviction should be reduced to second degree murder, which would "restore[] the defendant to the circumstances that would have existed had there been no constitutional error." *United States v. Stein*, 541 F.3d 130, 146 (2d Cir. 2008) (quotation omitted); *Ewing v. Horton*, 914 F.3d 1027, 1033 (6th Cir. 2019) (same).

The second question urged on certiorari is an issue of exceptional importance: whether the Eighth Amendment forbids the execution of a defendant who was under 21 years old at the time of the offense and suffered from significant mental impairments. See U.S. Sup. Ct. R. 10(c). In 2005, the Court recognized those who

are under 18 have diminished blameworthiness, so that executing such offenders is cruel and unusual punishment. *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

Three intervening developments justify an extension of *Simmons* to the entire set of late-adolescent offenders (age 18-20), especially those with mental illness:

- First*, recent scientific developments prove that brain maturation is not complete until well after the age of 21, especially in the areas of the brain that regulate impulse control, response inhibition, and executive functioning. App. 121–22. A late adolescent of 18 to 20 years has the intellectual maturity of an adult but the emotional maturity and response inhibition of a younger teenager. App. 134–35. Those limitations are all the more important in Johnson’s case. Johnson has a history of psychiatric hospitalization, a suicide attempt at the age of 14, a major depressive disorder, and auditory hallucinations. Neuropsychologist Daniel Martell diagnosed Johnson with a “focal deficit in frontal lobe executive functioning,” which impairs planning, response inhibition, and impulse control. App. 242. In light of the sudden death of Johnson’s twelve-year-old brother some two hours before the crime, as well as Johnson’s psychological impairments and mental illnesses, his “moral compass was effectively ‘offline’ at the time of the instant offense.” *Id.*

- Second*, intervening legal developments require a court to heed scientific consensus when determining the blameworthiness of any group of offenders under the Eighth Amendment. *See Moore v. Texas*, 137 S. Ct. 1039, 1049–53 (2017); *Moore v. Texas*, 139 S. Ct. 666, 668–72 (2019); *Hall v. Florida*, 572 U.S. 701, 712, 724 (2014).

•*Third*, the imposition and execution of death sentences against late-adolescent offenders is now rare. Among all capital jurisdictions in the United States, death sentences against offenders aged 18–20 were imposed seven times in 2017, once in 2018, twice in 2019, and zero times in 2020 and 2021. App. 247.

Finally, respondent cannot meritoriously argue that Johnson’s claims are unreasonably delayed. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006). Johnson brought his claims in the Missouri Supreme Court on July 12, 2022, or more than six weeks before that court set his execution date. App. 3, 4. And, after the state court denied relief, Johnson petitioned for a writ of certiorari one month in advance of the time limit set forth in U.S. Sup. Ct. R. 13.1. The Court should grant a stay so that it may consider Johnson’s meritorious petition in the normal course.

WHEREFORE, for all the foregoing reasons, petitioner Kevin Johnson respectfully requests that the Court stay his execution pending its consideration of his petition for writ of certiorari.

Respectfully submitted,

/s/ Joseph W. Luby
Joseph W. Luby
Assistant Federal Defender
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928-0520
joseph_luby@fd.org

Counsel for Petitioner



Supreme Court of Missouri
en banc

SC89168

State of Missouri, Respondent,
vs.
Kevin Johnson, Appellant.

- Sustained
- Overruled
- Denied
- Taken with Case
- Sustained Until
- Other

Order issued: Appellant's motion to recall the mandate and, in the alternative, petition for writ of habeas corpus overruled and denied.

By: Paul M. Mine
Chief Justice

August 30, 2022
Date



SUPREME COURT OF MISSOURI
en banc

August 24, 2022

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC89168
)	
)	
KEVIN JOHNSON,)	
)	
Appellant.)	

PER CURIAM

BE IT REMEMBERED, on February 1, 2008, the St. Louis County circuit court entered its judgment fixing punishment at death; and

Thereafter, on March 14, 2008, Kevin Johnson’s notice of appeal from said judgment and sentence was filed in this Court; and

Thereafter, on May 26, 2009, this Court affirmed the judgment and sentence; and

Thereafter, on June 30, 2009, this Court overruled his motion for rehearing; and

Thereafter, on March 23, 2012, Kevin Johnson’s notice of appeal from the judgment overruling his postconviction relief motion was filed in this Court; and

Thereafter, on July 16, 2013, the Court affirmed the overruling of his postconviction relief motion; and

Thereafter, on October 1, 2013, this Court overruled his motion for rehearing; and

Thereafter, Kevin Johnson sought relief in various federal courts; and

Thereafter, on March 21, 2022, the Supreme Court of the United States denied Kevin Johnson's petition for writ of certiorari;

Thereafter, on May 11, 2022, the state filed a motion to set execution date and, on July 11, 2022, Kevin Johnson filed a response thereto;

NOW, THEREFORE, it is ordered that Kevin Johnson's sentence be executed during the twenty-four hour period beginning at 6:00 p.m. on November 29, 2022.

A warrant of execution is directed to issue accordingly.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the order of said Supreme Court, entered of record at the May Session thereof, 2022, and on the 24th day of August, 2022, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 24th day of August, 2022.



Betsy AuBuchon

Clerk

Alma [Signature]

Deputy Clerk

IN THE SUPREME COURT OF MISSOURI

State of Missouri,)	
)	
Respondent,)	
)	
vs.)	Case No. SC89168
)	
Kevin Johnson,)	Execution scheduled Nov. 29, 2022
)	
Appellant)	

**MOTION FOR STAY OF EXECUTION
PENDING PETITION FOR WRIT OF CERTIORARI**

Appellant Kevin Johnson respectfully requests a stay of execution pending his petition for writ of certiorari, which seeks the United States Supreme Court’s review of this Court’s decision overruling and denying Johnson’s motion to recall the mandate and petition for writ of habeas corpus. Johnson states as follows in support of this motion:

1. On July 11, 2022, Johnson moved the Court to recall its mandate of affirmance on his direct appeal, and he alternatively filed a petition for a writ of habeas corpus. The pleading advanced three federal grounds for relief: first, racist statements made by two White jurors during deliberations in Johnson’s first trial prevented the jury from reaching a unanimous verdict of second degree murder as ten of the jurors had voted, in violation of Johnson’s rights to due process, equal protection, an impartial jury, and a reliably determined sentence under the Eighth Amendment; second, the initial jury’s failure to reach a unanimous finding of deliberation precludes the retrial jury’s findings of any aggravating circumstances

under double jeopardy principles; and third, Johnson’s death sentence violates the Eighth Amendment in light of his age at the time of the offense (19) and his significant mental impairments.

2. The Court overruled the motion to recall the mandate and denied the petition for writ of habeas corpus on August 30, 2022. Six days earlier, the Court scheduled Johnson’s execution for November 29, 2022.

3. On October 27, Johnson filed a petition for writ of certiorari in the United States Supreme Court, seeking review of this Court’s ruling on the motion to recall the mandate and petition for writ of habeas corpus as to the first and third of the above-described federal claims. *See Johnson v. Missouri*, No. 22-5947 (filed Oct. 27, 2022; docketed Oct. 31, 2022). A copy of Johnson’s petition for writ of certiorari accompanies this motion as Exhibit 1.

4. In order to ensure that the attached petition is able to be fairly and adequately considered, without the rush of proceedings attendant to execution dates, Johnson requests a stay of his execution so that the United States Supreme Court can properly determine the substantial federal questions that his certiorari petition has presented.

5. The United States Supreme Court’s rules require that Johnson first request a stay from this Court before seeking one above. *See* U.S. Sup. Ct. R. 23.3 (“Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court

or courts below or from a judge or judges thereof.”).

6. Johnson respectfully requests that a stay of execution from this Court remain in place until either 1) the United States Supreme Court grants certiorari and decides the issues presented, or 2) the United States Supreme Court denies certiorari.

WHEREFORE, for all the foregoing reasons, the Court should grant a stay of execution pending the United States Supreme Court’s consideration of Johnson’s petition for writ of certiorari.

Respectfully submitted,

/s/ Joseph W. Luby

Joseph W. Luby, Mo. Bar No. 48951

Assistant Federal Defender

Federal Community Defender Office

Capital Habeas Unit

601 Walnut Street, Suite 545 West

Philadelphia, PA 19106

215-928-0520

Email: joseph_luby@fd.org

/s/ Rebecca E. Woodman

Rebecca E. Woodman, Mo. Bar No. 68901

Rebecca E. Woodman Attorney at Law, L.C.

1263 W. 72nd Ter.

Kansas City, Missouri 64114

785-979-3672

Email: rewlaw@outlook.com

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2022, I filed the foregoing pleading electronically with the clerk of the court to be served by operation of the court's electronic filing system upon all attorneys of record.

/s/ Joseph W. Luby
Counsel for Appellant




Supreme Court of Missouri
en banc

SC89168

State of Missouri, Respondent,
vs.
Kevin Johnson, Appellant.

- Sustained
- Overruled
- Denied
- Taken with Case
- Sustained Until
- Other

Order issued: Appellant's motion for stay of execution overruled.

By: 
Chief Justice

November 7, 2022
Date