No. A22-____

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.

Application for Stay of Execution Pending Appeal
in the Supreme Court of Missouri
Directed to the Honorable Brett M. Kavanaugh
as Circuit Justice for the Eighth Circuit

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 the Missouri Supreme Court's disposition of his pending appeal therein. Pursuant to Missouri law, a special prosecutor appointed by the Circuit Court of St. Louis County brought a motion to vacate Johnson's conviction and death sentence as tainted by racial bias on the part of the trial prosecutor and therefore unconstitutional. Without addressing the merits of the special prosecutor's claims, the state trial court denied the motion to vacate, essentially on the ground that it had insufficient time to review and determine the merits and no authority to issue a stay of the execution warrant that had been entered by the Missouri Supreme Court. App. 38–43. Johnson and the special prosecutor both appealed the trial court's ruling and requested the Missouri Supreme Court to enter a stay of execution. App. 168, 202.

On November 28, 2022, the Missouri Supreme Court denied the requests for stay of execution. App. 1. The appeals of the state trial court's denial of the motion to vacate judgment, however, remain pending in the Missouri Supreme Court. *State v. Johnson*, Case No. SC99873, Supreme Court of Missouri. Should the Missouri Supreme Court ultimately deny relief, Johnson would seek this Court's certiorari review of that decision. Long before the Missouri Supreme Court addresses the appeal, however, Johnson will have been executed. Under 28 U.S.C. § 1651(a), this Court has the jurisdiction to stay Johnson's execution pending the Missouri

Supreme Court's review of the appeal. This Court should stay the execution to preserve its jurisdiction.

INTRODUCTION

The State of Missouri is poised to execute Kevin Johnson, not for his crimes, but because he is Black and his victim was White. In rejecting Mr. Johnson's proffered evidence of purposeful discrimination, and thus denying a stay of execution, the Supreme Court of Missouri relied on its interpretation of this Court's decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987). Under that interpretation of *McCleskey*, no quantum of proof could ever sustain a claim of racial discrimination in a prosecutor's charging decisions. This Court should set the record straight; *McCleskey* is not a license for States to execute citizens on the basis of race. A stay should be granted.

It is a "basic premise of our criminal justice system" that the law "punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). Acting under a Missouri statute, the special prosecutor conducted an extensive investigation and alleged, in large part based on new facts uncovered by that investigation, that the St. Louis County prosecutor had violated this "guiding principle" by making charging decisions on the basis of the races of the defendants and the victims, and by using peremptory challenges to discriminate against Black jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

The claim of discrimination was not brought by Mr. Johnson, but by the very entity, through a duly appointed special prosecutor, that had put him on death row, The special prosecutor's proffer provided strong evidence of racial discrimination. He

proffered that the trial prosecutor in this case, Robert P. McCulloch, over nearly 30 years of prosecuting capital cases, discriminated at every key decision point. A multivariate analysis showed it was race, and not legitimate factors that dictated the result. The special prosecutor narrowed the analysis to cases most like Mr. Johnson's and again showed that race was the operative factor; for Black defendants McCulloch sought death, but he spared the sole White defendant although his was the most aggravated case, after inviting that defendant the opportunity to plead for mercy, a privilege he denied the Black defendants. The special prosecutor found that McCulloch routinely discriminated in jury selection, including in this case, and produced an internal memorandum evincing a strategy to discriminate in jury selection in this case but avoid detection. And he produced anecdotal evidence of McCulloch's racism, including a speech in 2018 that prompted a mass walkout by fellow prosecutors in disgust over McCulloch's unabashed views.

The fact that the claims were brought by a duly appointed special prosecutor pursuant to statute in itself speaks to the fact that the claims have merit. The two dissenting Missouri Supreme Court justices have also confirmed that this is true. App. 22–36; *State v. Johnson*, Nos. SC89168 & 99873 (Mo. Nov. 28, 2022) (Breckinridge, J., dissenting). Evincing outright hostility to any such claims, however, the majority ruled that the special prosecutor could never meet the proof required to show discriminatory conduct by the prosecutor because after all "the *jury*" had found Johnson guilty of murder, weighed the aggravating and mitigating factors, and sentenced Johnson to death. App. 16, *Johnson* (Mo. Nov. 28, 2022) (emphasis in original). On that theory, no claim of selective prosecution—no matter the proof—

could ever succeed.

The Missouri Supreme Court has short circuited the statutory process for factual development enshrined in Missouri law, depriving Mr. Johnson of his rights under that statute as well as his underlying constitutional right not to be sentenced to death based upon the color of his skin. Because there has been no final ruling by that court, this case is not ripe for certiorari review. In order to preserve its own jurisdiction ultimately to consider the merits of this case, this Court should grant a stay of execution.

STATEMENT OF JURISDICTION

Johnson seeks a stay of execution in order to litigate his appeal in the Supreme Court of Missouri. This Court, and indeed all federal courts, "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Because this Court has ultimate jurisdiction over the appeal that is now pending in the Supreme Court of Missouri, it has the authority to protect that jurisdiction by staying an execution that would otherwise moot the case.

In this case, the state trial court issued its final order and judgment on November 19, 2022, including a dismissal of the special prosecutor's motion to vacate judgment, which alleged that Johnson's conviction and death sentence were invalidated by violations of the United States Constitution. App. 38. Johnson and the special prosecutors filed separate notices of appeal on November 19, 2022. Both

appeals are docketed under.); *State v. Johnson*, No. SC99873 (Mo.).[1] Both the special prosecutor and Johnson moved the Supreme Court of Missouri for a stay of execution on November 21, 2022. The special prosecutor moved for a stay within his appeal, No. SC99873, and Johnson moved for a stay within his direct-appeal case, No. SC89168 (in which the Missouri Supreme Court had issued the execution warrant). The Missouri Supreme Court held consolidated oral argument on the stay motions on November 28, 2022.

The Missouri Supreme Court denied both stay motions on November 28, 2022. App. 1. Two judges dissented from that decision. App. 19–20. With respect to Johnson's stay motion, the state high court ruled that he was not entitled to a stay on his appeal because he had previously litigated related claims. App. 12. With respect to the special prosecutor's motion for a stay, the court denied the stay on the basis of its belief that it is virtually impossible to bring a successful claim of selective prosecution under *United States v. Armstrong*, 517 U.S. 456 (1996), or of discriminatory

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[1] The statute under which the litigation below was brought, Rev. Stat. Mo, § 547.031, permits the prosecuting attorney of the county of conviction to move to vacate the judgment if that attorney finds information that the judgment is tainted by "constitutional error at the original trial or plea that undermines the confidence in the judgment." Rev. Stat. Mo. § 547.031.3. The statute explicitly grants the prosecuting attorney the right of appealing an adverse ruling, Rev. Stat. Mo. § 547.031.4, a right the special prosecutor exercised. Mr. Johnson also appealed, as the real party in interest under Missouri law. *See, e.g.*, *Perkinson v. Burford*, 623 S.W.2d 30, 34 (Mo. Ct. App. 1981) ("The real party in interest is a party having a justiciable interest susceptible of protection through litigation.") (citations omitted); *In re Cromwell's Estate*, 522 S.W.2d 36, 41 (Mo. Ct. App. 1975) (real party in interest entitled to maintain appeal); *Herky, LLC v. Holman*, 277 S.W.3d 702, 704 (Mo. Ct. App. 2008) (error to dismiss appeal because although developers "were not the legal property owners when they filed their appeal, they were nonetheless the real parties in interest . . . [because] they stood to enjoy the benefits of a successful appeal.").

enforcement of the death penalty under *McCleskey v. Kemp*, 481 U.S. 279 (1987), and that the merits of the claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), had previously been litigated. App. 13–18.

Both of the appeals remain pending in the Missouri Supreme Court, but will be rendered moot by Johnson's scheduled execution. While the state court gave somewhat different reasons for denying the two stay motions, with respect to the stay requests Mr. Johnson is clearly the real party in interest and the one directly affected by the state court's rulings. Accordingly, this Court has jurisdiction to consider whether to grant Mr. Johnson a stay of execution pending the outcome of the appeals in the Missouri Supreme Court. This timely and urgent application follows.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Course of Proceedings Below

Johnson was charged with first degree murder in the Circuit Court of St. Louis County for the killing of Sgt. William McEntee of the Kirkwood Police Department on July 5, 2005, when Johnson was just 19 years old. Although a first trial ended when the jury deadlocked 10 to 2 in favor of a conviction on the lesser non-death-eligible offense of second degree murder, a second jury convicted Johnson of first degree murder and sentenced him to death in 2007. Former Prosecuting Attorney Robert McCulloch made the decision to charge first degree murder and seek the death penalty, personally prosecuted both trials, conducted all of the state's direct and cross examinations, and gave all opening statements and closing arguments.

The Missouri Supreme Court affirmed Johnson's conviction and sentence on direct appeal, and it later affirmed the circuit court's denial of post-conviction relief.

State v. Johnson, 284 S.W.3d 561 (Mo.), *cert. denied*, 558 U.S. 1054 (2009); *Johnson v. State*, 406 S.W.3d 892 (Mo. 2013), *cert. denied*, 571 U.S. 1240 (2014). The federal courts thereafter denied habeas corpus relief. *Johnson v. Steele*, No. 4:13-CV-2046-SNLJ, 2018 WL 3008307 (E.D. Mo. June 15, 2018) (amended memorandum and order denying petition); *Johnson v. Steele*, 999 F.3d 584 (8th Cir. 2021) (denying certificate of appealability and affirming district court's refusal to recuse), *cert. denied*, 142 S. Ct. 1376 (2022).

On August 28, 2021, Missouri established a statutory remedy for prosecutors seeking to vacate unconstitutional criminal judgments. Mo. Rev. Stat. § 547.031. On December 1, 2021, Johnson filed an application for relief with the Conviction and Incident Review Unit (CIRU) within the Office of the St. Louis County Prosecuting Attorney. Johnson asked the CIRU to investigate, among other things, his claim that the prosecution intentionally discriminated against Black jurors at the second of his two trials, and following that investigation, to move the circuit court to vacate Johnson's conviction and sentence under § 547.031. Johnson later supplemented his CIRU application with information from a comprehensive statistical study by Prof. Frank R. Baumgartner of the University of North Carolina, which indicated that the St. Louis County Prosecutor's Office had acted with racial bias in death-eligible homicide prosecutions throughout McCulloch's tenure as prosecuting attorney. Johnson also asserted that McCulloch and his office selectively prosecuted Johnson and other Black defendants in cases involving the killings of police officers by pursuing the death penalty against all four such Black defendants but not against a White defendant charged with an equally or more aggravated crime. Johnson again

asked the CIRU to investigate his claims and, if warranted, file a motion under § 547.031.

Acting through the Attorney General, on May 11, 2022, the State moved the Missouri Supreme Court to set an execution date against Johnson. The CIRU opposed that motion. CIRU Chief Jessica Hathaway informed the court that Johnson was seeking relief under § 547.031 based on claims "that his conviction and death sentence are unfairly and unconstitutionally tainted by racial bias." App. 53 (letter from Jessica Hathaway to Clerk Betsey AuBuchon). She explained that her office had conducted a "preliminary investigation" and that while further investigation might be warranted, the CIRU had a conflict of interest because one of Johnson's trial attorneys is now employed by the prosecuting attorney's office. *Id.* She explained that the CIRU had been attempting to locate a special prosecutor to complete the investigation of Johnson's claims but was thus far "unable to locate a special prosecutor who is willing and able to serve." *Id.* The CIRU requested that the court refrain from setting an execution date "until we have a special prosecutor in place to take any further action he or she deems appropriate with respect to Mr. Johnson's case." *Id.* Despite that request, on August 24, 2022, the Missouri Supreme Court scheduled Johnson's execution for November 29, 2022.

On October 12, 2022, the St. Louis County Prosecuting Attorney moved the state trial court to appoint attorney E.E. Keenan as special prosecutor, pursuant to Mo. Rev. Stat. § 56.110. *See* App. 54 (motion). The court granted the motion on the same day, and Keenan entered his appearance. *See* App. 57 (order of appointment); App. 58 (appearance).

Special prosecutor Keenan conducted extensive investigation, including reviewing prosecutor files and records, and reaching out to relevant witnesses, including all of the trial prosecutors. App. 65. On November 15, 2022, the St. Louis County Prosecuting Attorney, acting through the court-appointed special prosecutor, filed a motion to vacate and set aside Johnson's conviction and sentence because the underlying criminal judgment was infected by racial bias. App. 59. That same day, the court-appointed special prosecutor entered his appearance in the Missouri Supreme Court and informed that court that a motion to vacate had been filed in the trial court.

On November 16, 2022, the trial court summarily and *sua sponte* denied the motion to vacate. App. 37. Later that date, the special prosecutor filed a motion in the Missouri Supreme Court to stay Johnson's execution. On November 17, 2022, the Attorney General moved in the state high court to strike the motion for stay and any other filings from the special prosecutor. Prior to the filing of the special prosecutor's response, the Missouri Supreme Court struck the special prosecutor's filings on the ground that "there are no matters pending before this Court at the present time to which Mr. Keenan is a proper party or representative." App. 113.

On November 18, 2022, the trial court held a telephone conference concerning the special prosecutor's motion to vacate and the court's order denying the motion. The court explained that it denied the motion to vacate because it could not conduct a hearing and resolve the claims between the time of the motion's filing and the scheduled execution date of November 29. *See* App. 119–20. The court also appeared to agree with the Attorney General's argument that it lacked jurisdiction to consider the case while there was a pending execution warrant that had been issued by the

Missouri Supreme Court. App. 119.

Later on November 18, 2022, the special prosecutor filed a motion to amend the trial court's judgment and for new trial. *See* App. 124 (State's Motion to Amend Judgment and for New Trial, Nov. 18, 2022). The motion explained that the statute provides that, upon the filing of a motion to vacate, the circuit court "shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented." App. 124. (quoting Mo. Rev. Stat. § 547.031.2). The special prosecutor argued, among other things, that the trial court had jurisdiction to consider the motion to vacate during an execution warrant, and that a stay would be sought from the Missouri Supreme Court so that the trial court could resolve the special prosecutor's claims "in the normal course." App. 125–26. Shortly after the filing of the special prosecutor's motion, Johnson separately moved to amend the judgment and for new trial, adopting the grounds urged by the special prosecutor. *See* App. 165 (Defendant Kevin Johnson's Motion to Amend Judgment and for New Trial, Nov. 18, 2022).

On November 19, 2022, the trial court entered an Order and Judgment denying the motions to amend judgment and for new trial. *See* App. 38 (Order and Judgment, Nov. 19, 2022). The court recognized that Mo. Rev. Stat. § 547.031 requires a hearing. Nevertheless, the court reasoned that it could not conduct an adequate hearing – that is, a hearing consistent with the statute and in accordance with the requirements of due process and equal protection – before the scheduled execution date. App. 40–42.

The trial court did not address the special prosecutor's and defense counsel's arguments that it could consider the motion to vacate while the prosecutor and Johnson sought a stay in the Missouri Supreme Court, and that entry of a stay by that

court would permit the trial court to resolve the prosecutor's claims in the regular course rather than in the compressed timeframe of a warrant posture. App. 38–43, 125–26, 165.

The trial court also wrote – without relevant argument from the Attorney General and without allowing Johnson and the prosecutor to be heard on the point – that "many of" the claims brought by the special prosecutor "renew arguments and claims previously raised on behalf of Kevin Johnson and rejected in the various Courts of Appeal in the State and Federal systems" and that relief under § 547.031 "requires something more than the rearticulation of previously litigated claims at the eleventh hour." App. 41–42.

On November 22, 2022, both the special prosecutor and Johnson moved the Missouri Supreme Court to stay Johnson's execution, so that the trial court could hear the merits of the special prosecutor's claims and evidence in a manner consistent with due process and equal protection. App. 168, 202. On November 28, 2022, the state high court denied those applications.

B. The Evidence and Claims Developed by the Special Prosecutor

Through the duly appointed St. Louis County special prosecutor, the State has alleged that Kevin Johnson's death sentence was imposed on the basis of the "immutable characteristic" of his race and therefore was unconstitutionally tainted by racial discrimination, and that the architect of this discrimination was Robert P. McCulloch, the former prosecuting attorney for St. Louis County. *See* App. 59 (State of Missouri's Motion to Vacate Judgment). The State has made those allegations based on an extensive but still incomplete investigation of the files of the prosecuting

attorney's offices, and interviews or attempts to interview many of the persons with relevant evidence. The State of Missouri itself, through the special prosecutor, has found that there is clear evidence that Johnson's conviction and death sentence are invalidated by racial bias. *See, e.g.*, App. 65, 67, 69, 72.

The trial court did not even attempt to review the merits of these profoundly troubling claims because it believed that it was impossible during an execution warrant to conduct the hearings and review processes mandated both by Missouri statute and by due process. App. 42 (Order and Judgment). The Missouri Supreme Court reached no final decision on the merits of the appeals before it. Rather, it ruled that the claims were unlikely to succeed, essentially because no selective prosecution claim could ever succeed as long as a duly selected jury had a basis for concluding that the accused was guilty and eligible for the death sentence. App. 14–18, *Johnson*, Nos. SC89168 & SC99873.

The unrebutted allegations of the State are that Johnson's conviction and death sentence are invalidated by three types of unconstitutional racial bias:

> *First*, the trial prosecutor violated equal protection by selectively prosecuting and seeking the death penalty against four Black defendants accused of killing police officers, but not against a similarly situated White defendant (Trenton Forster), who was exclusively invited to present evidence against a capital prosecution.
>
> *Second*, a rigorous study of all of St. Louis County's death-eligible prosecutions during the years of McCulloch's tenure shows that cases with White victims (like Mr. Johnson's case) were 3.5 times more likely to result in a

death sentence than cases involving Black victims, and that White-victim cases were more than twice as likely to result in a charge of first degree murder instead of a lesser offense.

Third, the special prosecutor found substantial, previously undisclosed support for Johnson's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). Johnson had raised a *Batson* claim at trial, on direct appeal, and on federal habeas review. After review of the trial prosecutor's files, the special prosecutor discovered additional evidence of discriminatory intent, including an incriminating memorandum from the trial team's work product materials, showing that the prosecutors strategized in advance of trial to use fewer than their allotment of nine peremptory challenges in the hope that additional Black jurors would be stricken by the trial judge instead of the prosecution. *See* App. 100–04. The special prosecutor also urged that this Court's intervening opinion in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), called into question the state high court's *Batson* ruling on direct appeal. *See* App. 107–09.

REASONS WHY PETITIONER IS ENTITLED TO A STAY

The standard for granting a stay of execution is well-established. This Court will consider the prisoner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). All of these factors weigh in favor of staying Johnson's execution pending his prompt and meritorious appeal below.

I. The Special Prosecutor's Claims are Meritorious; if Certiorari Review is Necessary, Johnson Will Likely Succeed.

The special prosecutor has brought meritorious claims on behalf of the State of Missouri. As discussed above, the state trial court did not reach the merits of the claims at all. The state high court majority did address the merits in the context of denying a stay. But the two dissenting Justices of that court showed that the claims had at least enough merit to warrant a stay under *Hill*. App. 25–36, *Johnson*, Nos. SC89168 & SC99873 (Breckinridge, J., dissenting). Moreover, the state high court's denial of a stay—thus effectively foreclosing further review of the special prosecutor's claims without the hearing and other processes guaranteed by Missouri statute—violates due process. On all of these grounds, Johnson meets the likelihood of success prong.

A. The special prosecutor's proof shows that the decisionmaker in this case acted with discriminatory purpose.

The proof proffered by the special prosecutor shows not only that discrimination in capital charging and sentencing was pervasive during the tenure of former Prosecuting Attorney Robert McCulloch, but also that race, and not case characteristics, was the dispositive factor when the analysis is limited to cases most similar to Mr. Johnson's. The only representative of the State to investigate and consider the substantive allegations of racial bias here determined that "unconstitutional racial discrimination infected this prosecution" and thus he had "no ethical option but to move to vacate the judgement." App. 204, 209.

The special prosecutor describes a pattern of selective prosecution in police-killing cases over which McCulloch presided as prosecuting attorney. In the four

cases that the office capitally prosecuted for killing a police officer, the defendants were Black (Kevin Johnson, Lacy Turner, Dennis Blackman, and Todd Sheppard). The fifth case involved a White defendant (Trenton Foster), and McCulloch declined to pursue death.

Johnson will not reproduce here the prosecuting attorney's thorough comparison of the five cases. *See* App. 72–84. It is telling, as the special prosecutor explains, that (a) Forster's case is no less aggravated than the others, Forster tried to shoot and kill a second police officer but failed only because his gun jammed after he killed the first officer, and Forster's deliberation was made clear by multiple social media posts declaring his intent to kill a police officer; (b) Forster's background and characteristics were no more mitigating than those of the Black defendants, bearing in mind the defendants' histories of mental illness and social deprivation, and the defendants' ages at the time of the offense; and (c) the special prosecutor's review of records revealed no criteria or policies for deciding when the office should seek the death penalty, no memoranda explaining why death was sought or not sought in any of the cases, and no legitimate case-related reason for treating the Forster case more leniently than the others. App. 72–87. Worse, the prosecution extended to Forster an opportunity that it withheld from the Black defendants accused of killing police officers. App. 85–87. The office invited Forster's attorney to submit mitigating evidence. Counsel for Forster asked for, and received, a nine-month delay in which to present such evidence, after which McCulloch publicly announced his decision not to seek the death penalty. App. 85–87.

This Court has set out the requirements for making a selective prosecution

claim: "To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). The special prosecutor's allegations make out a *prima facie* case of selective prosecution.

Moreover, racial bias unconstitutionally affected the capital sentencing process in St. Louis County. Looking at McCulloch's history of discrimination in capital cases, the prosecuting attorney points to a new, rigorous, and scientific study of over 400 death-eligible homicide prosecutions from 1991 through 2018, which demonstrates that under McCulloch the death penalty was largely reserved for cases in which the victim was White, in the process substantially devaluing the lives of Black victims. *See* Frank Baumgartner, *Homicides, Capital Prosecutions, and Death Sentences in St. Louis County, Missouri, 1990-2018*, Sept. 20, 2022 (App. 265). Dr. Baumgartner's findings are stark and troubling:

> ●Overall, capital-eligible cases with White victims were 3.5 times as likely to lead to a sentence of death as cases with Black victims. White-victim cases saw a death-sentencing rate of 14 percent, whereas Black-victim cases saw a rate of four percent. These results were highly statistically significant.
>
> ●Dr. Baumgartner analyzed whether the observed race effects could be a result of the level of aggravation present in the case. He produced four separate regression models for the overall sentencing result that controlled for statutory aggravating and mitigating circumstances that could plausibly influence the charging and sentencing decision. In each model, the White race-of-victim effect strongly persisted even after controlling for other statutory factors.
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> ●Examining the overall likelihood of receiving death, the "odds multiplier" for White victim cases consistently ranged from 3.3 to 3.7. Otherwise stated, the study demonstrates a "very powerful White-victim effect, consistently leading to results suggesting 3 to 4 times the rate of use of the death penalty in such cases compared to those with Black victims."
>
> ●The study shows a similar and statistically significant effect at two key

> prosecutorial decision-points: whether to charge first-degree murder (odds multiplier of 2.2) and whether to file a notice of intention to seek death (odds multiplier of 2.9). Even limited to guilt-phase considerations, then, the study shows that the presence of a White victim more than doubles the odds that the case will be charged as first degree murder.
>
> ●Overall, the presence of a White victim "acts as [a] non-statutory and impermissible aggravating factor, with an influence on capital sentencing comparable to the defendant's status of having a prior conviction of first-degree murder or felonious assault."

App. 269–70, 282–88.

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), this Court rejected a claim that patterns of race discrimination in Georgia capital prosecutions violated the Constitution, because McCleskey failed to demonstrate "a constitutionally significant risk of racial bias." *Id.* at 313. The evidence relied on by the special prosecutor overcomes the deficiencies identified in *McCleskey*. McCleskey's Fourteenth Amendment claim failed because he did not show that purposeful discrimination was operative in the case at hand. "[T]o prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* at 292 (emphasis in original). McCleskey's principal proof, as characterized by the Court, was not particularized to *his* case, but rather showed a statewide race-of-victim effect, encompassing simultaneously all key decision points from the prosecutor's election to seek death to the jury's verdict. *Id.* at 294–95.

The proof in this case, by contrast, focuses acutely on discriminatory patterns displayed by a particular prosecutor's office and a close analysis of a single decisionmaker, Robert McCulloch—who prosecuted this particular defendant. Far from requiring a strained "inference from statewide statistics," *McCleskey*, 481 U.S. at

295 n.15, the study focuses on the decisions of a single prosecutor, specifically controls for aggravating and mitigating circumstances, and documents a pronounced race-of-victim bias in the prosecutor's choice of criminal charge, the prosecutor's choice of whether to file a death notice, and the prosecutor's successful effort to obtain a capital sentence.

The Baumgartner study does not merely reflect ordinary or "apparent" disparities that "are an inevitable part of our criminal justice system." *McCleskey*, 481 U.S. at 312. It shows a discriminatory practice and policy to reserve the death penalty for cases where the victim was White, or at the very least, a system in which the presence of a White victim in the case served as a de facto aggravating circumstance, with influence on the decisionmaker comparable to the presence of statutory aggravating circumstances such as multiple victims or a defendant's history of previous assaultive or homicide convictions.

The special prosecutor's allegations make out a case of race discrimination unconstitutionally affecting the imposition of the death penalty in St. Louis County. Through the special prosecutor, the State of Missouri agrees that racial bias has impermissibly tainted the administration of the death penalty in St. Louis County. Johnson has shown a likelihood of success on this claim. That fact alone shows that Johnson has established a likelihood of success on the merits of this claim.

B. Violation of *Batson*

The special prosecutor's *Batson* allegations lend further support to his showing that racial bias infects Johnson's conviction and sentence. *See McCleskey*, 481 U.S. at 309–10 (rejecting race discrimination claim, in part, because the law guarantees the

safeguard of "a capital sentencing jury representative of a criminal defendant's community"). The special prosecutor describes a troubling memorandum crafted by the prosecution team between Johnson's two trials. *See* App. 87–88, 100–04.

At the first trial, the court precluded the prosecutor from waiving peremptory strikes of Black jurors as a tactic in an attempt to have Black jurors—whose numbers were higher in the strike pool sequence—stricken without him needing to announce a strike. App. 87. Months before the retrial and without knowledge of which jurors might serve, the prosecution decided in advance to reprise this tactic by exercising fewer than its nine available peremptory strikes. As explained by the special prosecutor, and as the trial court had found at the first trial, the prosecutor's methods reflect an attempt to evade *Batson*. App. 87–88, 101–03. By arranging for the trial judge to exercise the prosecution's unused strikes, the prosecution could achieve one or more additional strikes of Black jurors and then attribute those strikes to the court instead of the prosecutor. *Id.* Meanwhile, the prosecution could seek cover for its own strikes of Black jurors—including three of McCulloch's four strikes—by arguing that it left additional strikes on the table instead of systematically excluding as many Blacks as it could. McCulloch's objective was to make "backdoor strikes of minority jurors." App. 87–88.

The prosecution, then, was more intent on defeating any *Batson* objections than on complying with *Batson*. App. 104. The memorandum, together with the strike patterns in the two trials, provides far more direct evidence of discriminatory intent than the "jury shuffle" practice found by this Court to raise an inference of discriminatory intent in *Miller-El v. Dretke*, 545 U.S. 231, 253–55 (2005). *A fortiori*,

the memorandum raises a strong inference of discriminatory intent here. Given that McCulloch has ignored all entreaties from the special prosecutor, depositions and an evidentiary hearing are necessary to determine what additional "family secrets" operated at the time of Johnson's trial. App. 68, 87–88, 98.

The special prosecutor also invoked this Court's decision in *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019), to support the *Batson* claim. *See* App. 107–09. The Missouri Supreme Court rejected a *Batson* claim on direct appeal, which was limited to the prosecutor's strike of Juror Debra Cottman. *See Johnson*, 284 S.W.3d at 570–71 (principal opinion); *but see id.* at 589–91 (Teitelman, J., dissenting). In his direct appeal brief, Johnson had pointed out the St. Louis County Prosecutor's recent history of *Batson* violations, including those in *State v. McFadden*, 191 S.W.3d 648 (Mo. 2006); *State v. McFadden*, 216 S.W.3d 673 (Mo. 2007); *State v. Hampton*, 163 S.W.3d 903 (Mo. 1995); and *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. E.D. 2004). The court refused to consider such history, finding it immaterial: "A previous *Batson* violation by the same prosecutor's office does not constitute evidence of a *Batson* violation in this case, absent allegations relating to this specific case." *Johnson*, 284 S.W.3d at 571.

Flowers undermined the state high court's ruling: it allows a defendant to rely on "relevant history of the State's peremptory strikes in past cases" without any requirement of an additional nexus to the case at hand. *Flowers*, 139 S. Ct. at 2243. That history is especially relevant when, as here, newly-discovered evidence shows that the trial prosecutor deliberately exercised his peremptory strikes in a manner consistent with the history of strikes in past cases. *See* App. 87–88, 100–04.

Under the circumstances of this case, the State's confession of error should be given considerable weight. Courts are not mind-readers, and discriminatory purpose must be divined from the facts and circumstances of the case. In this instance, the special prosecutor had a unique window into the thought processes of the trial prosecutors and the materials that shaped their thinking. Through § 547.031, the State's legislatively-designated voice has spoken: the improper consideration of race played a substantial role in the decisions leading to Mr. Johnson's conviction and death sentence.

Based on the State's admissions, there is a strong probability of success on the merits. Moreover, on these facts the state high court's denial of relief is in conflict with this Court's precedents, including *Flowers* and *Miller-El*.

C. Due process violation

Johnson's conviction and death sentence are constitutionally infirm, for the reasons set forth above. Additionally, should the Missouri Supreme Court ultimately deny relief on Johnson's claims or permit his execution without any additional proceedings in the state trial court, it would likely also violate Johnson's due process rights.

Due process protections extend to state post-conviction proceedings. *See, e.g.*, *Williams v. Pennsylvania*, 579 U.S. 1, 8-10 (2016) (participation of biased judge in state post-conviction proceedings violated due process). When a State guarantees procedural protections to a prisoner through mandatory statutory language, the defendant has a life and liberty interest protected by the Fourteenth Amendment against "arbitrary deprivation by the State." *Hicks v. Oklahoma*, 447 U.S. 343, 346

(1980).

In pertinent part, Mo. Rev. Stat. § 547.031 provides as follows:

> 1. A prosecuting or circuit attorney, in the jurisdiction in which a person was convicted of an offense, may file a motion to vacate or set aside the judgment at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted. The circuit court in which the person was convicted *shall have jurisdiction* and authority to consider, hear, and decide the motion.
>
> 2. Upon the filing of a motion to vacate or set aside the judgment, the court *shall order a hearing and shall issue findings of fact and conclusions of law* on all issues presented. The attorney general shall be given notice of hearing of such a motion by the circuit clerk and shall be permitted to appear, question witnesses, and make arguments in a hearing of such a motion.
>
> 3. The court shall grant the motion of the prosecuting or circuit attorney to vacate or set aside the judgment where the court finds that there is clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in the judgment. In considering the motion, the court shall take into consideration the evidence presented at the original trial or plea; the evidence presented at any direct appeal or post-conviction proceedings, including state or federal habeas actions; and the information and evidence presented at the hearing on the motion.

Mo. Rev. Stat. § 547.031.1-3 (emphases added).

The mandatory language of the statute leaves no room for doubt that where, as here, the prosecuting attorney files a motion to vacate or set aside the judgment, the applicable circuit court "shall have jurisdiction" and "shall order a hearing and shall issue findings of fact and conclusions of law on all issues presented." It is beyond dispute that the circuit court here did not order a hearing and did not issue findings of fact and conclusions of law. Denial of the claims without those procedures itself violated Mr. Johnson's right to have the mandatory provisions of the statute complied with. *See* App. 36, *Johnson*, Nos. SC89168 & SC99873 (Breckinridge, J.,

dissenting) ("giving full effect to the General Assembly's purpose in enacting section 547.031 requires a stay to permit proceedings under that statute to be fully adjudicated through an appeal."). Because the state high court has not ruled on Johnson's appeal, a due process claim is not yet ripe. If, however, the state high court were ultimately to deny relief to Mr. Johnson without his having been afforded a hearing in the trial court, then his due process rights would be violated.

Mr. Johnson's due process rights are also being violated in another respect. According to the special prosecutor's allegations—the merits of which have not been conclusively ruled on—the State of Missouri violated Mr. Johnson's constitutional rights to equal protection and due process at trial. Last year, the State enacted Mo. Rev. Stat. § 547.031, which enabled local prosecuting attorneys to seek review of convictions and judgments that they determined had resulted in the convictions of innocent persons or in judgments tainted by constitutional error. As discussed above, Mr. Johnson had a life or liberty interest in the State's compliance with its own statute.

Mr. Johnson attempted to avail himself of the protection afforded by the new statute by filing—on December 1, 2021—an application for relief under the statute with the CIRU of the St. Louis County Prosecuting Attorney. The Prosecuting Attorney considered the application for several months before it determined that it had a conflict of interest which precluded it from further investigating the matter. The determination that there was a conflict of interest was only made public by the Prosecuting Attorney on July 11, 2022, in a letter from CIRU Chief Hathaway to the Clerk of the Missouri Supreme Court, sent two months after the State, through the

Attorney General, had moved that court to set an execution date. App. 53. But even after the Missouri Supreme Court, on August 24, 2022, scheduled Mr. Johnson's execution for November 29, 2022, the Prosecuting Attorney still took no action to have a special prosecutor appointed until October 12, 2022, when the Prosecuting Attorney moved the circuit court to appoint attorney E.E. Keenan as special prosecutor. App. 54.

Even then, the State—acting through the special prosecutor—did not move to vacate the judgment as unconstitutional—based on the State's own discriminatory conduct—until November 15, 2022, a scant two weeks before the execution date. When the state trial court dismissed the special prosecutor's motion, it termed the State's failure to recognize the conflict earlier "disconcerting" and its failure to file the motion earlier "inexplicable." App. 41. The court then dismissed the motion because there was insufficient time to hold a hearing as the result of the State's own untimely actions. App. 42.

Had the Missouri Supreme Court granted a stay, the harm caused by the State's earlier foot dragging could have been remedied. Through the Attorney General, however, the State argued that there was no remedy and Mr. Johnson should be executed because another arm of the State—the special prosecutor—had been dilatory in determining that it had violated Mr. Johnson's rights through its discriminatory conduct before and at trial and seeking review. *State v. Johnson*, No. SC99873, Suggestions in Opp'n to Mot. for Stay of Execution 11–13 (Mo. filed Nov. 23, 2022). The Supreme Court of Missouri agreed, even though no party even suggested that Mr. Johnson had been dilatory. Such a suggestion would have been

meritless, as Mr. Johnson sought relief pursuant to the new statute shortly after it had been enacted and long before an execution warrant had been issued. Rather, the State violated Mr. Johnson's rights, hid that violation, and then declared that when one arm of the State discovered the violation and attempted to rectify it, that that arm of the State had acted too slowly.

The Due Process Clause "imposes procedural limitations on a State's power to take away protected entitlements." *Dist. Attorney for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67 (2009) (citing *Jones v. Flowers*, 547 U.S. 220, 226–39 (2006)). Reasonableness is the touchstone of due process. *See, e.g.*, *Jones*, 547 U.S. at 226–29. The effect of the State's actions here is patently unreasonable. The rule effectively announced by the Missouri Supreme Court—that the State may hide discrimination, then decide after failing to move promptly to correct it that the attempt at error correction was untimely and thus that the State may reap the benefit of its own actions—is no more "tenable in a system constitutionally bound to accord defendants due process" than a rule declaring "'prosecutor may hide, defendant must seek.'" *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

Indeed, if Johnson is executed because he could not obtain a stay, the due process violation will then be complete. There would, however, be no remedy remaining for Johnson. This is yet another reason why this Court should grant a stay.

II. Relative Harm to the Parties

Johnson will suffer irreparable harm if he is executed before his claims are heard. Although the State has a recognized interest in the enforcement of criminal judgments, it "also has an interest in its punishments being carried out in accordance

with the Constitution of the United States." *Harris v. Vasquez*, 901 F.2d 724, 727 (9th Cir. 1990). And the State has competing interests in this case: different representatives of the State have taken adverse positions on the validity of the underlying criminal judgment. Missouri law specifically recognizes the prosecuting attorney's authority to bring an action in the state trial court to vacate or set aside the judgment. Mo. Rev. Stat. § 547.031. Although the Attorney General has the authority to represent the State in Missouri's appellate courts, *see* Mo. Rev. Stat. § 27.050, the local prosecutor may appeal the circuit court's ruling on a motion to vacate. *See* Mo. Rev. Stat. 547.031.4. That power would mean little if the only relevant State interests were those voiced by the Attorney General. Missouri's legislature, after all, has the "right to create causes of actions and to prescribe their remedies." *Sanders v. Ahmed,* 364 S.W.3d 195, 205 (Mo. 2012).

The special prosecutor's decision to bring and maintain claims against the validity of Johnson's conviction and sentence – and to do so without those claims becoming moot – is itself a legitimate State interest that informs the appropriateness of a stay. The balance of harm to the parties favors a stay.

III. The Public Interest Supports a Stay.

The public's elected representatives have authorized the local prosecutor to seek vacatur of a prisoner's criminal judgment when clear and convincing evidence shows that judgment is unconstitutional. Mo. Rev. Stat. § 547.031.3. That interest cannot be vindicated if the prisoner is killed before the prosecutor's claims can be resolved, including claims brought by a special prosecutor who stands in the prosecuting attorney's shoes to "prosecute or defend the cause." Mo. Rev. Stat. § 56.110. More

broadly, the public has an interest in ensuring that the ultimate punishment is legally imposed. "[T]he public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional right." *In re Ohio Execution Protocol Litigation*, 840 F. Supp. 2d 1044, 1059 (S.D. Ohio 2012).

IV. Johnson Has Not Delayed the Assertion of any Remedies.

At no point has Johnson "delayed unnecessarily in bringing the claim[s]." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). He applied for relief from the St. Louis County Prosecutor's Conviction and Incident Review Unit on December 1, 2021, or only two months after § 547.031 was enacted. *See* Special Prosecutor's Motion for Stay of Execution (filed Nov. 16, 2022), at 8. Johnson's application asked the CIRU to investigate his claims and to bring a motion to vacate under § 547.031.

The CIRU concluded that it had a conflict of interest because one of Johnson's trial attorneys is now employed by the prosecutor's office. *See* App. 53 (Letter from Jessica Hathaway to Clerk of Missouri Supreme Court, dated July 11, 2022). The CIRU explained that it had been searching for a special prosecutor to handle Johnson's application for relief. *Id.* Nevertheless, it was not until October 12, 2022, that the CIRU selected attorney E.E. Keenan as a special prosecutor and moved the circuit court for his appointment. *See* App. 54 (motion to appoint special prosecutor); App. 57 (order appointing Keenan). Johnson had no control over the timing of the special prosecutor's selection and appointment, or even over the CIRU's determination that it had a conflict of interest. And it is no fault of Johnson that the special prosecutor's appointment came only six weeks before the scheduled execution date.

The circuit court was correct on one important point: there was no possibility

that the prosecutor's and Johnson's claims could be fairly and properly heard and decided between the special prosecutor's filing and November 29. App. 41–42. The chronology of events "weigh[ed] heavily" upon the circuit court. *Id.* at 5. It would be impossible to resolve the claims in the manner required by statute and consistent with the demands of due process and equal protection. *Id.* The court placed no blame on Johnson for the fact that the special prosecutor's claims were not asserted until November 15, 2022. Nor could it have. The late timing of the special prosecutor's appointment on October 12 and the filing of the motion to vacate on November 15 may well be "inexplicable" and "disconcerting," as the trial court observed. *Id.* at 4. But they are no fault of Kevin Johnson.

To deny a stay under these circumstances would be fundamentally unfair. The prosecuting attorney is an entity of the State. That very entity now confesses that it engaged in racial discrimination in seeking and obtaining Johnson's conviction and death sentence. The same State entity received Johnson's request for relief in December 2021 and determined that it had a conflict of interest, but it failed to move for the appointment of a special prosecutor until October 12, 2022, or about six weeks before Johnson's execution date. Despite the special prosecutor's admirable efforts to investigate Johnson's case and to develop and assert the prosecutor's claims on November 15, there was insufficient time for the claims to be litigated, heard, and adjudicated before November 29.

Johnson seeks a stay based on meritorious claims supported by the sovereign's confession of error. The State should not be permitted to execute Johnson on the grounds that the State itself was tardy in asserting claims against the very criminal

judgment that it admits to having obtained unconstitutionally. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1283 (2022) ("[R]espondents can hardly complain about the inequities of delay when their own actions were a significant contributing factor.").

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

Respectfully submitted,

/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