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

Through the special prosecutor, the State has alleged that Kevin Johnson's conviction and death sentence are the product of systematic racial discrimination. *See* Ex. 1 (State of Missouri's Motion to Vacate Judgment). Through the Legislature, state law provides that such errors can be remedied "at any time." Mo. Rev. Stat. § 547.031.1 Yet, the circuit court and the Attorney General are now saying that, because Johnson's execution has been scheduled for November 29, the courts cannot consider whether the special prosecutor's conclusions are true. Ex. 2 (transcript of telephone conference, Nov. 18, 2022) at 5–6; Ex. 3 (Order and Judgment of Nov. 19, 2022), at 4–5.

The state's current execution schedule should not be a vehicle for such manifest injustice – particularly without any fault of Johnson, who applied for relief with the prosecuting attorney's office last December, and who bears no responsibility for the fact that the office has a conflict of interest and did not move for the appointment of a special prosecutor until six weeks before his execution

date. Ex. 4 (motion to appoint); Ex. 5 (order of appointment). From Johnson's perspective, one arm of the state is rushing to execute him in order to prevent another arm of the state from having its findings of racial bias and discrimination heard in court. Johnson's execution should be stayed so that the prosecutor's claims – which remain uncontested at this point – can be fully and fairly decided on their merits.

As for this Court, its first premise for scheduling Johnson's execution was that "on February 1, 2008, the St. Louis County circuit court entered its judgment fixing punishment at death." Order of Aug. 24, 2022, at 1. That judgment is now under attack by the same prosecutor's office that obtained it. Acting through a court-appointed special prosecutor, the St. Louis County Prosecuting Attorney moved to vacate and set aside Johnson's conviction and sentence under Mo. Rev. Stat. § 547.031. Ex. 1.

Presiding Judge Mary Elizabeth Ott denied the motion to vacate on the grounds that the court did not have time to conduct a fair hearing and decide the claims before the scheduled execution date, and that it lacked authority itself to stay Johnson's execution. Ex. 3 at 4–5; *see also* Mo. Rev. Stat. § 547.031.2 ("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."). Judge Ott explained:

> [T]he Court will, in light of the exigent circumstances present in this case, continue to give it the highest priority that must always be given

> to cases involving the penalty of death. However, the question is not simply can a hearing be conducted but rather can the date of the hearing afford the parties adequate time to prepare and present the evidence, and the Court adequate time to thoughtfully consider the evidence admitted at hearing, keeping in mind the important public interests at issue.

Id. at 4. The court found it "disconcerting" that the prosecutor's office did not move for the appointment of a special prosecutor until October 12,[1] and "inexplicable" that the motion to vacate was not filed until November 15. *Id.* at 4. Judge Ott did not blame Johnson for this situation, which "weigh[ed] heavily" on her because the court lacked the time to conduct the statutorily required hearing in a manner consistent with the demands of due process and equal protection. *Id.* at 5.

Johnson does not dispute that the circuit court cannot stay an execution warrant issued by this Court – a measure that neither he nor the special prosecutor requested of the circuit court. *See* Ex. 1 (motion to vacate); Ex. 10, 11 (motions to amend judgment). He instead asks this Court to stay the execution so that the prosecutor may assert his claims in the circuit court, which can resolve the claims in a non-warrant posture that satisfies the court's concerns about procedural fairness to all parties. *See* Ex. 3 at 4–5.

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[1] To be fair, the prosecutor's office explained to this Court in July that it had been searching for a special prosecutor but had been unable to locate one "who is willing and able to serve." Ex. 6 (letter from Jessica Hathaway to Clerk Betsy AuBuchon, Jul. 11, 2022). Among other limitations, a special prosecutor must refrain from representing any party other than the state "in any criminal case or proceeding in th[e] circuit for the duration of th[e] appointment." Mo. Rev. Stat. § 56.110.

In deciding whether to grant a stay, this Court should consider the special prosecutor's motion to vacate for what it is: the state's confession of error. Through the special prosecutor, the state admits long-standing and pervasive racial bias in St. Louis County's handling of this case and other death-eligible prosecutions, including the office's decisions of which offense to charge, which penalty to seek, and which jurors to strike. Among the "key facts" relied upon by the special prosecutor are the following:

> ●Of the five police-officer killings that were prosecuted during his tenure as St. Louis County Prosecuting Attorney, Robert McCulloch pursued the death penalty against four Black defendants but not against the one White defendant, Trenton Forster. As compared to the other cases, "Forster's conduct was more aggravated: he had bragged on social media about wanting to kill police officers ('I want fuck the police carved into my grave'), and had also indicated an intent to 'tak[e] out every single nigga in the city.'"
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> ●In the Forster case, McCulloch's office "issued a written invitation to defense counsel to submit mitigating evidence that might convince the prosecutor's office not to seek death," then "granted the defense nearly a year to provide arguments against death." McCulloch ultimately decided not to seek death against Forster, without giving any specific explanation why. By contrast, McCulloch issued no such "mitigation-invitation" to Johnson or other Black defendants who stood accused of killing police officers.
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> ●The prosecution's work product shows a "strategy to evade *Batson* [*v. Kentucky*, 476 U.S. 79 (1986)] by exercising fewer than their allotted nine peremptory challenges, in the hope that the trial court might eliminate Black jurors ranked high in the strike pool without those strikes counting against the prosecution."
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> ●Former Assistant Prosecutor Sheila Whirley, who was among the three prosecutors at Johnson's trial, told the special prosecutor that she was reluctant to reveal the office's "family secrets," but she acknowledged that the decision to seek the death penalty was

McCulloch's.

> ●Mr. McCulloch's office maintained no record of guidelines, practices, or procedures on whether to seek the death penalty.
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> ●A comprehensive study of 408 St. Louis County death-eligible homicide prosecutions during Mr. McCulloch's tenure demonstrates that the prosecutor's office "largely reserved the death penalty for defendants whose victims were White when deciding whether to charge first degree murder and to seek the death."

Ex. 1 ("State of Missouri's Motion to Vacate and Suggestions in Support"), at 3–5.

Johnson wishes to make clear that the matters asserted by the special prosecutor are not a "rearticulation of previously litigated claims," as the circuit court remarked in passing. Ex. 3 at 5. Indeed, the special prosecutor newly asserts that the state engaged in selective prosecution by seeking the death penalty against Johnson and three other Black defendants who were charged with killing police officers but not against a similarly situated White defendant (Forster). Ex. 1 at 8–23, 29–34. It was not until 2017 that McCulloch elected not to seek death against Forster, so Johnson could not assert such a selective prosecution claim at his 2007 trial, on direct appeal in 2009, or in post-conviction proceedings that terminated in 2014.

Similarly, the special prosecutor relies on Dr. Baumgartner's careful study of all 408 death-eligible prosecutions that took place during McCulloch's tenure from 1991 through 2018. Ex. 1 at 5–7, 34–36. The study was not completed until September 20, 2022. Ex. 7 at 1. In no sense is the study duplicative of any previous claim. Finally, although Johnson has previously litigated a *Batson* claim in this

Court and elsewhere, the special prosecutor supports that claim with incriminating work product materials that undermine the trial prosecution's denial of racial motives in jury selection, and which have never been available to Johnson previously. Ex. 1 at 36–40.

Johnson's execution is scheduled for November 29. The Court should stay the execution so that the prosecution's claims can be fully and fairly decided under all the relevant evidence. Were the execution to go forward, it would not be because the state's claims lacked merit, or because Johnson was dilatory, but because the imminence of the execution (sought by the Attorney General), prevented the circuit court from performing its statutory obligation to conduct a hearing and issue findings of fact and conclusions of law. The allegations of racial bias, conceded to be true by the prosecutor, are too grave to go unheard.

PROCEDURAL BACKGROUND

1. 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 10-2 in favor of a conviction on the lesser 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.

2. This 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).

3. 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 Mo. Rev. Stat. § 547.031.

4. Johnson supplemented his CIRU application on April 21, 2022. Based on the preliminary results of a comprehensive statistical study by Prof. Frank R. Baumgartner of the University of North Carolina, Johnson asserted that the St. Louis County Prosecutor's Office 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 to file a motion under § 547.031.

5. Acting through the Attorney General, the state on May 11, 2022, moved this Court to set an execution date against Johnson.

6. In response to the Attorney General's motion, CIRU Chief Jessica Hathaway wrote a letter to the Clerk on July 11, 2022. Ex. 6 (letter from Jessica Hathaway to Clerk Betsey AuBuchon). 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." *Id.* She explained that her office had conducted a "preliminary investigation" and that further investigation may be warranted. *Id.* Nevertheless, Hathaway advised the Court that the CIRU had a conflict of interest because one of Johnson's trial attorneys is 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.*

7. On August 24, 2022, the Court scheduled Johnson's execution for November 29, 2022.

8. On October 12, 2022, the St. Louis County Prosecuting Attorney moved the circuit court to appoint attorney E.E. Keenan as special prosecutor, pursuant to Mo. Rev. Stat. 56.110. *See* Ex. 4 (motion). The circuit court granted the motion on the same day, and Keenan entered his appearance. *See* Ex. 5 (order of appointment); Ex. 8 (appearance). Johnson then submitted an updated CIRU application consolidating his initial application with the supplemented claims, along with a finalized version of the statistical study and analysis conducted by Prof. Baumgartner. Following his appointment, the special prosecutor reviewed "tens of thousands of pages of evidence [including file materials], … contacted every member of the prosecution team, [and] reviewed extrinsic evidence bearing on the case." Ex. 1 at 1.

9. 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 on account of the racial bias infecting the underlying criminal judgment. Ex. 1. That same day, the court-appointed special prosecutor entered his appearance and alerted this Court that a motion to vacate had been filed in the circuit court.

10. On November 16, 2022, the Attorney General moved to strike the special prosecutor's appearance and notice of filing in this Court. The special prosecutor filed suggestions in opposition to the motion to strike later that day.

11. The circuit court denied the motion to vacate on November 16, 2022, stating only that: "This Court has received a pleading entitled Motion to Vacate Judgement. The Court enters the following judgment: The Motion to Vacate Judgement is DENIED." Ex. 9.

12. Later on November 16, 2022, the special prosecutor filed a motion in this Court to stay Johnson's execution.

13. On November 17, 2022, the Attorney General moved to strike the motion for stay and any other filings from the special prosecutor. Prior to the filing of the special prosecutor's suggestions in opposition to the motion, the 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." Order of Nov. 17, 2022.

14. On November 18, 2022, Judge Ott 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 had denied the motion to vacate because the court 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* Ex. 2 (transcript) at 5–6.

15. Later on November 18, 2022, the special prosecutor filed a motion to amend the circuit court's judgment and for new trial. *See* Ex. 10 (State's Motion to Amend Judgment and for New Trial, Nov. 18, 2022). The special prosecutor argued, among other things, that the circuit court had jurisdiction to consider the motion to vacate during an execution warrant, because the statute allows for the prosecutor to bring a motion to vacate "at any time," and it provides that the circuit court of conviction "shall have jurisdiction and authority to consider, hear, and decide the motion." *Id.* at 2 (quoting Mo. Rev. Stat. § 547.031.1). The special prosecutor did *not* ask the circuit court to stay Johnson's execution. *Id.* Rather, he argued that the court could consider the motion to vacate despite the warrant's pendency, and that a stay would be sought from this Court so that the circuit court could resolve the special prosecutor's claims "in the normal course." *Id.* at 2–3.

16. 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* Ex. 11 (Defendant Kevin Johnson's Motion to Amend Judgment and for New Trial, Nov. 18, 2022).

17. On November 19, 2022, Judge Ott entered an Order and Judgment denying the motions to amend judgment and for new trial. *See* Ex. 3 (Order and Judgment, Nov. 19, 2022). The court recognized that § 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, relying on *State ex rel Schmitt v. Harrell*, 633 S.W.3d. 463, 468 (Mo. App. W.D. 2021) (finding that three days was insufficient time to adequately prepare for a hearing under § 547.031). Ex. 3 at 3–5. Without blaming Johnson for the timing, the court found it "inexplicable" that the motion to vacate was filed only 14 days before the scheduled execution date. *Id.* at 4. The court also found it "disconcerting" that the prosecutor's office did not "recognize [its] conflict of interest . . . prior to October of 2022." *Id.* at 4.[2]

18. As additional grounds for its decision, the circuit court stated that it lacked authority to stay an execution warrant issued by the Supreme Court. Ex. 3 at 4–5. The circuit court did not address the special prosecutor's and Johnson's arguments that it could consider the motion to vacate while the prosecutor and Johnson sought a stay in this Court, and that entry of a stay by this Court would permit the circuit court to resolve the prosecutor's claims in the regular course rather than in the rushed timeframe of a warrant posture. *See* Ex. 10 at 2–3; Ex. 11.

19. The circuit court also wrote 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

[2] In fact the prosecutor's office described the conflict in its letter to this Court on July 11, 2022, urging the Court to refrain from setting an execution date while the office searched for a special prosecutor. *See* Ex. 6 (Letter to clerk from Jessica Hathaway, Jul. 11, 2022).

Federal systems" and were a "rearticulation of previously litigated claims." Ex. 3 at 4–5.

20. As explained elsewhere in this motion, the special prosecutor's motion raises matters well beyond Johnson's previous claims. The special prosecutor's legal claim of racial bias is essentially three-fold:

> *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). It was not until December 2017, or more than three years after the end of Johnson's post-conviction proceedings, that former prosecuting attorney McCulloch declined to seek death against Forster. *See* Ex. 1 at 8 & n.4. Johnson has never before asserted a selective prosecution claim in any court.
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> *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 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. Johnson submitted a preliminary version of the study to the prosecutor's office on April 21, 2022, and the final version was completed on September 20, 2022. Ex. 7 at 1. At no point has Johnson ever asserted, in

any court, a claim involving statistical evidence showing racial bias by the St. Louis County Prosecutor's Office.

Third, the special prosecutor found substantial, previously undisclosed support for Johnson's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). It is true that Johnson raised a *Batson* claim at trial, on direct appeal, and on federal habeas review. Nevertheless, the special prosecutor discovered 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* Ex. 1 at 36–40. The special prosecutor also urged that the United States Supreme Court's intervening opinion in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), calls into question this Court's *Batson* ruling on direct appeal. *See* Ex. 1 at 43–45.

21. The prosecutor and Johnson have filed separate notices of appeal in the circuit court.

22. Johnson now moves for a stay of execution.

STANDARDS GOVERNING A STAY OF EXECUTION

This Court has never issued an opinion governing the standards for issuing a stay of execution. In the similar context of a preliminary injunction, though, a court weighs "the movant's probability of success on the merits, the threat of irreparable

harm to the movant absent the injunction, the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest." *State ex rel. Dir. of Rev. v. Gabbert*, 925 S.W.2d 838, 839 (Mo. 1996). The Attorney General will likely invoke the similar framework of *Hill v. McDonough*, 547 U.S. 573 (2006), which governs federal-court stays of state executions. *Hill* disfavors a stay when the prisoner's claim "could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* at 584 (quotation omitted). In this case the Court need not decide whether the *Hill* standard applies in the absence of the comity and federalism concerns that motivate it. *See id.* ("[E]quity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts."). Johnson demonstrates below that he satisfies all requirements for a stay and has not delayed the assertion of any claims.

I. THE PROSECUTOR IS LIKELY TO SUCCEED ON THE MERITS OF HIS CLAIMS.

A stay requires "some showing of probability of success on the merits." *Gabbert*, 925 S.W.2d at 839 (as to preliminary injunction). Johnson and the prosecuting attorney readily make that showing.

A. Section 547.031 embraces the prosecuting attorney's constitutional claims against Johnson's conviction and sentence.

The prosecuting attorney has the authority to move for an order vacating or setting aside a criminal judgment "at any time." Mo. Rev. Stat. § 547.031.1. There

is no question that the prosecuting attorney may seek appointment of a special prosecutor, who stands in the elected prosecutor's shoes and represents the state to "prosecute or defend the case." Mo. Rev. Stat. § 56.110. And there is no question that the duly appointed special prosecutor has moved to vacate Johnson's conviction and sentence. *See* Ex. 1. It remains for the circuit court to exercise its "jurisdiction and authority to consider, hear, and decide the motion," Mo. Rev. Stat. § 547.031.1. The proper and orderly exercise of that jurisdiction requires a stay from this Court.

In determining the scope of relief available under the new statute, the General Assembly's language controls. "When ascertaining the legislature's intent in statutory language, it commonly is understood that each word, clause, sentence, and section of a statute should be given meaning." *Middleton v. Mo. Dep't. of Corr.*, 278 S.W.3d 193, 196 (Mo. 2009). By its own terms, the statute is not limited to claims of actual innocence. The circuit court must grant the prosecutor's motion if it finds "clear and convincing evidence of actual innocence *or constitutional error* at the original trial or plea that undermines the confidence in *the judgment*." Mo. Rev. Stat. § 547.031.3 (emphases added). The prosecutor's claims here allege unconstitutional racial bias in charging, sentencing, and jury selection. It is widely recognized that such bias "undermines public confidence," "compromises the defendant's right to a trial by an impartial jury," and "fosters disrespect for and lack of confidence in the criminal justice system." *Kimbrough v. United States*, 552

U.S. 85, 98 (2007) (concerning sentencing disparities between offenses involving crack and powder cocaine); *State v. McFadden*, 191 S.W.3d 648, 650 n.2 (Mo. 2006) (citing *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) and *Miller-El v. Dretke*, 545 U.S. 231, 237–38 (2005)).

In embracing claims of "constitutional error" undermining "the judgment," the statute extends not only to claims against the prisoner's conviction, but also the sentence. Mo. Rev. Stat. § 547.031.3. The term "judgment" encompasses a defendant's sentence, and indeed, there is no "judgment" in a criminal case until a sentence is imposed. *See State v. Waters*, 597 S.W.3d 185, 187 (Mo. 2020); *State v. Williams*, 871 S.W.2d 450, 452 (Mo. 1994). "The word 'sentence' in legal terms means 'a judgment or final judgment.'" *Yale v. City of Independence*, 846 S.W.2d 193, 194 (Mo. 1993). In interpreting the statute's terms, the Court must presume that "the legislature was aware of the state of the law at the time of its enactment." *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 426 (Mo. 1988). When a statute contains terms "which have had other judicial or legislative meaning attached to them, the legislature is presumed to have acted with knowledge of that judicial or legislative action." *Citizens Elec. Corp. v. Dir. Dep't of Revenue*, 766 S.W.2d 450, 452 (Mo. 1989). A constitutional error in the defendant's sentence, then, is necessarily an error in the underlying "judgment." Mo. Rev. Stat. § 547.031.3. The prosecutor's penalty-phase allegations state cognizable claims.

B. The prosecuting attorney makes a meritorious showing that racial bias infects Johnson's conviction and sentence.

The prosecuting attorney relies on a wide spectrum of evidence, covering every stage of the prosecution, and further illuminated by access to internal documents.

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, and 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 (Ex. 7). 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 conducted a further analysis to investigate 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.

●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." All the models were statistically significant.

●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."

Ex. 7 at 5–6, 18–24.

The special prosecutor also 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* Ex. 1 at 8–20. 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. *Id.* at 8–23. Worse, the prosecution extended to Forster an opportunity that it withheld from the Black defendants accused of killing police officers. *Id.* at 21–23. The office invited Forster's attorney to submit mitigating evidence. Counsel for Foster 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. *Id.*

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the United States Supreme Court rejected the 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 a "superficial" showing based on aggregate statistics, *State v. Mallett*, 732 S.W.2d 527, 538–39 (Mo. 1987), the study specifically controls for aggravating and mitigating circumstances, and it 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, outrageous or wanton vileness, or a defendant's history of previous assaultive or homicide convictions.

Similarly troubling is McCulloch's unequal prosecution of police-killing cases depending on the race of the defendant. The requirements for a selective prosecution claim rest on equal protection standards, requiring the defendant to show a "discriminatory effect . . . that . . . was motivated by a discriminatory purpose." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). That showing requires proof that "similarly situated individuals of a different race were not prosecuted." *Id.* The cases being employed for comparison need only be "similarly" situated to the one at hand, so that the cases reflect "common features essential to a meaningful comparison." *Chavez v. Ill. St. Police*, 251 F.3d 612, 635 (7th Cir. 2001) (quotation omitted). A selective prosecution claim does not require

direct evidence of discriminatory intent, such as a clear admission of racist motives. *See*, *e.g.*, *United States v. Tuitt*, 68 F. Supp. 2d 4, 10 (D. Mass. 1999). Rather, "[a] discriminatory effect which is severe enough can provide sufficient evidence of discriminatory purpose," *id.*, including a "complete absence" of comparable White defendants who were prosecuted as the claimant was. *Id.* at 14, 18; *cf. Armstrong*, 517 U.S. at 470 (finding no showing of discriminatory effect and discriminatory purpose because defendants "failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted").

The special prosecutor's evidence satisfies the criteria described by *Armstrong* and applied in subsequent cases. During McCulloch's tenure in office, the St. Louis County Prosecutor's Office sought the death penalty in all death-eligible police killings except the single such case that involved a White defendant. Moreover, the office provided only the White defendant, and not any of the Black defendants, the pretrial opportunity to present mitigating evidence showing why capital prosecution was not appropriate.

The present case is unique because the state's recent filing is itself evidence of racial discrimination underlying Johnson's conviction and sentence. The special prosecutor occupies the elected prosecutor's place "for all matters related to this investigation and prosecution." Ex. 5. Through the special prosecutor, the sovereign has confessed error. The state acknowledges that the office which sought

and obtained Johnson's first degree murder and death sentence acted with systematic racial bias, and that the case-files and other information reveal no legitimate factual difference that justifies seeking death against Kevin Johnson, Lacy Turner, Dennis Blackman, and Todd Sheppard, but not against Trenton Forster. *Cf. State v. Taylor*, 929 S.W.2d 209, 221 (Mo. 1996) ("More likely [than racial bias], the unique circumstances of Ann Harrison's murder and the strength of the State's case motivated the prosecutor's decision."). The disparate treatment between Forster and the Black defendants permits an inference of discrimination because other explanations have proven unavailing, including "statutory aggravating circumstances, the type of crime, the strength of the evidence, and the defendant's involvement in the crime." *State v. Taylor*, 18 S.W.3d 366, 377 (Mo. 2000).

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 the time of Johnson's two trials. *See* Ex. 1 at 23–24, 36–40. Months before the retrial and without knowledge of which jurors might serve, the prosecution decided in advance to exercise fewer than its nine available peremptory strikes. As explained by the special prosecutor,

and as found by the circuit court during Johnson's first trial, the prosecutor's methods reflect an attempt to evade *Batson*. *Id.* 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." *Id.* at 24. The prosecution, then, was more intent on defeating any *Batson* objections than in complying with *Batson* to begin with. *Id.*at 40. Given that McCulloch has ignored all entreaties from the special prosecutor, depositions and an evidentiary hearing will reveal whatever additional "family secrets" operated at the time of Johnson's trial. *See* Ex. 1 at 4, 22–23, 34.

The special prosecutor also invokes the United States Supreme Court's decision in *Flowers v. Mississippi*, 139 S. Ct. 2228, 2244 (2019), to support the *Batson* claim. *See* Ex. 1 at 43–45. This Court rejected a *Batson* claim on direct appeal, concerning 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 brief, Johnson 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). *See* Appellant's Statement, Brief, and Argument (Oct. 14, 2008), at 57–58. The Court cast aside such history as 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* rejects this Court's approach and requires consideration of the "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 newly-discovered evidence shows that it persisted at the time of Johnson's trial. *See* Ex. 1 at 23–24, 36–40.

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 this 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.

C. Whether or not the circuit court has jurisdiction to consider a motion to vacate during the pendency of an execution warrant, this Court should stay Johnson's execution so that the prosecutor's claims can be fairly resolved on their merits as the circuit court indicated they should be.

Judge Ott concluded that § 547.031 requires a full and fair hearing (among other procedures), and that it was impossible for the court to conduct such a hearing before Johnson's execution date. *See* Ex. 3 at 4–5. The court relied on *State ex rel Schmitt v. Harrell*, 633 S.W.3d. 463, 468 (Mo. App. W.D. 2021), which held that three days was insufficient time for the Attorney General to prepare for a hearing under the statute. Judge Ott observed that there were only six business days between the special prosecutor's filing of the motion to vacate on November 15 and the scheduled execution on November 29. Ex. 3 at 4. The court simply could not comply with the statute and treat the parties fairly within the limited time available. *Id.* at 3–5. Judge Ott acknowledged that "death is different," and that her inability to resolve the prosecutor's claims "weighs heavily upon this court." *Id.* at 5. Recognizing that the circuit court cannot stay a superior court's execution warrant in order provide more time, the court denied relief. *Id.* at 4–6.

Johnson does not contest that the circuit court cannot stay an execution warrant issued by this Court – a step that neither he nor the special prosecutor asked the circuit court to take. *See* Ex. 1 (motion to vacate); Ex. 10, 11 (motions to amend judgment). Neither does Johnson dispute that the circuit court could not hold a fair hearing and decide the prosecutor's claims in the two weeks between

the filing of the motion to vacate and the execution date. Judge Ott nevertheless believes that the prosecutor's claims deserve a full airing in accordance with § 547.031. *See* Ex. 3 at 3–5. This Court should grant a stay in order to allow the circuit court to fulfill its statutory obligation.

1. The pendency of an execution warrant does not require a circuit court to dismiss a motion to vacate or set aside a criminal judgment brought under § 547.031.

Johnson anticipates that the Attorney General will argue that a circuit court lacks jurisdiction to consider a motion to vacate during the pendency of an execution warrant. *See* Ex. 2 at 5 (so arguing during teleconference). In fact, nothing prevents the court from exercising such jurisdiction. As this Court has recognized, its exclusive authority over "matters affecting a sentence of death" is subject to statutory exceptions. *State ex rel. Nixon v. Daugherty*, 186 S.W.3d 253, 254 (Mo. 2006). To be sure, prior to the adoption of section 547.031, circuit courts had jurisdiction over final capital cases only under Rule 24.035 or Rule 29.15. *Id.* Accordingly, "[u]nless and until the legislature adopts a law authorizing a circuit or prosecuting attorney to file a motion for a new trial upon discovery of evidence indicating a wrongful conviction," no other post-conviction relief was available in the circuit court. *State v. Lamar Johnson*, 617 S.W.3d 439, 446 (Mo. 2021) (Draper, J. concurring).

Section 547.031 changed that. Within months of this Court's decision in *Lamar Johnson*, the General Assembly enacted a law providing that "[a]

prosecuting or circuit attorney . . . may file a motion to vacate or set aside the judgment at any time," and "[t]he circuit court in which the person was *convicted shall have jurisdiction and authority to consider, hear, and decide the motion*." Mo. Rev. Stat. § 547.031.1 (emphasis added). This express statutory authority is consistent with a circuit court's "unequivocal . . . 'original jurisdiction over *all cases and matters*, civil and criminal.'" *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 476–77 (Mo. 2009) (quoting Mo. Const. art. V, sec. 14) (emphasis by the Court). And, because "the judgment" in a capital case includes the sentence of death, *see*, *e.g.*, *State v. Hunter*, 840 S.W.2d 850, 869 (Mo. 1992); *see also* Mo. Sup. Ct. R. 29.08(a), section 547.031 grants the circuit court the "jurisdiction and authority" to consider a prosecuting attorney's claims against a death sentence "at any time."

These provisions are entirely consistent with this Court's "exclusive appellate jurisdiction … in all cases where the punishment imposed is death." Mo. Const. art. V, § 3. The statute thus grants the prosecuting attorney "the authority and right to file and maintain an appeal of the denial or disposal of such a motion" to vacate. Mo. Rev. Stat. § 547.031.4. In capital cases like this one, such appeals lie in this Court under article V, § 3.

Nor does § 547.031 conflict with Rule 30.30(b)'s provision that "[n]o other filing in this or any other Court shall operate to stay an execution date without further order of this Court or other competent authority." Indeed, the rule implicitly

recognizes that "other filing[s] in . . . other Court[s]" may coincide with a pending execution date but never suggests that other courts would be without jurisdiction to consider such filings. The rule limits only the power of lower Missouri courts to stay an execution. Here, the prosecuting attorney did not ask the circuit court for a stay of execution; no party disputes that this Court is the proper venue for a motion to stay. *See* Rule 30.30(b) (this Court's scheduling of an execution is "without prejudice to the defendant seeking a stay of execution after an execution date is set..."); Ex. 10 at 2–3.

In short, the circuit court had the jurisdiction – and the duty – to "consider, hear, and decide" the motion to vacate here. Nothing in § 547.031 or in the litigation of the motion below conflicts with this Court's rules for scheduling executions or with its exclusive constitutional authority over appeals in capital cases.

2. Even if the circuit court lacked authority to consider the motion to vacate during a warrant period, this Court should stay Johnson's execution so that the prosecutor may bring his claims in the circuit court in a non-warrant posture.

The appropriateness of a stay from this Court does not depend on the warrant-pending jurisdiction of the circuit court. As shown above, because the circuit court had jurisdiction to consider the motion to vacate, this Court should enter a stay so that the circuit court's ruling can be reversed on appeal and then remanded to that court for a determination of the merits of the prosecutor's claims. On the other hand, if the circuit court lacked jurisdiction, Johnson and the

prosecutor should not be left without a remedy. Section 547.031, after all, allows the prosecutor to bring a motion to vacate "at any time" if the prosecutor determines that clear and convincing evidence shows that the underlying criminal judgment is the result of constitutional error. So long as Johnson and the prosecutor otherwise show that the claims are likely to succeed on the merits – which they do for the reasons explained above – this Court should stay the execution so that the prosecutor may newly assert his claims in a non-warrant posture, which would allow the circuit court to conduct the fair and constitutional hearing that it otherwise lacks time to hold. *See* Ex. 3 (Order and Judgment), at 4–5.

II. THE REMAINING CONSIDERATIONS WEIGH IN FAVOR OF GRANTING A STAY.

Beyond the merits, the remaining factors militate in favor of a stay. Johnson would suffer irreparable harm if he were executed before a final determination of the prosecuting attorney's claims conceding the unconstitutionality of Johnson's conviction and sentence; the state would not be unfairly prejudiced by a stay, which would allow the full and fair litigation of the state's claims on appeal and then subsequently in the circuit court; the public interest favors an orderly and fair determination of those same claims under the statute recently enacted by the General Assembly; and Johnson has not delayed the instigation of those claims in any respect.

A. Johnson would suffer irreparable harm without a stay.

The death penalty is "obviously irreversible," *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, J., granting stay as circuit justice), and Johnson's execution would immediately moot the claims that are currently pending against his underlying conviction and sentence. Due process guarantees to Johnson "a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). Far from allowing Johnson to be heard, his scheduled execution would extinguish his claims (and the prosecutor's) in violation of due process. *See Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) ("Once a prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness.") (quoting *Ford v. Wainwright*, 477 U.S. 399, 424, 426 (1986)).

B. The balance of harms supports a stay.

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. The General Assembly specifically recognizes the prosecuting attorney's authority to bring an action in the circuit 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 alone. The General Assembly, 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 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.

C. 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 by bringing clear and convincing evidence that the 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).

D. 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 three months after the effective date of § 547.031. *See* Special Prosecutor's Motion for Stay of Execution (filed Nov. 16, 2022), at 8. That application asked the CIRU to investigate Johnson's 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* Ex. 6 (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* Ex. 4 (motion to appoint special prosecutor); Ex. 5 (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 is no possibility that the prosecutor's and Johnson's claims can be fairly and properly heard and decided between now and November 29. Ex. 3 at 4–5. The chronology of events "weighs 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 Judge Ott 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 is 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.").

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Court should grant a stay of execution pending resolution of the prosecutor's claims against Johnson's conviction and sentence, whether on appeal in this Court or in the Circuit Court of St. Louis County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 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
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