Case No. 2105R-02833-01

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

STATE OF MISSOURI
Plaintiff,

v.

KEVIN JOHNSON,
Defendant.

STATE OF MISSOURI'S MOTION TO VACATE JUDGMENT AND SUGGESTIONS IN SUPPORT

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Special Prosecutor for Plaintiff
State of Missouri

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The Department of Corrections plans to execute Kevin Johnson on November 29, 2022. Just over a month ago, the Court appointed the undersigned Special Prosecutor to review allegations of constitutional error at trial.

Since then, the State has reviewed tens of thousands of pages of evidence, and has contacted every member of the prosecution team. The State has also reviewed extrinsic evidence bearing on the case.

This evidence clearly and convincingly shows that improper racial factors played a substantial role throughout the process - in the prosecutor's selection of defendants for first degree prosecution, the decision to seek a death sentence, and in the selection of jurors ultimately tasked with determining guilt and sentence. The evidence is equally clear and convincing that these improper factors substantially influenced prosecutorial decision-making in Mr. Johnson's case.

The crime here - the killing of Kirkwood Police Sergeant William McEntee - is horrific. Mr. McEntee's family, the law enforcement community, and the community deserve justice. Unfortunately, the original Prosecuting Attorney did not pursue that justice according to law. The law requires this Court to vacate the judgment, and order a new trial that adheres to constitutional standards. *See* RSMo 547.031.

INTRODUCTION

Kevin Johnson was 19 years old when he killed Kirkwood Police Sergeant William McEntee.[1] Mr. Johnson is Black; Sgt. McEntee was White. Mr. Johnson claims that he saw the police failing to intervene to help his dying 12-year-old brother the day of the killing. Out of anger, he claims he got a gun and killed Sgt. McEntee.

The St. Louis County Prosecuting Attorney charged Mr. Johnson with first degree murder and sought the death penalty. The first trial deadlocked 10-2 in favor of conviction on second degree murder. Following a retrial, the State secured a conviction on first degree murder and a death sentence.

In 2021, the Missouri General Assembly passed, and Governor Parson signed, a new law codified as RSMo 547.031. This statute allows a prosecutor to reopen a judgment for, among other reasons, constitutional error at trial.

Proof of discrimination "often depend[s] on inferences rather than on direct evidence," because those who discriminate are "shrewd enough not to leave a trail of direct evidence." *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 116 (Mo. banc 2015) (citation omitted). Analysis "generally must rely on circumstantial evidence." *Id.* "There will seldom be eyewitness

[1] These facts come generally from *State v. Johnson*, 284 S.W.3d 561, 567 (Mo. banc 2009), as well as other portions of the record, of which the Court may take judicial notice.

testimony as to the [decisionmaker]'s mental processes." *Id.*

Following a comprehensive review of the evidence, the undersigned Special Prosecutor has determined that unconstitutional racial discrimination infected this prosecution, and that this error requires the judgment to be set aside. Among other key facts:

- Five police-officer killings were prosecuted by the office during Mr. McCulloch's tenure. Mr. McCulloch pursued the death penalty against four Black defendants but not against the one White defendant, Trenton Forster. This was despite the fact that 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." (Ex. 13, Forster Messages.)
- In the White-defendant police-killing case, Mr. 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. His office granted the defense nearly a year to provide arguments against death, and Mr. McCulloch ultimately decided not to seek death against the White defendant, Trenton Forster, without giving any specific explanation why. (Ex. 6, Corr. with Forster Counsel.)
- By contrast, Mr. McCulloch never issued a mitigation-invitation to Mr.

Johnson or any of the other three Black defendants accused of killing police officers. (Ex. 3, Bradford Aff.)

- Work product from the prosecution team shows the prosecutors' strategy to evade *Batson* 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. (Ex. 7, Work Product Memorandum re: Johnson Jury Selection.)
- Mr. McCulloch has refused to even acknowledge correspondence from the Special Prosecutor asking him about the case, despite his extensive statements to the news media about this and other cases. (Ex. 3, Bradford Aff.; Ex. 4, McCulloch Corr.)
- Former Assistant Prosecutor Sheila Whirley, who participated in Mr. Johnson's trial, when questioned about why the State pursued death, stated that she is reluctant to reveal "family secrets," and said the death decision was Robert McCulloch's. (Ex. 3, Bradford Aff.)
- Mr. McCulloch's office maintained no record of guidelines, practices, or procedures on whether to seek the death penalty, despite Mr. McCulloch's own statement that the existence of such procedures is the reason no bias exists in the death penalty. (Ex. 2, Alton Aff.)
- A comprehensive and rigorous statistical study of 408 St. Louis County

death-eligible homicide prosecutions during Mr. McCulloch's tenure as prosecuting attorney, shows that he 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. 10, Baumgartner Report.)

- Later statements by Mr. McCulloch to other prosecutors show a particular animosity towards young Black males like Mr. Johnson, viewing them as a population that "we had to deal with." (Ex. 1, Hummel Aff.)

These facts and others leave no serious doubt that Mr. McCulloch's office discriminated. The judgment must be set aside so that a lawful trial and sentence may proceed.

STATEMENT OF FACTS

A. Capital charging and sentencing.

1. Dr. Frank Baumgartner of the University of North Carolina has submitted a report based on his investigation of the 408 death-eligible cases prosecuted under Mr. McCulloch. *See* Baumgartner, Frank, *Homicides, Capital Prosecutions, and Death Sentences in St. Louis County, Missouri, 1990-2021, Report*, Sept. 20, 2022. In an investigation conducted in two stages, Dr. Baumgartner found large race-of-victim effects at virtually every stage of St.

Louis County capital prosecutions (cases where the facts would support a first-degree homicide conviction and at least one aggravating circumstance), meaning that cases with White victims were highly favored to proceed to the next step toward an ultimate death sentence. Dr. Baumgartner summarized the unadjusted results: "The cleanest comparison is simply this: Black victim cases have a 4.0 percent chance of leading to a death sentence; White-victim cases see a 14.1 percent chance. The ratio of these two rates is 3.5. White-victim cases are 3.5 times as likely to lead to a death sentence than Black victim cases." (Ex. 10, Baumgartner Report at 6.)

2. 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. Dr. Baumgartner produced four separate models for the overall death 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. Baumgartner Report at 19, 22. Examining the overall likelihood of receiving death, the odds multiplier for White victim cases consistently ranged from 3.3 to 3.7. 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." (Ex. 10, Baumgartner Report at 20.)

3. Dr. Baumgartner concluded:

> . In the prosecution of death-eligible homicides in St. Louis County for the years studied there are strong race-of-victim effects at multiple key stages of the prosecution.
>
> . The effects are particularly pronounced at two decision-points attributable solely to the prosecutor, the decision to charge the case as a first-degree murder and the decision to give notice of intention to seek death.
>
> . The likelihood that the defendant will be charged with death-eligible first degree murder instead of second degree murder is approximately 2.2 times greater in White-victim cases than in Black-victim cases.
>
> . The ultimate likelihood of receiving a death sentence if the victim is White is approximately 3.5 times the likelihood of a death sentence in cases where the victim is Black.
>
> . These effects persist after the introduction of controls for aggravating and mitigating factors, meaning that these disparities cannot be explained by legitimate case characteristics.

(Ex. 10, Baumgartner Report at 22-24.)

4. In terms of predicting which case proceeds to the next stage, and to an ultimate death sentence, the presence of a White victim essentially functioned as an aggravating factor. *Id.* at 20-21.

B. Cases Most Similar to Mr. Johnson's

5. There were five St. Louis County defendants prosecuted to completion[2] for the intentional killing of a police officer for which Prosecuting Attorney Robert P. McCulloch considered death: Lacy L. Turner[3], Dennis Blackman, Todd L. Shepard, Kevin Johnson, and Trenton Forster[4]. Forster is White. Turner, Blackman, Shepard, and Johnson are Black. All five victims, Sergeant Kenneth Koeller, Officer JoAnn Liscombe, Sergeant Michael King, Sergeant William McEntee, and Officer Blake Snyder were White.

6. The State reproduces here non-exclusive summaries of the facts of these cases.

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[2] In another police officer killing, Sergeant Richard Eric Weinhold was shot to death by Thomas Russell Meek on October 31, 2000, while trying to evict Meek from an apartment. *See* William C. Lhotka, *Man held in officer's death tries to claim self-defense*, St. Louis Post-Dispatch, Nov. 3, 2000. Meek, who is White, was charged with first degree murder, but found to be mentally incompetent and committed. He was never tried.

[3] Although the murder occurred in 1987, Turner was not arrested until 1989 and was charged with first degree murder. The docket shows notice of aggravating circumstances was filed April 29, 1991 (amended July 2, 1991), during McCulloch's tenure. *State v. Turner*, 21CCR-604615.

[4] Forster's case was tried after Mr. McCulloch left office, but it was Mr. McCulloch who made the decision not to seek death. Joel Currier and Christine Byers, *Suspect in Killing of St. Louis County Officer Won't Face Death Penalty*, St. Louis Post-Dispatch (Dec. 9, 2017) ("After a complete examination and reexamination of all evidence in this case, I have determined that seeking a death sentence in this case is not appropriate.").

7. The facts were summarized in Respondent's brief on appeal:

At about 2:09 a.m. on January 28, 1987, a silent alarm went off at the Dandy Man's Store at Northland Shopping Center in Jennings in St. Louis County (Tr. 808, 871).

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Officer Yarbrough arrived at the crime scene at about 2:13 a.m. (Tr . 808). As he drove towards the Dandy Man's Store, he saw that Sergeant [Kenneth] Koeller' s police car was parked in front of that store (Tr. 811). The victim's car was still running, and its headlights were on (Tr. 811-812). Officer Yarbrough noticed that the display window of the aforementioned store was broken and that several items were lying on the ground in front of the store (Tr. 812).

Officer Yarbrough stopped his patrol car, exited it, took cover on the passenger side of it, and radioed for assistance (Tr. 811-813). He saw a radio mike hanging out of the victim's car and two feet sticking out from behind the victim's car (Tr. 813). He ran to the back of that car and found the victim lying on his back (Tr. 814). There were no signs of life (Tr. 818). Officer Yarbrough radioed for an ambulance and additional assistance (Tr. 818, 823). The victim had been shot in the neck (Tr. 815, 817, 906-907). The entrance wound was a contact wound on front of the neck, while the exit wound was on the back of the neck (Tr. 1177-1183). The victim bled to death after the bullet transected the victim's right carotid artery (Tr. 912-913). There was evidence of blunt trauma to the victim's face (Tr. 910-913). Some of the abrasions and bruises were inflicted with a linear object, such as the barrel of a gun (Tr. 910-913). Some of the abrasions and bruises could have been made by a fist (Tr. 911-913). The victim's pistol was missing

(Tr. 826). The victim's pistol was a .357 magnum (Tr. 826).

Respondent's Brief, 3-7.

***State v. Dennis Blackman*, No. 2191R-01060-01**

8. According to the Missouri Court of Appeals:

> At 1:13 a.m., Officer [Joann] Liscombe reported to the dispatcher that she was on a "pedestrian check". Meanwhile, another driver, Steve Carter, saw the man at the corner of Old Halls Ferry and Patricia Ridge. As Carter turned the corner, the man gave him a "frightening" look, causing Carter to lock his car door. Carter saw Officer Liscombe pull up, stop in the intersection and turn her spotlight toward the man. The man initially tried to run away up a hill but was unsuccessful because of the amount of ice on the ground. He saw Officer Liscombe get out of her car and walk toward the man.
>
> After overhearing the report in the 7–Eleven store, Charles Myers decided to drive by the area. As he drove by, he saw Officer Liscombe standing face to face with the man. Officer Liscombe looked at Myers as he passed them, and then turned her head back toward the man. The man never took his eyes off Officer Liscombe.
>
> Meanwhile, the dispatcher tried to reach Officer Liscombe but received no response. The dispatcher called for another car to check on her. As another motorist approached the intersection of Old Halls Ferry Road and Patricia Ridge, he saw Officer Liscombe lying on the ground with blood on her hand and in her hair. Her flashlight and glasses were lying several feet away and her gun was missing from its holster. He and other motorists came to her assistance. The first police officer arrived at 1:23 a.m. All noticed

a massive head wound. She was eventually taken to a hospital.

Officer Liscombe was in shock upon arrival at the hospital and never regained consciousness. She had two bullet wounds in close proximity to the right side of her head, both of which were fatal. She also suffered a gunshot wound to her left hand which entered through her palm and would have immediately incapacitated her hand. She had a horizontal linear wound to the back of her head, caused by a blunt object, which split open her scalp and extended to her bone. This wound would have caused a momentary, stunning reaction sufficient to knock her to the ground, but not to lose consciousness. She also suffered a linear bruise to her thigh and numerous contusions to her legs. Several fingernails had broken off and the fragments were found at the scene, indicating a struggle. Blood patterns on her shirt indicated she was lying down when she was shot in the head. Officer Liscombe died on January 14, 1991.

State v. Blackman, 875 S.W.2d 122, 127-28 (Mo. Ct. App. 1994).

***State v. Todd Shepard,* No. 08SL-CR08802-01**

9. According to the Missouri Court of Appeals:

[Todd] Shepard testified that on the night of the murder he was driving around in the Loop area on what he called a "reco[n] mission" and that he considered the police to be the enemy. He further testified that after he saw Sergeant King in a parked police car, Shepard parked his car "kind of strategically," checked his gun, put the gun in his pocket and approached the officer's car, made eye contact with the officer, and then fired five shots at the officer through his open window.

Memorandum Supplementing Order Affirming Judgment Under Rule 30.25(B) at 3.

***State v. Kevin Johnson*, No. 05CR-2833**

10. According to the Supreme Court of Missouri:

> [Kevin Johnson] had an outstanding warrant for a probation violation resulting from a misdemeanor assault. Around 5:20 in the evening of July 5, 2005, Kirkwood police, with knowledge of the warrant, began to investigate a vehicle believed to be Appellant's at his residence in the Meacham Park neighborhood. The investigation was interrupted at 5:30 when Appellant's younger brother had a seizure in the house next door to Appellant's residence. The family sought help from the police, who provided assistance until an ambulance and additional police, including Sgt. McEntee, arrived. Appellant's brother was taken to the hospital, where he passed away from a preexisting heart condition. Appellant was next door during this time, and the police suspended their search for Appellant and never saw Appellant.
>
> After the police left, Appellant retrieved his black, nine millimeter handgun from his vehicle. When talking with friends that evening, Appellant explained his brother's death as, "that's f____ up, man. They wasn't trying to help him, that he was too busy looking for me." Around 7:30, two hours after Appellant's brother had the seizure, Sgt. McEntee responded to a report of fireworks in the neighborhood and Appellant was nearby. As Sgt. McEntee spoke with three juveniles, Appellant approached Sgt. McEntee's patrol car and squatted down to see into the passenger window. Appellant said "you killed my brother" before firing his black handgun approximately five times. Sgt. McEntee was shot in the head and upper torso, and one of the juveniles was hit in the leg. Appellant reached into the patrol car and took Sgt. McEntee's

silver .40 caliber handgun.

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Meanwhile, Sgt. McEntee's patrol car rolled down the street, hit a parked car, and then hit a tree before coming to rest. Sgt. McEntee, alive but bleeding and unable to talk, got out of the patrol car and sat on his knees. Appellant reappeared, shot Sgt. McEntee approximately two times in the head, and Sgt. McEntee collapsed onto the ground.

State v. Johnson, 284 S.W.3d 561, 567-68 (Mo. banc 2009)

***State v. Trenton Forster*, No. 16SL-CR07513-01**

11. According to the Missouri Court of Appeals:

On October 6, 2016, St. Louis County Police Officers Snyder and John Becker ("Officer Becker") responded to a 9-1-1 call from a residential house. In uniform and in a marked police vehicle, Officer Snyder pulled behind Forster's car. Officer Snyder approached Forster's driver's side door and tried to talk to Forster. Officer Snyder stated "show me your hands" and repeated "police, show me your hands." Forster then shot Officer Snyder in the face.

Officer Becker took cover and told Forster to show his hands. Forster responded, "I have a f---ing gun, kill me." As Forster kept moving within his car, Officer Becker opened fire on him. Forster said, "F---ing shoot me, I have a gun," and pointed his gun at Officer Becker. Officer Becker reloaded and fired several more shots at Forster, who dropped his gun and was handcuffed.

> Officer Snyder died from his gunshot wound. In addition to the handgun used to shoot Officer Snyder, police recovered an AK-47, ammunition, and drug paraphernalia from Forster's car.

State v. Forster, No. ED107837, Memorandum Opinion, at 2.

12. According to the State's appellate brief in *Forster*, the defendant expressed his intent to kill a police officer on social media multiple times. *See* Respondent's Brief, *Forster*, at 9. In the months before the charged offenses, Forster made several Twitter posts regarding killing and his hostile attitude towards police, such as "**I want fuck the police carved into my grave**," "I'm going to kill people," and "**I'll pull that thing on an officer.**" *Id.* at 10-13. In addition to the fatal shot that Forster fired into Officer Snyder's face, Forster attempted to shoot a second officer but was unsuccessful only because the gun had "jammed, or 'stovepiped,' meaning that an empty cartridge case that had been fired had failed to eject and was protruding from the slide, which prevented another cartridge from being cycled into the firing chamber." Respondent's Brief, Forster, at 16. For the attempted second shooting, Forster was convicted of second degree assault of a law enforcement officer. *See State v. Forster*, 616 S.W.3d 436, 439 (Mo. App. E.D. 2020). (*See also* Ex. 13, Forster Messages.)

13. Forster also expressed his intent to kill Black St. Louisans, stating:

"I swear bruh **I'm takin [sic] out every single nigga in the city** with drugs." (See Ex. 13, Forster Messages.)

14. As to mitigation, all five defendants were afflicted with serious mental health disorders. Trenton Forster suffered from bipolar disorder, attention deficit hyperactivity disorder, generalized anxiety disorder, panic disorder, and polysubstance use disorder. *See Forster*, 616 S.W.3d at 440. Bipolar disorder is marked by "clear changes in mood, energy, and activity levels. These moods range from periods of extremely "up," elated, irritable, or energized behavior (known as manic episodes) to very "down," sad, indifferent, or hopeless periods (known as depressive episodes). Less severe manic periods are known as hypomanic episodes."[5] As early as age twelve, Forster expressed suicidal ideation, and was reported to have made attempts at that age. A second attempt was reported to have occurred at age sixteen. He continued to have suicidal thoughts throughout his adolescence, compounded by his drug addiction. *State v. Forster*, 16SL-CR07513-01 (Tr. 590, 919, 1206-16, 1425).

15. At age 17, Kevin Johnson was diagnosed under DSM-IV with three Axis I disorders; Dysthymia (masked) 300.4, Adjustment disorder with mixed disturbance of emotions and conduct. 309.4; and Child Neglect 995.5. *See* Levin Report. Each of these can be highly debilitating. At one of Mr. Johnson's

[5] https://www.nimh.nih.gov/health/topics/bipolar-disorder.

placements in a group home as a juvenile, St. Joseph Home for Boys, where he was being treated with Ritalin and imipramine for depression and attention deficit disorder, Mr. Johnson attempted to commit suicide by hanging himself with towels and a bedsheet. (Tr. 2259-60). He was thereafter admitted to a psychiatric facility. (Tr. 2260). Another examiner noted suicidal ideation at age fifteen. (Tr. 2264).

16. Some of the most common symptoms to be associated with Dysthymic Disorder are "feelings with inadequacy; social withdrawal; general loss of interest or pleasure; feelings of guilt or brooding about the past; excessive anger; decreased activity; productivity; or effectiveness."[6] Adjustment disorder with mixed disturbance of emotions and conduct may result from any stressful change that impacts family life. These include: "Distress caused by a stressful and life-changing event; behavioral patterns are impacted in a substantially negative way; enjoyable, healthy and fun activities no longer attract interest; sadness, helplessness, hopelessness or symptoms of clinical depression; anxiety, panic attacks, nervousness or problems with sleeping; behavioral issues, such as acting out in a negative way

[6]https://fscj.pressbooks.pub/abnormalpsychology/chapter/dysthymic-disorder-300-4/#:~:text=224%20Dysthymic%20Disorder%20%28300.4%29%20DSM-IV-TR%20criteria%20A.%20Depressed,observation%20by%20others%2C%20for%20at%20least%202%20years.

at home, at school at work or in public; potential arrest or school suspension for behavioral problems."[7] Child abuse typically results in "greater emotional than physical damage. An abused child may become depressed. He or she may withdraw, think of suicide or become violent. An older child may use drugs or alcohol, try to run away or abuse others."[8]

17. Later evaluators determined Johnson has a history of hearing voices, suicidality, and rendered additional diagnoses including dissociative identity disorder and depression, as well as a frontal lobe impairment that diminished his impulse control. Report of Neuropsychologist Daniel A. Martell, Ph.D., July 16, 2016, at 22; Report of Richard G. Dudley, Jr., M.D., Aug. 7, 2016, at 8-10.

18. In Todd Shepard's case, a defense psychiatrist found:

> Mr. Shepard presents with an equally longstanding and significant history of delusions and paranoid thinking consistent with a type of serious mental illness called a "psychosis" in which he cannot tell what is real from what is imagined. The main feature of this disorder is the presence of delusions, which are unshakable beliefs in something untrue. Mr. Shepard experiences non-bizarre delusions, which involve situations that could occur in real life, however, the situations are either not true at all or highly exaggerated. Mr. Shepard's delusions involve the belief that he is

[7]https://www.regionalcenter.org/mental-health/adjustment-disorder-with-mixed-disturbance-of-emotions-and-conduct
[8] https://fpnotebook.com/prevent/Abuse/ChldAbs.htm

> to be responsible for inciting a "racial/class revolution" and that his actions on the night of the incident offense were a part of his messianic mission. These misinterpretations and misperceptions or experiences of reality are a manifestation of his psychotic thinking which are hallmarks of a psychotic thought disorder.

Trial Court Report, Todd Shepard.

19. According to a psychiatrist (whose testimony was later excluded by the trial court), Dennis Blackman suffered a psychotic episode or dissociative episode while he was in police custody based on his statements to police that he had another personality named "Death." *See Blackman*, 875 S.W.2d at 133.

20. Turner was intellectually disabled, and suffered from depression and dependent personality disorder. (*State v. Turner*, Tr. 2199, 2216-17).

21. Both Forster and Johnson had very difficult upbringings.[9] Trenton Forster's family was dysfunctional. His father and sister suffered from depression. His father had an addiction to opioids and suffered from alcoholism early in Forster's life. At a young age Forster displayed odd behaviors (*e.g.* sleeping in closets) and experienced low resilience, anger, irritability and an

[9] As to Shepard, the presentence investigation related that his parents had divorced, both drank, and at least one source said the father was physically abusive toward the mother. Trial court report, Todd Shepard. Insufficient information was available on the social histories of Lacy and Blackman.

inability to regulate emotions. Forster's mother was extremely strict and this caused substantial tension between them. His parent's marriage was dissolving, resulting in much yelling, screaming, and profanity. His parents divorced in 2010 and there was a traumatizing, bitter custody battle. Forster later developed a drug addiction and experienced suicidal ideation. Appellant's Brief, *State v. Forster*, 2020 WL 2514845 (Mo. App. E.D. 2020).

22. Kevin Johnson suffered parental abandonment at a young age. Johnson's father was imprisoned for murder when defendant was two years old. His mother was addicted to crack cocaine and prostituted herself to support her habit—oftentimes in front of her children. At Mr. Johnson's trial, a defense witness, Dr. Daniel Levin, testified that records from the Department of Family Services (DFS) showed his mother's inability to care for her children, and noted that twelve hotline calls were made on her. There was no food in the house because the mother sold food stamps in order to get money to buy drugs, workers found the children alone with roaches and unsanitary living conditions, a social worker observed the mother yelling at and threatening her children even in their presence. (Tr. 2240-41). The resulting trauma to Mr. Johnson was profound.

> This is something we see in children who, first of all, have suffered terrible losses. He's already suffered the loss of his father, but now he has a mother who's very troubled. She's barely

> functioning. She has serious drug problems, she's abandoned the children at night, there's no food in the house. So what happens is that any child of Kevin's age, any child in that situation is going to become traumatized. It's going to be extremely traumatic for them. And they're going to be scared to death. They are going to be crying out for help and wondering where their parents are.

(Tr. 2241-42).

23. DFS removed Mr. Johnson and his younger sister from their mother's home when he was four-years-old, and Mr. Johnson went to live with his aunt, Edythe Richey. (Tr. 2243-45). DFS did nothing to help Mr. Johnson cope with the severe neglect, loss, and trauma that he had experienced. (Tr. 2246). Mr. Johnson began wetting the bed and acting aggressively with other children when he was seven years old, which confirmed that he had not been receiving the help that he needed. (Tr. 2248). His aunt responded to the bedwetting by hitting him with a switch every night, and continued to do that into his teenage years. (Tr. 2250).

24. The remainder of Mr. Johnson's childhood was spent in group homes. (See Trial Record.)

C. The Decision to Seek Death

25. During the course of the investigation, the Special Prosecutor sought information about whether the Prosecuting Attorney's Office under Mr.

McCulloch maintained any written procedures or guidelines on making the decision to seek the death penalty. (See Ex. 2, Alton Aff.)

26. Procedures are key in making the death decision. According to comments in Mr. McCulloch's own personnel file, he "disputes claims of bias" in the death penalty because of "**the process and procedure that is employed by prosecutors** in making the determination of whether or not to seek death." (*See* Ex. 8, McCulloch Personnel Records.)

27. Contrary to his own representations, Mr. McCulloch did not maintain any such process or procedure. (*See* Ex. 2, Alton Aff.)

28. Instead, he made the decision of whether to seek death on his own. (*See* Ex. 3, Bradford Aff.)

29. The available case records show that, as a practical matter, Mr. McCulloch employed two separate processes for the death determination in police officer killings: one for a White defendant, and another for Black defendants. (*See* Ex. 3, Bradford Aff.)

30. When prosecuting White police killer Trenton Forster, McCulloch directed a letter to Forster's counsel requesting information on why the State should not seek death. (Ex. 6, Corr. with Forster Counsel (letter of Oct. 24, 2016, containing bottom notation of RPMc, the initials of Robert P.

McCulloch).)

31. Forster's counsel wrote back, requesting a nine-month extension of time to provide mitigation evidence. (Ex. 6, Corr.with Forster Counsel t (Letter of Feb. 28, 2017).)

32. Mr. McCulloch did exactly what Forster asked, granting a nine-month extension and waiting until December 11, 2017, to announce that he would not seek the death penalty. *See* Joel Currier, *Suspected Mo. Cop Killer Won't Face Death Penalty*, St. Louis Post-Dispatch (Dec. 11, 2017), available at https://www.police1.com/legal/articles/suspected-mo-cop-killer-wont-face-death-penalty-zrvnJ5s1Cz4e7bHY/.

33. The decision outraged the victim's family, but McCulloch gave no explanation, stating simply: "that his decision came after 'a complete examination and reexamination of all evidence in this case'" and that he "'cannot elaborate on the decision,' citing ethical rules for prosecutors." *See* Joel Currier, *Suspected Mo. Cop Killer Won't Face Death Penalty*, St. Louis Post-Dispatch (Dec. 11, 2017), available at https://www.police1.com/legal/articles/suspected-mo-cop-killer-wont-face-death-penalty-zrvnJ5s1Cz4e7bHY.

34. Seeking to learn about Mr. McCulloch's handling the case, the Special Prosecutor wrote Mr. McCulloch a letter, emailing him on four separate

occasions. The Special Prosecutor also called Mr. McCulloch four times. The Special Prosecutor visited Mr. McCulloch's official address. Lights were on, a car was in front, and the Special Prosecutor saw a woman visibly walking around the home, but refusing to come to the door or even acknowledge that the prosecutor was there. He has not responded to any of these attempts - not even an offer of a five-minute phone call. (*See* Ex. 3, Bradford Aff.; Ex. 4, McCulloch Corr.)

35. Mr. McCulloch is willing and able to talk to others about his cases: he recently sat down for a two-hour interview with the *Riverfront Times*, a St. Louis newspaper, where he discussed the death penalty. (See Ex. 9, *Riverfront Times* Article.)

36. The Prosecuting Attorney's files do not contain any record of an invitation to any Black police killing defendants to provide mitigation evidence. (*See* Ex. 3, Bradford Aff.)

D. Attempted Use of Backdoor Racial Strikes at Trial.

37. During the first trial in this case, Mr. McCulloch attempted to waive some of the State's peremptory strikes in an attempt to have Black jurors - whose numbers were higher in the strike pool sequence - stricken without him needing to announce a strike; the Court refused to permit this. (*See* Ex. 11, Trial Transcript 1 Excerpt.)

38. Between the first and second trial, the Prosecuting Attorney's office conducted legal research and prepared a confidential memo - which it instructed others not to copy - trying to find ways around the Circuit Court's ruling or to convince the Circuit Court to change its mind and permit Mr. McCulloch to use backdoor strikes of minority jurors. (Ex. 7, Work Product Memorandum re: Johnson Jury Selection.)

E. Personal Animus Against Black Youth Expressed by Robert McCulloch.

39. In 2018, Mr. McCulloch gave a presentation at the Oregon District Attorneys' Association summer conference. (Ex. 1, Hummel Aff..)

40. During his talk, Mr. McCulloch displayed a photograph on a PowerPoint slide showing several Black males, whose ages appeared to be 16 to 20. (*Id*.)

41. The picture did not show them engaging in any unlawful activity, nor did Mr. McCulloch state that they were engaged in any unlawful activity. (*Id*.)

42. While displaying this picture, Mr. McCulloch stated: "This is what we were dealing with." (*Id*.)

43. John Hummel, a District Attorney who has personally made the

decision to seek the death penalty, witnessed the presentation. He states that Mr. McCulloch's tone of voice when speaking of these young people was sharp, and expressed contempt and animosity about them. (*Id.*)

The State discussed further facts below as necessary.

DISCUSSION

The authority of the State to seek to set aside a judgment and this Court's jurisdiction to consider and decide any such motion derives from RSMo 547.031. This Court must set aside the judgment upon a finding of "clear and convincing evidence of actual innocence ***or*** constitutional error at the original trial or plea that undermines the confidence in the judgment." Pursuant to this "constitutional error" provision, there are three requirements which must be met for the judgment to be set aside.

First, the standard of proof to be met is clear and convincing evidence, which imposes a higher burden than mere preponderance of the evidence, but less than the beyond a reasonable doubt standard. "Clear and convincing evidence means that you are clearly convinced of the affirmative of the proposition to be proved. This does not mean that there may not be contrary evidence." *In re Pogue*, 315 S.W.3d 399, 400 (Mo. App. 2010).

Second, the State must show evidence of "constitutional error at the

original trial." As demonstrated below, the evidence uncovered in this case shows discriminatory purpose that violates the equal protection provisions of the Missouri and United States Constitutions.

Lastly, the error must be such that it "undermines the confidence in the judgment." The term "judgment" necessarily embraces the defendant's sentence as well as the underlying conviction. In Missouri, after all, "A final judgment occurs only when a *sentence* is entered." *State v. Williams*, 871 S.W.2d 450, 452 (Mo. banc 1994) (emphasis in original). In assessing whether confidence in the conviction or sentence has been undermined, "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 342 (Mo. banc 2013) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). As the United States Supreme Court stated: "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

A. Legal Standards.

To establish a selective prosecution violation, the defendant must show that similarly situated individuals of a different race were not prosecuted. In

United States v. Armstrong, 517 U.S. 456, 469 (1996):

> The requirements for a selective-prosecution claim draw on ordinary equal protection standards. The claimant must demonstrate that the federal [or state] prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose. 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) (internal quotation and citation omitted).

Armstrong does not require identity of facts, only that the cases be substantially similar. *Chavez v. Ill. St. Police*, 251 F.3d 612, 635 (7th Cir. 2001) (court should take "care[ ] not to define the [similarly situated] requirement too narrowly."). It is not necessary that individuals be similar in all respects, only that the movant demonstrate that he or she shares "common features essential to a meaningful comparison." *Id.*

"It is appropriate to judge selective prosecution claims according to ordinary equal protection standards." *Wayte v. United States*, 470 U.S. 598, 608 (1985). Where direct evidence is unavailable, equal protection claimants can, and frequently do, rely on the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See*, *e.g.*, *Ballou v. McElvain*, 29 F.4th 413, 422 (9th Cir. 2022) (as to equal protection employment

discrimination case); *Demoret v. Zegarelli*, 451 F.3d 140, 151 (2d Cir. 2006) (same). Under that framework, the criminal defendant may make a prima facie case of discrimination by showing that he or she has been adversely prosecuted while "persons similarly situated to the defendant were not generally subject to prosecution," along with a producing a reasonable inference that "the prosecutor's discriminatory selection was based on an impermissible consideration such as race, religion, or any other . . . discriminatory purpose." *State v. Kramer*, 637 N.W.2d 35, 42-43 (Wisc. 2001); *United States v. Schoolcraft*, 879 F.2d 54, 68 (3d Cir. 1989). Once the defendant makes a prima facie case, the burden shifts to the prosecution to state a "reasonable basis to justify the classification," or a legitimate and non-discriminatory and legitimate reason for the challenged decision. *Kramer*, 637 N.W.2d at 44; *Schoolcraft*, 879 F.2d at 68; *see also United States v. Carron*, 541 F. Supp. 347, 349 (W.D.N.Y. 1982) ("Once the defendant satisfies this burden of proof, the burden shifts to the government, which must justify its actions in singling out a particular person or persons for prosecution."). At the third and final stage of any burden-shifting case, the claimant may produce evidence showing that the stated reason is a pretext for discrimination. *See*, *e.g.*, *Demoret*, 451 F.3d at 151; *Floyd-Gimon v. Univ. of Ark. for Med. Sciences*, 716 F.3d 1141, 1149 (8th Cir. 2013); *Ottoman v. City of Independence*, 341 F.3d 751, 759 (8th Cir. 2003).

Statistical evidence also plays a role. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court was asked to infer discriminatory purpose from a demonstration of state-wide systemic race-of-victim discrimination. The Court stated: "[T]o prevail under the Equal Protection Clause, [a defendant] must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* at 292-93 (emphasis in original). Here, evidence appears that focuses on a single decision maker: Prosecuting Attorney Robert P. McCulloch. This is the type of evidence the Court in *McCleskey* indicated it would look for.

B. Argument

1. The Capital Prosecution of Kevin Johnson was Motivated in Substantial Part by Discriminatory Intent and the State Violated Equal Protection.

At every stage of capital prosecutions under Mr. McCulloch, race played a prominent role, and remained a decisive factor when the analysis is limited to cases most similar to Mr. Johnson's, police officer killing. The State violated Equal Protection.

From the outset, direct evidence shows a differential in treatment: Mr. McCulloch gave Trenton Forster a year to plead for his life and provide mitigation evidence. He provided no such opportunity to Black killers. Mr. McCulloch's decision to give extra leniency to a White cop killer finds no

support in the record of the case. Mr. Forster had previously boasted about how he hated the police and wanted to get into a violent confrontation with a police officer. He then executed his plan: shooting at police officers and killing one of them. Mr. McCulloch articulated no explanation for this leniency, and any explanation he might try to offer at the hearing in this case would lack credibility. He has only said that Mr. Forster had mental health problems, but so did every other police-killing defendant - including Kevin Johnson. Importantly, Mr. McCulloch could not have learned of the extent of Forster's mental health problems unless he had gone searching for mitigating evidence. In other words, he found the conclusion that he was looking for.

Missouri courts have consistently looked to the treatment of other similarly-situated parties to assess pretext. *See, e.g., McGhee v. Schreiber Foods, Inc.*, 502 S.W.3d 658, 667 (Mo. App. W.D. 2016) ("[I]nstances of disparate treatment, that is, when the employee has been treated differently from other employees, can support a claim of discrimination[.]") Comparators "[n]eed not be identical in every conceivable way. . . . So long as the distinctions between the [defendant] and the proposed comparators are not so significant that they render the comparison effectively useless, the similarly-situated requirement is satisfied." *Id.* at 668.

Narrowing the inquiry to cases most similar to Mr. Johnson's, the State

can discern no significant distinctions that would justify seeking death against Mr. Johnson and the other Black defendants, but not for Mr. Forster, who is White. The five defendants were similarly situated. All involved the killing of a police officer. In all, multiple aggravating circumstances were present. Indeed, it could be reasonably maintained that Forster's case was the most aggravated. Forster was prosecuted and convicted for assault on a second officer, and there is strong evidence that but for the fact his gun jammed, the second officer would have been killed as well.

Any claim that Forster, the White defendant, was not deserving of death due to his mental illness smacks of pretext; all five defendants suffered from mental disorders which diminished their culpability. Forster suffered from bipolar disorder, attention deficit hyperactivity disorder, generalized anxiety disorder, panic disorder, and polysubstance use disorder. Johnson had been diagnosed with three serious mental illnesses as recognized by DSM-IV, dysthymia, adjustment disorder with mixed disturbance of emotions and conduct, and child abuse. Todd Shepard suffered from a delusional disorder. Dennis Blackman experienced psychotic and dissociative episodes. Lacy Turner suffered from an intellectual disability, depression, and dependent personality disorder. By today's standards, his disability would render him ineligible for the death penalty. Each of these defendants could be viewed as

having significantly diminished culpability due to their mental disorders.

Disparate treatment is blatant in another respect. Only Forster was specifically invited to make his case for life; the Black defendants received no comparable invitation. Even if Forster made a better showing of mitigation—which he does not—it was because the State solicited it solely from the White defendant; it had no interest in actually considering waiving death for the Black defendants. And McCulloch made clear his disdain for the mitigating side of the scale in aggravated cases ("so what … if these people can become a productive member of society … they still committed a horrible, brutal, vicious, murder,"), further evidence that race, not mental illness, was the deciding factor in Forster. Finally, Forster's mental impairment simply could not have been the reason for waiving death; the State vigorously disputed this same evidence when Foster put forth a diminished capacity defense to first degree murder. McCulloch's newly articulated justification regarding Forster's mental illness and diminished capacity is inconsistent with his decision to nonetheless pursue prosecution for first degree murder.

It is well-settled that shifting explanations are circumstantial evidence of pretext. *Foster v. Chatman*, 578 U.S. 488, 512 (2016). In *Foster*, "the prosecution's principal reasons for the strike shifted over time, suggesting that those reasons may be pretextual." *Id.* at 507. Indeed, "[s]uch implausible

explanations and false or shifting reasons support a finding of illegal motivation." *Hall v. N.L.R.B.*, 941 F.2d 684, 688 (8th Cir. 1991). *See York Prod., Inc. v. N.L.R.B.*, 881 F.2d 542, 545 (8th Cir. 1989) (finding illegal motivation where, inter alia, initial reason was later abandoned and new position was adopted at hearing); *N.L.R.B. v. RELCO Locomotives, Inc.*, 734 F.3d 764, 782 (8th Cir. 2013) (vacillation in reasons supported finding employment termination illegal); *Aerotek, Inc. v. Nat'l Lab. Rels. Bd.*, 883 F.3d 725, 732 (8th Cir. 2018) (finding implausible employer's rationale that was contradicted by their own activity and communications).

In assessing the similarities of these cases, the State notes the complete absence of both guidelines for when death is appropriate, or any contemporaneous memoranda reflecting the decision-making process. Requests for these materials reveal none exist. Rather, it seems these were *ad hoc* decisions, and as such are further prone to the influence of improper factors. Neither has the Special Prosecutor been favored with a response from the trial prosecutors. Finally, the trial prosecution team was provided the opportunity to dispute claims of purposeful discrimination but declined to do so. McCulloch has failed to respond to numerous emails, and telephone messages.

Even an email requesting a five minute telephone call went unanswered.

Second chair prosecutor Patrick Monahan has been similarly unresponsive, declining to speak with the Special Prosecutor except if provided with written notice of the questions to be asked.

Third chair prosecutor Sheila Whirley picked up the Special Prosecutor's phone call. But she was similarly unhelpful, stating that she would not "give up the family secrets" without a clearer understanding of the Special Prosecutor and his role. She then simply pointed the finger at McCulloch, said he made the decision, and directed the Special Prosecutor to look at the notice of aggravating factors filed with the Court.

The trial prosecutors have declined to justify their actions, let alone prove any such justifications. The Court can and should draw a credibility inference from the trial team's refusal to give any real explanation of their decision. Most especially, Mr. McCulloch's decisions lack credibility because he has refused to even acknowledge the Special Prosecutor's attempts at contact - all while giving a two-hour news media interview.

In addition, statistical evidence supports an inference of discrimination. Statistical evidence is "relevant in conjunction with all other evidence in determining intentional discrimination." *Cox v. First Nat. Bank*, 792 F.3d 936, 941 (8th Cir. 2015) (citation omitted).

The Baumgartner Report presents compelling evidence that racial discrimination was pervasive in the selection of cases for capital prosecution; at virtually every decision-point race played a prominent role. Overall, White-victim cases saw a death rate of 14 percent, whereas Black-victim cases saw a rate of just four percent. Thus, cases with White victims were 3.5 times as likely to lead to a sentence of death as cases with Black victims, and 2.2 times as likely to lead to the filing of first degree murder charges. These unadjusted results were highly statistically significant.

Baumgartner then employed commonly accepted statistical procedures to determine if the disparities could be explained by legitimate case characteristics, aggravating and mitigating circumstances. He concluded:

> [T]he multivariate analysis results are highly consistent and confirm the simple comparisons laid out in Table 1 [unadjusted results]. The most important result from this analysis is the 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. In effect, the presence of a White victim in a particular case acts as 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.

Baumgartner Report at 20-21.

The Baumgartner Report differs in significant respects to the study

rejected in *McCleskey*. In *McCleskey*, the Court found the combined statewide effects—encompassing all decision-makers, prosecutors, juries, and judges—did not alone demonstrate McCleskey himself was a victim of purposeful discrimination. Here, the focus was on a single jurisdiction, St. Louis County, and the tenure of a single prosecutor, Robert P. McCulloch. The study also permits a close look at the discrete decision-points, from arrest through sentencing, to determine the source of the observed disparities. Notably, most of the ultimate disparity is attributable to prosecutorial decision-making, fairly imputed to Mr. McCulloch, not the juries or courts. The sheer pervasiveness and magnitude of this demonstration goes a long way to proving purposeful discrimination in Mr. Johnson's case.

2. Previously Undisclosed Work Product, Together with Newly Available Legal Authority, Sustain Mr. Johnson's *Batson* Claim and Further Show the Pervasive Racial Bias Underlying His Conviction and Sentence.

Beyond systematically discriminating against Black defendants in charging first degree murder and seeking the death penalty, Mr. Johnson's prosecutors discriminated against Black jurors as well. Work product materials generated between the two trials show the prosecution's conscious

intent to evade *Batson* and exclude Black jurors from trial.

Jury selection in the first trial began on March 26, 2007, or only six days after the second of the Missouri Supreme Court's finding of *Batson* error in a St. Louis County case because the prosecution's stated explanations for striking a Black juror were "implausible and merely a pretext to exercise a peremptory strike for racially discriminatory reasons." *McFadden*, 216 S.W.3d at 677.

After the parties and the Court had completed challenges for cause in Mr. Johnson's first trial, McCulloch announced that he wished to exercise fewer than nine of his allotted peremptory strikes. (1st Tr. 372-73.). The Court explained that it would strike whatever number of jurors the State declined to strike (for a total of nine), but, in doing so, the Court would follow its longstanding practice of ensuring that reducing the remaining juror pool to the final twelve jurors would not result in the arbitrary elimination of Blacks. (1st Tr. 373-74).

Mr. McCulloch called the Court's rule "silly," and "bizarre." (1st Tr. 374-75). He asked, "[I]f I don't have nine people I don't strike, *why am I being penalized*?," (1st Tr. 375), suggesting that the retention of Black jurors would "penalize" the prosecution. McCulloch then struck four jurors, leaving the Court to strike five, and resulting in a jury with six White and six Black

members. (1st Tr. 376). McCulloch objected to the judge's method as an act of discrimination against White and male jurors. (1st Tr. 378).

The Court explained that, if it had engaged stricken jurors in the manner suggested by McCulloch, by starting with the highest non-stricken member and counting downward, the Court would have stricken four Black jurors. (1st Tr. 378-79). The Court suggested that McCulloch was asking the Court to strike the Black jurors rather than having the prosecution do so (1st Tr. 379: "Not by the prosecutor. You're asking the Court to do it"). McCulloch insisted that the jurors stricken by the Court "are people that I think would make fine jurors and would not strike them." (1st Tr. 381).

The prosecution engaged in a similar tactic during Mr. Johnson's retrial, again exercising only four of its nine available strikes. (Tr. 1048-49). The prosecutor's four strikes included three Black jurors, which left three additional Black jurors from among the 26 remaining jurors on the venire. (Tr. 1049-53, 1057). This time, the Court announced that it would exercise the five remaining state strikes by random draw. (Tr. 1054). With three Blacks remaining, and five random strikes to be allocated among the 26 veniremembers, McCulloch could hope to achieve an additional one or two Black strikes while attributing those strikes to the judge instead of the prosecution—a distinction he made clear. (Tr. 1055).

McCulloch's objectives are laid bare by the prosecution's work product between the two trials - evidence that Mr. McCulloch's office tried to shroud behind an instruction not to copy it. (See Memorandum to Patrick Monahan, attached as Exhibit.) A research memorandum sought to provide support for the proposition that Judge Wiesman's "decision to only strike white jurors claiming that the State was trying to circumvent *Batson* was an erroneous decision." It urged that the prosecution's exercise of fewer than its allotted strikes "is insufficient to establish discrimination." And it contended that the trial judge had wrongly "interject[ed] himself into the process and allow[ed] himself more say than the state.

The implications of the prosecution's memo are several and troubling. First, the prosecution's actions from the first trial show a deliberate attempt to strike Black jurors from the back of the venire, and then to attribute those strikes to the judge instead of the prosecution. Judge Wiesman understood the tactic and identified it as such. (1st Tr. 379). The prosecution recognized what the judge had inferred; its memorandum described the "Judge's decision to only strike white jurors claiming that the State was trying to circumvent *Batson*," and it sought to "argue that Judge Wiesman's decision was erroneous." Second, even random strikes undertaken by the Court on retrial helped the prosecution evade *Batson*. If indeed McCulloch was content to proceed with a small number

of Black jurors in the months immediately following *McFadden*, which he did by striking three of the available six Black veniremembers, he could hope that the Court's five random strikes would result in the exclusion of one or two more minorities, and without the State being blamed for that exclusion (Tr. 1055: "I would prefer not to call them the State's strikes."). Third, at the very least, the memorandum clarifies that the prosecutors were committed in advance to a strategy of leaving multiple peremptory challenges unexercised, but without knowing who the veniremembers were. There is no rational strategic basis for such a pre-commitment, other than to weaken any inference of racial discrimination from strikes that the prosecution expected to take, that is, to immunize in advance whatever limited number of Black strikes the prosecution would feel compelled to make. All told, the tactic shows that the prosecution was more interested in defeat any *Batson* claim than in seating a fair and impartial jury.

McCulloch's motives at jury selection should be revisited for another reason: the United States Supreme Court's 2019 opinion in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), lends credence to the plausible *Batson* claim that Mr. Johnson brought on direct appeal.

At trial, the primary panel of 30 veniremembers comprised 24 Whites and six Blacks. Thus, the prosecution had an opportunity to strike 24 Whites

and struck one for a strike rate of 4%. The prosecution had the opportunity to strike six Blacks and struck three for a strike rate of 50%. Including the eight additional venirepersons comprising the alternate pool, the prosecution had the opportunity to strike 30 Whites and struck two (7%). It had the opportunity to strike eight Blacks and struck four (50%).

Based on these facts, there did not appear to be a dispute as to the existence of a prima facie case of discrimination, thus the burden shifted to the State to justify its strikes on non-racial grounds. The focus was principally on the strike of Debra Cottman, a Black woman. McCulloch offered two grounds, that he struck Cottman because she was "not all that willing to answer the questions regarding the death penalty," and because Cottman served as a foster parent for children at the Annie Malone Children's Home, which is one of several such homes where Mr. Johnson briefly stayed during his troubled childhood. (Tr. 1051).

As to the first ground, unwillingness to answer questions, there appears to be no record support differentiating Cottman's voir dire responses from those of other jurors, and it is noted that the Supreme Court of Missouri focused solely on the second ground, the juror's connection with Annie Malone Children's Home. Cottman testified that she had been a foster parent for children from the Annie Malone Children's Home. But her association with

Annie Malone was fleeting. Cottman was what was known as a "visiting foster parent." (Tr. 1010). She explained, "They come visit at my home, stay at my home for the weekend." (Tr. 1010). Cottman did not know anyone from Annie Malone that was associated with the case, including Kevin Johnson. (Tr. 1011). Similarly, Mr. Johnson himself had little contact with that agency. The record shows he had stayed there for one week as a child, through placement by the DFS. (Tr. 1003-04, 1051, 2112-13, 2270). Nevertheless, McCulloch said, "I don't want anyone associated with Annie Malone." (Tr. 1051).

Mr. McCulloch, though, declined to strike White jurors who had worked within DFS and/or in the foster care system. Juror Bayer had worked as a "weekend foster parent" at the St. Vincent Home for Children. (Tr. 1009-10). Juror Duggan worked as a teacher and had been "involved in hot lining several students during [her] teaching career" meaning it was necessary to report to DFS that "something going on with a student." (Tr. 1005). Juror Georger was a mentor for the Family Court for two or three years and worked extensively with children. (Tr.1003-04, 1006-07). Juror Boedeker worked with "new moms and babies" and occasionally would consult with DFS whenever there was "a positive drug screen on the mother or baby after delivery." (Tr. 1007-08). None of the jurors, including Cottman, were asked by McCulloch about their experiences in the foster care system, and none said that their experiences

would affect their consideration of Mr. Johnson's trial.

In his application, Mr. Johnson asks the State to revisit his claim of discriminatory jury selection, acknowledging that this claim has been decided adversely in the courts, but without taking into consider historical evidence of discrimination. On direct appeal Mr. Johnson called the Court's attention to previous *Batson* violations from St. Louis County during the few years before his trial, specifically, *State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007); *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006); *State v. Hampton*, 163 S.W.3d 903 (Mo. banc 2005); and *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. E.D. 2004). The Court refused to consider the evidence as relevant, stating that "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." *State v. Johnson*, 284 S.W.3d 561, 571 (Mo. banc 2009). Intervening authority from the United States Supreme Court is directly to the contrary: A defendant may rely on, and a court must consider, "relevant history of the State's peremptory strikes in past cases." *Flowers*, 139 S. Ct. at 2243.

Flowers also makes clear that a stricken Black juror and a non-stricken White juror need not be identical in all respects in order for the comparison to support an inference of discrimination. At issue in *Flowers* was the strike of a Black juror who worked at Wal-Mart where the defendant's father also worked.

To discredit the prosecutor's explanation the Black juror might sympathize with a defendant whose father worked at the same Wal-Mart as the juror, the Court relied on the fact that the prosecution declined to strike multiple White jurors who worked at a bank where the defendant's family were customers. *Id.* at 2245. The comparison jurors did not work at the identical location (Wal-Mart) as the stricken juror, and their experience with the defendant's family was different (working at a place where they had contact with numerous relatives of the defendant, as opposed to working at a place where the defendant's father worked). That ruling contrasts with the Missouri Supreme Court's reasoning on direct appeal. The Court in *Johnson* accepted the prosecutor's explanation that he struck a juror who worked as a foster parent at the Annie Malone Children's home. *Johnson*, 284 S.W.3d at 570-71. It rejected Mr. Johnson's and the dissent's showing that the prosecution declined to strike numerous White jurors who worked at other foster care agencies or with the Division of Family Services, which took custody of Mr. Johnson for most of his childhood. *Id.* The comparison was not probative, the Court suggested, because the White jurors did not work at Annie Malone's itself. *Id.*; *but see id.* at 590 (Teitelman, J., dissenting: "There were at least four white jurors who had substantial contacts with the division, which had legal custody of appellant for most of his childhood.").

The Supreme Court did not have the full opportunity to consider the record of other cases involving Mr. McCulloch's office, because the United States Supreme Court had not decided *Flowers* at the time this case was appealed, or even in any later PCR or habeas proceedings. Further, the new evidence of a prosecution memo showing an intent to evade *Batson* and strike Black jurors through the back door shows the prosecutor's intentions. Here, the prosecution intentionally discriminated against Black jurors in Mr. Johnson's case.

CONCLUSION

The effect of race was pervasive throughout the capital decision-making by former Prosecuting Attorney Robert P. McCulloch. No significant factors explain why death was sought against the Black capital defendants, including Mr. Johnson, but not the White defendant, Trenton Forster. Mr. Forster got extra due process - the right to successfully plead for his life for a year - that no Black defendant got. Those disparities are made worse by the St. Louis County Prosecutor's Office pattern of discriminating against Black jurors, as it appears to have done intentionally at Mr. Johnson's trial.

The facts demonstrate, by clear and convincing evidence, that the capital prosecution of Kevin Johnson and the exclusion of Black jurors at his trial was motivated in substantial part by discriminatory intent—equal protection violations that undermine the confidence in the judgment.

Sergeant McEntee's survivors, the women and men of law enforcement, and the community deserve a just conclusion to this case. That conclusion will only be just if it comports with the law. Unfortunately, the available evidence all shows that racial bias infected the process here. The Court must vacate the judgment and allow further proceedings to bring this case to a lawful conclusion.

Dated: November 15, 2022

Respectfully submitted,

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