IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Kevin Johnson,	)	
	)	
Petitioner/Appellant,	)	
	)	
vs.	)	**Case No. 18-2513**
	)	
Troy Steele,	)	**This is a capital case**
	)	
Respondent/Appellee.	)	

APPELLANT'S APPLICATION FOR CERTIFICATE OF APPEALABILITY

Respectfully submitted,

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FACTUAL AND PROCEDURAL INTRODUCTION

Petitioner Kevin Johnson was convicted of first degree murder and sentenced to death by the Circuit Court of St. Louis County for the killing of Sgt. William McEntee of the Kirkwood Police Department on July 5, 2005, when Petitioner was nineteen years old. The incident occurred in the troubled Meacham Park neighborhood shortly after Petitioner learned that his twelve-year-old brother had died suddenly in Sgt. McEntee's presence. Former Prosecuting Attorney Robert McCulloch personally tried the case. Petitioner's first trial resulted in a hung jury, with the jurors deadlocked at 10-2 in favor of non-premeditated second degree murder instead of death-eligible first degree murder. *See* PCR Tr. 453, 491-92.[1] A subsequent jury found Petitioner guilty of first degree murder and sentenced him to death.

As briefly summarized here, the trial evidence showed that Kirkwood officers Nelson and Brand were patrolling Petitioner's neighborhood, searching for Petitioner in order to arrest him on an alleged probation violation when Petitioner's brother – Joseph Long, known to the family and neighborhood as "Bam Bam" – suddenly collapsed in his Grandma Pat's home nearby and then died as a result of a congenital heart defect. App. 57; Trial Tr. 1299, 1364. Trial Tr. 1220-33.

[1] Throughout this filing, Petitioner cites the transcript from the retrial as "Trial Tr.," the transcript from the first trial as "Initial Trial Tr.," and the transcript from the state post-conviction hearing as "PCR Tr."

Petitioner, who was staying at his great-grandmother's house next door to Grandma Pat's and had been caring for his two-year-old daughter that day, was watching the officers from the house when Bam Bam collapsed. App. 57; Trial Tr. 1833-36, 1847-48; Initial Trial Tr. 772-88. [2]

Paramedics arrived at the scene minutes later, as did Sgt. McEntee and other police officers. App. 57. Petitioner saw Sgt. McEntee remove Petitioner's distraught mother from the home where her son had collapsed, and then block her from re-entering. Trial Tr. 1192-93, 1850-51; Initial Trial Tr. 784-85. Petitioner and others believed that the police officers were more interested in arresting him than in attempting to save Bam-Bam's life. Initial Trial Tr. 785-86; ECF Doc. 63 at 109-10, and sources cited. About thirty minutes after paramedics removed Bam Bam on a stretcher, Petitioner learned that his brother had been pronounced dead at a nearby hospital. Trial Tr. 1857-58; Initial Trial Tr. 788. Petitioner became angry and kicked a bedroom door off of its hinges. Initial Trial Tr. 788.

About two hours later, Sgt. McEntee returned to the neighborhood in response to a fireworks disturbance. App. 57. Eyewitnesses testified that Petitioner approached Sgt. McEntee in his patrol car, squatted down to the passenger window, said "You killed my brother," and then shot Sgt. McEntee about five

[2] Petitioner testified at his first trial but not the second one. As part of its case-in-chief at the retrial, the prosecution played a videotape of Petitioner's testimony from the first trial. *See* Respondent's Habeas Corpus Ex. A, L, M.

times, hitting him in the head and upper torso areas. App. 57. Sgt. McEntee's car rolled down the street and hit a parked car, after which Sgt. McEntee managed to get out of the car but could not stand up. App. 57. Next door to Sgt. McEntee's location was the home where Petitioner's young daughter lived. Trial Tr. 1693-94. Petitioner emerged from behind his daughter's house, by way a "gangway" that ran between his daughter's house and the house where Sgt. McEntee's car had crashed. Trial Tr. 1485-88.

Petitioner did not simply follow the route of Sgt. McEntee's patrol car that had rolled down the street. Trial Tr. 1153-54, 1485-88, 1952-53. The defense argued, and Petitioner's testimony explained, that he ran to his daughter's home after the first shooting in order to see her "one last time," and he came across the fallen Sgt. McEntee by chance; in contrast, the prosecution argued that Petitioner was pursuing Sgt. McEntee the entire time and wanted to "finish him off" with more gunfire. Trial Tr. 1952-53, 1982-4; Initial Trial Tr. 800-05, 833-36; ECF Doc. 35 at 92-94, and exhibit cited. It was not disputed, though, that Petitioner shot Sgt. McEntee again, that the last shot was to the back of Sgt. McEntee's head, and that the final shot was the fatal wound. App. 57-58; Trial Tr. 1809-10. The absence of gunpowder "stippling" in the area showed that the fatal wound was not a "close" or "contact" wound from point-blank range. Trial Tr. 1820-21. The medical examiner testified that the fatal shot could have been fired from as close by as two feet away or from as far away as ten feet or more. Trial Tr. 1821. Eyewitness Cecil

Jones said that Petitioner stood over Sgt. McEntee after the shooting and said, "You killed my brother. You killed my little brother, and that's what you get." Trial Tr. 1681-85. Petitioner fled the scene but surrendered to police three days later. App. 58.

Following Petitioner's conviction and death sentence, his appellate and post-conviction remedies were unavailing in the state courts. *See State v. Johnson*, 284 S.W.3d 561 (Mo.), *cert. denied*, 558 U.S. 1054 (2009) ("*Johnson I*"); *Johnson v. State*, 406 S.W.3d 892 (Mo. 2013), *cert. denied*, 571 U.S. 1240 (2014) ("*Johnson II*"). The district denied the habeas corpus petition and related motions on February 28, 2018. App. 1. Petitioner thereafter moved to alter or amend the judgment, which motion the district court denied June 15, 2018. App. 116. On the same date the district court entered an "amended" order denying the petition for writ of habeas corpus, somewhat broadening the reasoning of its previous ruling. App. 56.

Petitioner filed a notice of appeal, but this Court remanded with directions that the district court either grant or deny a certificate of appealability. *See* Order of July 16, 2018. The district court then denied a COA – App. 137 – and this application follows. Petitioner now requests that the Court issue a COA so that he may appeal the district's adverse rulings on Claims 1, 5, 16, 18, 19, 20, and 21

from his petition for writ of habeas corpus.[3]

STANDARDS GOVERNING ISSUANCE OF A CERTIFICATE OF APPEALABILITY

A COA will be granted when the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A COA "does not require a showing that the appeal will succeed." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) ("*Miller-El I*"). Instead, a COA should issue if a district court's ruling is "debatable among jurists of reason," if reasonable jurists could debate whether the petition should have been resolved "in a different manner," or when the issues presented are "adequate to deserve encouragement to proceed further." *Id.* at 336 (quotations omitted); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

When considering whether to grant a COA, a court should resolve any doubts in favor of the petitioner. *See Whitehead v. Johnson*, 157 F.3d 384, 386 (5th Cir. 1998); *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002). In a capital case, "the nature of the penalty is a proper consideration" to weigh in favor of granting a COA. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *see also Slack*, 529 U.S. at 483 (holding that the COA requirement codified the pre-AEDPA *Barefoot* standard). The purpose of the COA requirement is "to prevent frivolous appeals."

[3] The notice of appeal separately lists the district judge's refusal to recuse from the habeas proceedings. See ECF Doc. 157. Petitioner does not need a certificate of appealability in order to appeal the district court's denial of Petitioner's motion for recusal. *See Nelson v. United States*, 297 Fed. Appx. 563, 566 (8th Cir. 2008); *Trevino v. Johnson*, 168 F.3d 173, 177-78 (5th Cir. 1999). The Court should therefore set a briefing schedule whether it grants or denies a COA on Petitioner's specific claims for habeas relief.

Barefoot, 463 U.S. at 893.

I. The Court should grant a certificate of appealability on Petitioner's substantial claim that trial counsel failed to investigate and present evidence describing the violent community and extended family in which Petitioner was raised (Habeas Corpus Claim 21)

Chronic exposure to community violence is known to have devastating consequences, including structural changes to the brain itself as well as the development of symptoms of post-traumatic stress disorder and other mental illnesses. *See* Emily Badger, *Have You Ever Seen Someone Be Killed?*, N.Y. Times May 25, 2018; Kevin M. Fitzpatrick and Janet P. Boldizar, *The Prevalence and Consequences of Exposure to Violence among African-American Youth*, 32 J. Amer. Acad. of Child & Adolescent Psychiatry 424 (1993); *Early Life Stress Can Leave Lasting Impacts on the Brain*, Science Daily, June 27, 2014, *available at* <<http://www.sciencedaily.com/releases/2014/06/140627133107.htm>>; Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 Hofstra L. Rev. 923, 931-34 (2008). Trial counsel had easy access to information about Petitioner's community; they need only have interviewed people who lived there. Their failure to do so left Petitioner to be convicted and sentenced by an ill-informed jury who believed that Petitioner experienced nothing worse than the supposedly "lousy childhood" belittled by the prosecutor. Trial Tr. 2324

A. Petitioner's claim

From the time of his early childhood, when Petitioner's father murdered an acquaintance and was sent to prison when Petitioner was about sixteen months old, Petitioner repeatedly saw and heard about members of his community killing and being killed. A reasonable investigation would have informed trial counsel that "Meacham Park has a lot of fist fights [and] … a lot of killings," that "[t]here's bodily harm done out there pretty much every day," and that "growing up in Meacham Park meant that you or someone you love might die young." ECF Doc. 88-1 at 84, 274. Children "got used to hearing about … murders," fell asleep to the sound of gunshots, and carried guns for protection around the neighborhood from a young age. *Id.* at 45, 144, 303, 323. Gangs had a "gargantuan" impact in school hallways and coerced students to join, and fearful students expected to be "dead by 21." *Id.* at 208.

Petitioner's relatives and neighbors would have told counsel that prostitution in Meacham Park "would happen right in the middle of the street, in the kids' parks, on community steps," and that "[y]ou could look over, and there would be one girl on her knees in front of a line of 20 guys." *Id.* at 304. Police officers extorted sexual favors from prostitutes by threatening them with arrest. *Id.* at 248. Many girls began having sex by age 7 or 8, and "[i]t was nothing to go through the back streets of Meacham Park and see a little 11- or 12-year-old girl riding a grown man right out in the open in their cars." *Id.* at 304. Furthermore, "women on drugs

would perform oral sex on 10- and 11-year-old boys just to get the boys' pocket change to go buy more drugs." *Id.* Petitioner's extended family has a generations-long history of incest and sexual abuse, which he witnessed from the age of four onward. *Id.* at 318-19, 380.

The following events occurred before Petitioner turned twelve years old:

• When Petitioner was eight months old, his father had an argument with, and then shot to death, a woman with whom he had been partying and using drugs. Several months later he pleaded guilty to second-degree murder, and he was not released from prison until Petitioner was thirteen years old.

• When Petitioner was three years old, his uncle Antonio was shot in the street three blocks from his Grandma Pat's house.

• A few months later, as he was playing with his brother on the grounds of the historic Turner School, Petitioner saw a man shoot their uncle Keith in the face.

• When Petitioner was four years old, four teenagers pistol-whipped, robbed, and killed one of his neighbors two blocks from Grandma Pat's.

• Later that year, a neighbor shot and killed an acquaintance, two blocks from the house, over twenty dollars' worth of crack cocaine.

• When Petitioner was five years old, his mother's cousin, Richard Booth, got into an argument with Uncle Keith's close friend – this time four blocks from Petitioner's home – over a half-pint of wine. Booth shot the other man dead.

• Later that year, another of cousin of Petitioner's mother, Neal Hurst, was shot and killed by another of Uncle Keith's friends, Montez Woods, five blocks from Petitioner's house.

• A few weeks later, after a sixteen-round shootout where no one was killed, Hurst's acquaintance Charles Witherspoon killed Petitioner's close friend Kenny Woods's uncle. Grandma Pat's house was three blocks from the shootings.

• The next year, when Petitioner was six, his friend Michael Greer's father shot and killed a man three blocks from Grandma Pat's house.

• When Petitioner was seven, family friend John Burgess was stabbed in the street five blocks away.

• When Petitioner was eight years old, a sixteen-year-old shot two spectators at Kirkwood High School's annual Thanksgiving Day football game.

• A month later, Petitioner's brother Marcus's father (Myron Hodges) and family friend (Pierre Wandex) were shot four blocks from Grandma Pat's house.

• A month before Petitioner's ninth birthday, his cousin Kevin Ragland shot and killed a man two blocks from Grandma Pat's house.

• Eight months later, and just houses down from Grandma Pat's, someone shot and killed family friend Ernest McMiller.

• The month after Petitioner's tenth birthday, Marcus's cousin Michael Berry kidnapped and robbed a stranger at gunpoint in the neighborhood.

• When Petitioner was eleven, his friend Martin's cousin killed his friend Jason's cousin on the street four blocks from Grandma Pat's house.

See Newspaper articles (ECF Doc. 88-1 at 987-1020); Jason Clark Dec. (*id.* at 47); ECF Doc. 35 at 10-11.

Had Petitioner's attorneys investigated his family's criminal history, they would have learned that Petitioner's father, brother, and *twenty-four* of his uncles and cousins spent time in prison before Petitioner turned 18. *Id.* at 1251-1357. They would have learned that his brother, three of his uncles, and four of his closest friends were Crips, but that his mother's cousins were Bloods, and that Petitioner's relatives were involved in numerous murders, robberies, and other

violent crimes. *Id.* at 321-28.

Well-defined norms require capital counsel to seek out "*all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Counsel must "explore all avenues leading to facts relevant to guilt and degree of guilt or penalty." *Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir. 1991); *Eldridge v. Atkins*, 665 F.2d 228, 232 (8th Cir.1981). Those avenues include evidence of the type at issue here. *See, e.g., Simmons v. Luebbers*, 299 F.3d 929, 936 (8th Cir. 2002) (among other evidence, defendant was raped or assaulted after he ran away from home, and he grew up in a "neighborhood frequented by street violence"); *Doss v. State*, 19 So. 3d 690, 704 & n.4 (Miss. 2009) (noting that defendant's family "lived in a very poor, bad, drug-infested neighborhood where gangs were prevalent in Chicago"); *Johnson v. Mitchell*, 585 F.3d 923, 943 (6th Cir. 2009) ("Johnson was further exposed to violence both in elementary school where he often engaged in fights, and in his predominately white neighborhood where the African-American petitioner was forced to defend himself in numerous skirmishes").

Trial counsel's investigation was critically incomplete. They did not speak to Petitioner's father or anyone from his side of the family, and they spoke to his mother only briefly by telephone. PCR Tr. 458. They did not request and review many of the available social service and criminal records about his family and

home, and they did not interview willing relatives who lived in St. Louis County, some of whom had lived with Petitioner as children. PCR Tr. 465; ECF Doc. 88-1 at 45, 54-57, 61-64, 71-93, 96-98, 111-29, 299-310, 333-36, 348-51 (Carmen Cooper-Crenshaw, Joyce Coleman, Charisse Clark, Shawn Fields, Lawanda Franklin, Aaron Harris, Tausha Harris, Myron Hodges, Syl Jackson, Candace Tatum, Roscoe Tatum, Cameron Ward). And it appears that counsel did not ask any witnesses about Petitioner's exposure to shootings, stabbings, gang violence, prostitution, or child sex. *See generally* Witness Declarations (ECF Doc. 88-1 at 36-189, 200-354).

The information was readily available to trial counsel. Police files in counsel's possession depicted Meacham Park as an open-air market for crack cocaine. *Id.* at 1023. In one police report, Petitioner himself told an officer "there was going to be a street fight." *Id.* at1359. Division of Family Services (DFS) records for Petitioner and his siblings spoke of gang fights, prostitution, drug sales, and child sex in Meacham Park. *Id.* at 643, 647, 670, 784, 822, 897, 1023. The *St. Louis Post-Dispatch* wrote about each of the murders that occurred near Petitioner's home and published multiple stories about gang warfare at Kirkwood High School. *Id.* at 999, 1003, 1010, 1014. It was unreasonable for counsel not to follow up on this information.

Had counsel asked Petitioner's brother Marcus, he could have told them that Meacham Park and Petitioner's own family were divided between Bloods and

Crips; that he "saw drugs and shootings in Meacham Park all the time;" and that Roscoe, Tink, and Wayne Wayne (all Crips) cooked crack in Grandma Pat's house and sold it on the streets. *Id.* at 322-25. Marcus could have described numerous murders and robberies between and involving relatives, and could have directed counsel to many other knowledgeable witnesses in the neighborhood. *Id.* at 322-28. Trial counsel's failure to interview Marcus and other neighborhood relatives – *especially relatives who had lived with Petitioner* – about violence in Meacham Park was deficient performance.

That deficiency prejudiced the defense. Absent evidence explaining the community in which Petitioner was raised and in which the shooting took place, the prosecution argued that Petitioner merely had a "lousy childhood." Trial Tr. 2324. The prosecutor blamed Petitioner for his problems and argued that Petitioner repeatedly failed to "live by the rules" and failed to take advantage of the opportunities and support from his Aunt Edythe and the child protective system. Trial Tr. 2320-25. Petitioner "passed and did nothing to help himself in this situation." Trial Tr. 2323. The prosecutor sought justice for the community, but from a jury who was not informed about that community: "Should the people of Meacham Park not get justice in this case because he didn't take advantage of all the opportunities that were there for him?" Trial Tr. 2325.

Pervasive and inter-generational community violence would prove not only that Petitioner suffered something well beyond a "lousy childhood," but also that

Petitioner had little respite from the chaos around him. *See* PCR Tr. 353 (Dr. Cross observing that the "buffers" in Petitioner's life "were gone" by age 17). Petitioner lacked the "nurture and support that might have mitigated the impact of the repeated exposure to violence." ECF Doc. 88-1 at 3 (per Dr. Dudley).

B. The district court's rulings

The district court observed that Claim 21 is defaulted. App. 71. It declined to excuse the default under *Martinez v. Ryan*, 566 U.S. 1 (2012), for the sole reason that "the underlying ineffective assistance of trial counsel is not a substantial one." *Id.* The court stated that trial counsel presented "substantial evidence of petitioner's childhood experiences of abuse and neglect." *Id.* Citing *Ringo v. Roper*, 472 F.3d 1001, 1007 (8th Cir. 2007), the court reasoned that trial counsel are not ineffective "simply because other counsel might have focused on different or additional details." *Id.* at 16-17. Having refused to excuse the procedural default under *Martinez*, the district court denied an evidentiary hearing on the claim. *Id.* at 17. The district court later denied a COA and simply summarized its earlier ruling. App. 140.

C. The district court's decision is debatable among reasonable jurists.

By finding that Petitioner did not advance a "substantial" claim of trial counsel's ineffectiveness under *Martinez*, the district court's ruling is both procedural and on the merits. Whatever the ruling's label, however, "reasonable

jurists" would find it "debatable or wrong" so as to justify issuance of a COA. *Slack*, 529 U.S. at 484. This case arises from the in-the-street murder of a police officer in Meacham Park. Numerous police reports, social service records, and newspaper articles described pervasive street fights, gang warfare, prostitution, drug sales, child abuse, and murders in Meacham Park. Numerous witnesses attested to police aggression and misconduct. *See* Section II, below. It was inexcusable for trial counsel to fail to at least investigate the troubled community in which Petitioner was raised and the crime occurred. *Cf. Wiggins*, 539 U.S. at 525 ("The scope of their investigation was also unreasonable in light of what counsel actually discovered in the DSS records.").

As a result of counsel's failure, the prosecution offered its unrebutted and untrue theory that it was Petitioner who made Meacham Park a violent place. "[T]hey're scared to death of this guy," the prosecutor argued. Trial Tr. 2335. "And they deserve to be able to walk the streets of their neighborhood and your neighborhood and anybody else's neighborhood without fear of guys like Kevin Johnson who reign in terror over this neighborhood." *Id.* Had counsel performed basic investigation, they could have presented overwhelming evidence that, in truth, Petitioner walked the streets of Meacham Park "in terror" his whole life.

1. Trial counsel's use of evidence of Petitioner's "abuse and neglect" from his immediate family does not cure counsel's failure to investigate the larger community and its unrelenting violence.

The district court reasoned that trial counsel introduced "substantial

evidence" describing Petitioner's "childhood experiences of abuse and neglect." App. 71. It then concluded that counsel are not ineffective simply because other attorneys might choose to present "different or additional details." App. 71-72. The ruling necessarily implies that the omitted evidence does not establish a unique "aspect of a defendant's character or record and any of the circumstances of the offense [. . . to] proffer[] as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). This was error for two reasons.

First, because this case involved the in-the-street shooting of a police officer, evidence of community violence and police aggression—or at least of the residents' widespread perceptions thereof—is among "the circumstances of the offense" that had uniquely mitigating potential. *Id.*; *see also supra* pp. 21-23. The evidence also helps to explain an aspect of Petitioner's character by providing insight into his state of mind at the time of the crime, which was a crucial issue at trial. Trial Tr. 1909, 1920-42, 1952-57, 1966-77, 1984-85, 1992-97, 2316-19, 2332-33. Counsel must "explore *all avenues* leading to facts relevant to the merits of the case and the penalty in the event of conviction." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (emphasis added). The district court's order, by contrast, authorizes capital counsel to explore *some* avenues while ignoring others, even if counsel have ample reason to believe that an investigation would be fruitful.

Second, Petitioner's lifelong experience of community violence was mitigating independent of the circumstances of the offense. Evidence that gangs

had a "gargantuan" influence in the hallways where Petitioner went to school, that children in Meacham Park fell asleep to the sound of gunshots, and that thirteen-year-olds carried guns for protection (ECF Doc. 88-1 at 45, 144, 208, 303, 323), for example, carries mitigating force separately and apart from Petitioner's abusive home life.

The prosecutor faulted Petitioner because he never "got back up" after getting "knocked down" at home. Trial Tr. 2324-25. But Petitioner's violent community made it exceedingly difficult to "get back up" or otherwise recover from the abuse and neglect that he suffered, in light of the community's "rampant" illegal activity and its troubling and pervasive "pattern of sex and violence." ECF Doc. 88-1 at 4. Counsel's deficient investigation left the jury ignorant of the community for whom the prosecutor sought justice: "Should the people of Meacham Park not get justice in this case because he didn't take advantage of all the opportunities that were there for him?" Trial Tr. 2325.

2. *Ringo* does not control Petitioner's claim

The district court's reliance on *Ringo v. Roper*, 472 F.3d 1001 (8th Cir. 2007), was misplaced, or at least debatable. App. 71-72, 140. *Ringo* is distinguishable on its controlling facts. Counsel in *Ringo* were specifically aware of the evidence that they strategically omitted from the trial. They decided not to present the testimony of childhood development specialist Dr. Wanda Draper because her testimony would contradict that of the defendant's mother and might

otherwise disrupt the "flow" of the mitigation case. *Ringo*, 472 F.3d at 1007. But that is just the point: counsel knew what Dr. Draper would say, because they obtained a report from her. *Id.* Counsel in Petitioner's case, by contrast, never obtained an evaluation from any mental health specialist, including one who could have described the impact of the violent community that counsel never investigated. PCR Tr. 167-68, 510-11.

Moreover, as explained above, neither *Ringo* nor any authority allows trial counsel to forgo *some* otherwise promising areas of mitigation investigation simply because counsel are pursuing others. *See, e.g., Rompilla* , 545 U.S. at 381-90 (counsel unreasonably failed to obtain file from the defendant's prior offense, notwithstanding counsel's otherwise thorough preparation of interviewing the client, speaking with his relatives, and employing "a cadre of three mental health witnesses"). The issue is not merely that "the evidence was not as detailed as it could have been." *Ringo*, 472 F.3d at 1007. It is that counsel abandoned an entire category of readily available mitigating evidence.

3. *Martinez* excuses the procedural default of Claim 21.

Petitioner has "cause" to overcome the default if (a) he brings a "substantial" claim of trial counsel's ineffectiveness, (b) his Rule 29.15 proceedings were the exclusive and "initial" avenue in which to present the claim, and (c) post-conviction counsel performed ineffectively with respect to the claim. *Martinez,* 566 U.S. at 14; *Dansby v. Hobbs*, 766 F.3d 809, 834 (8th Cir. 2014). Petitioner has

already explained above why his claim is "substantial," or at least why reasonable jurists could find it so. And there is no dispute that the Rule 29.15 proceedings were the exclusive and "initial" avenue in which to present the claim. *Martinez*, 566 U.S. at 14; Mo. Sup. Ct. R. 29.15(a).

Finally, post-conviction counsel were deficient in their investigation and claim development. Post-conviction counsel must conduct "an aggressive investigation of all aspects of the case," *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, § 10.15.1(E)(4) (2003), paralleling trial counsel's duty to seek out "all reasonably available mitigating evidence." *Id.* § 10.7(A). Post-conviction counsel in this case found it "apparent that trial counsel had not done a thorough job of investigating the family." ECF Doc. 88-1 at 355 (per attorney Willibey). Failing to "investigate and interview more witnesses about the community in which Kevin lived" is among post-conviction counsel's "chief regrets about Kevin's case." *Id.* at 357-58 "Meacham Park would have been the ideal place to develop this type of evidence." *Id.* at 192 (per attorney Leftwich). Post-conviction counsel "did not specifically investigate … the criminal history of Kevin's relatives," or "violent crimes near where Kevin was living." *Id.* at 357-58.

Rule 29.15 counsel declined to pursue even low-hanging fruit. Counsel failed to interview many of the family members living in the neighborhood. *Id.* at 45, 54-57, 71-81, 96-98, 111-29 (Joyce Coleman, Charisse Clark, Shawn Fields,

Lawanda Franklin, Myron Hodges, Syl Jackson). Counsel interviewed Petitioner's brother Marcus once, but they did not ask him about violence, gangs, child sex, or drugs. *Id.* at 1243-44. They did not interview Petitioner's uncles Wayne Wayne, Roscoe, Aaron, or Keith, his aunts Candace or Tausha, or his numerous cousins (except for Jermaine Johnson). *See generally* Witness Declarations (*id.* at 36-189, 200-354).

But post-conviction counsel missed another red flag. During Petitioner's postconviction proceedings, Federal Public Defender Amy Skrien represented Petitioner's brother Marcus in a federal gun possession case. *See* ECF Docs. 87-1, 94-5. Ms. Skrien asked whether Petitioner's attorneys would be willing to collaborate in compiling mitigation evidence, stating that she was "interested in reviewing DFS, family court records, any information about childhood and the neighborhood of Meacham Park." ECF Doc. 94-5. Skrien's team compiled substantial mitigating information about life in Meacham Park. In pleadings, she described the community as "a severely economically depressed area filled with poverty, drugs and violence." ECF Doc. 87-1. She also submitted letters to Marcus's judge from members of Petitioner's family, including Pat Ward, Henrietta Kimble, Alfred Jackson, Shalonda Miller, Joyce Coleman, and Valerie Jones. Skrien's non-capital sentencing memo and letters were filed months before Petitioner's capital post-conviction petition was due. *Id.*; Resp. Ex. U at 72 (Rule 29.15 motion). This filing not only flagged community violence as a source of

mitigating evidence for Petitioner; it also compiled a list of helpful witnesses for post-conviction counsel to contact.

The available records confirm post-conviction counsel's admitted deficiency. Reasonable jurists could debate whether to excuse the default of Petitioner's substantial claim under *Martinez*.

II. The Court should grant a COA on Petitioner's substantial claim that trial counsel failed to investigate and present evidence describing the police brutality in the community in which Petitioner was raised (Habeas Corpus Claim 20)

Petitioner stood trial for murdering a police officer, and the prosecutor urged the jury to provide "justice" for Sgt. McEntee as well as "the people of Meacham Park," who "deserve to be able to walk the streets of their neighborhood … without fear of guys like Kevin Johnson who reign in terror over this neighborhood." Trial Tr. 2324-25, 2335. All the while, the jurors knew little about the community of Meacham Park and its troubled relationship with the Kirkwood Police Department, as explained below. Petitioner grew up in a community where hostile policing was the norm, and the circumstances of his case necessitate an explanation of how he, and Meacham Park as a whole, experienced law enforcement. By failing to investigate and present this evidence, trial counsel deprived the jury of essential context surrounding Petitioner's crime.

A. Petitioner's claim

"Living in Meacham Park meant living in fear of the police." ECF Doc. 88-1

at 144 (per Emmanuel Johnson). For years, Meacham Park suffered from discrimination and oppression by the neighboring town of Kirkwood, where the population is mostly affluent Caucasians. *See generally* Colin Gordon Rpt. (ECF Doc. 88-1 at 567-619). Part of this tension resulted from Kirkwood's repeated attempts to expand its police department into Meacham Park, which eventually happened after Kirkwood annexed Meacham Park in 1992. *Id.* at 604-05. "It was a struggle for people to adjust when Kirkwood Police came in because … police [were] getting involved for the tiniest things." ECF Doc. 88-1 at 185 (per Cecil Jones). Police issued many jaywalking tickets, even though Meacham Park "only got sidewalks 5 or 10 years ago, so people who have lived in Meacham Park their whole lives are used to just walking down the street." *Id.* at 293 (per Florence Sloan). Racism was common, and officers often referred to black residents as "niggers." *Id.* at 97, 293 (per Myron Hodges, Florence Sloan).

Kirkwood police frequently resorted to excessive violence. *E.g.*, *id.* at 38 (After a fight broke out, "[t]he police came and maced all of us, even the little kids. Their eyes were burning really badly, and they had to pour milk in their eyes.") (per Thelma Allen); *id.* at 98 ("One time I was arrested and the police beat me up at the police station. Then, they took my shirt and put me in an air conditioned room where I froze until they released me.") (per Myron Hodges); *id.* at 247 ("One man reported that he was stopped on Tolstoi Street and forced to bend over. The officer searched his rectum right there on the street.") (per Harriet Patton); *id.* at

289 (police would "grab us and slam us around" when they searched black Meacham Park residents) (per Waddell Savage).

Sgt. McEntee was no different and had a reputation for racism and unprovoked violence. Local residents referred to him as "Tackleberry" (from the *Police Academy* movies) because he was "really big and tried to use his size to intimidate people." *Id.* at 293 (per Florence Sloan). He got into fights with people for no reason, *id.*; threw a pregnant woman onto the ground, *id.* at 171 (per Brittany Jones); knocked a teenage boy unconscious for playing dice at the park, *id.* at 277-78 (per Dameion Pullum); busted out people's taillights so he would have an excuse to pull them over, *id.* at 103(per Charles Howard); tried to hit a man with his car, *id.*; and referred to the young black men in the community as "monkeys sitting on a corner," *id.* at 188 (per Janet Jones).

Exposure to police violence led to distrust of police in Meacham Park's children, including Petitioner. "Children saw how their parents were treated, without respect or dignity, and this was their impression of the police. This helped perpetuate these tensions through multiple generations." *Id.* at 343 (per Jane Von Kaenel).

Petitioner experienced police brutality firsthand. One time, Petitioner was sitting on the porch with his uncle, his uncle's white girlfriend, and some of their friends. *Id.* at 277 (per Dameion Pullum). The police came up and told the women they had to leave, so Petitioner's uncle gave his girlfriend a kiss goodbye. *Id.* The

officer grabbed Petitioner's uncle and slammed his head into the bumper of a car. *Id.* Sgt. McEntee and a few other officers showed up, and they drew their guns on the group. *Id.* Another time, Sgt. McEntee maced Petitioner and a group of his friends for sitting in a car and listening to music after a football game. *Id.* at 276-77. In another instance, Petitioner was threatened at gunpoint when an officer chased him and his friend and, after catching them, threatened to shoot them. *Id.* at 48 (per Jason Clark); *see also* ECF Doc. 35 (Petition) at 252-58. The police targeted Petitioner because of his family's reputation and the fact that his relatives "did drugs and got into a lot of fights." ECF Doc. 88-1 at 294 (per Florence Sloan). The police would stop and question Petitioner when he was just walking down the street talking on the phone with his friends. *Id.* at 38 (per Thelma Allen).[4]

Trial counsel did present one witness who relayed a story which hinted at the racial tensions present in Meacham Park. Joseph White testified that he was twice pulled over by Sgt. McEntee, and that Sgt. McEntee screamed at him when White did not answer his questions "the way he thought I should have." Trial Tr. 2219-20. White's account presented a clear red flag to investigate Sgt. McEntee specifically and, more generally, what it was like to grow up black in the

[4] These anecdotes only sample the evidence on officers' aggression in Meacham Park. Counsel refer the Court more generally to the declarations of Thelma Allen, Jason Clark, Justin Clark, Seretha Curry, Shawn Fields, Aaron Harris, Tausha Harris, Myron Hodges, Charles Howard, Craig Howard, Alfred Sylvester Jackson, Emmanuel Johnson, Kevin Johnson, Sr., Brittany Jones, Cecil Jones, Janet Jones, Franklin McCallie, Tresa McCallie, Alvin Miller, Arthur Miller, Romona Miller, Harriet Patton, Bettye Price, Dameion Pullum, Waddell Savage, Florence Sloan, Candace Tatum, Marcus Tatum, Roscoe Tatum, Demetrius Taylor, Jane Von Kaenel, Cameron Ward, and Matthew Watkins. (ECF Doc. 88-1 at 36-189, 200-353).

predominantly white suburban enclave of Kirkwood. Given the abundance of witnesses and documents uncovered by federal habeas counsel to establish the distrust and fear Meacham Park residents felt toward the Kirkwood Police Department, all of which was available at the time of trial, trial counsel's failure to investigate, develop, and present such evidence was unreasonable.

Trial counsel barely investigated systemic abuse by the police and could not make a reasonable decision about the use of such evidence. When counsel fails to investigate an issue, the question becomes whether the investigation "was itself reasonable." *Wiggins*, 539 U.S. at 523. Counsel must first seek out "all reasonably available mitigating evidence" before reasonably deciding what evidence to present. *Id.* at 524. With little investigation into the activities of Sgt. McEntee and the Kirkwood Police Department, it was impossible for counsel to make "a fully informed decision with respect to sentencing strategy." *Id.* at 527.

Counsel had ample notice of the issue's importance. During his interrogation, Petitioner told the police that he feared Sgt. McEntee, and he described an incident in which Sgt. McEntee hit and maced Petitioner's friend. Resp. Ex. G. Pt. 2 at 169. Petitioner mentioned other officers "harassing" him, including when he was stopped for riding a bike after dark without a light and when he was ticketed for parking too close to a fire hydrant when his car was more than fifteen feet away. *Id.* at 169-72, 206-07. In a pretrial deposition, Florence Sloan described Sgt. McEntee as a "jerk" and "a**hole" who "harassed" people

and "would just do things to us for being in Meacham Park and being us in Meacham Park." ECF Doc. 88-1 at 461-62. Cecil Jones testified similarly in his deposition, explaining that "nobody liked" Sgt. McEntee and that people were "fearful" of him. *Id.* at 420. Trial counsel had abundant reason to investigate the relationship between Meacham Park and the local police, but they failed to do so.

Given the information known to counsel, their failure to investigate was unreasonable. Counsel already made a tactical decision to impugn Sgt. McEntee's character, both by eliciting evidence about the Joseph White incident and by telling the jury that "there may be a side of Sergeant McEntee that his family didn't see." Trial Tr. 2331-32. Having decided that Sgt. McEntee's past was relevant to the defense, it was inexcusable for counsel not to investigate that past in order to discover readily available events from their own client's background. "[T]he presumption of sound trial strategy founders in this case on the rocks of ignorance." *White v. Roper*, 416 F.3d 728, 732 (8th Cir. 2005).

Petitioner was prejudiced by counsel's failure. The evidence underlying Claim 20 would have shown that the police themselves oversaw a violent "reign" in Meacham Park, that the citizens were afraid of them, that Sgt. McEntee was among the most feared and violent officers (and referred to black citizens as "niggers" and "monkeys"), and moreover, that Petitioner's own experiences with Sgt. McEntee and other police officers were among the traumas that contributed to his adverse mental state at the time of the shooting. *See* ECF Doc. 94 at 22-39 and

sources cited; ECF Doc. 88-1 at 6-7, 11-12 (per Dr. Dudley). "These were the people that were supposed to protect and serve our community, but instead they harmed us," explains longtime Meacham Park resident Brittany Jones. ECF Doc. 88-1 at 171.

The evidence of police brutality in Meacham Park would have helped explain Petitioner's frame of mind at the time of the crime. Other courts have looked with approval at evidence of a victim's actions against a defendant, not to "characterize the victims' conduct as improper so as [] to alienate the jury" but instead to argue that "the conduct had to be taken into consideration as to how Appellant perceived it and reacted to it." *Black v. Workman*, 682 F.3d 880, 904 (10th Cir. 2012); *see also State v. Thomas*, 625 S.W.2d 115, 119-21 (Mo. 1981) (defendant convicted of capital murder was sentenced to life; evidence showed that he shot a police officer because he thought the officer tried to arrest him for no reason).

Counsel also failed to discover and present evidence that would have materially strengthened their chosen guilt phase defense, which is that Petitioner killed Sgt. McEntee suddenly and out of anger when he saw him smiling in the hours after the death of his brother Joseph ("Bam Bam"), having earlier seen Sgt. McEntee struggling with his mother on the porch as Bam Bam lay dying inside. Evidence that Sgt. McEntee had brutalized and traumatized Petitioner (and others) in the past would support counsel's theory that Petitioner acted out of devastation

rather than cool reflection. Experiential trauma would also support a defense that mental illness diminished Petitioner's capacity to deliberate at the time of the shootings, and it would otherwise mitigate the crime in the jury's eyes. *See* Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 Hofstra L. Rev. 923, 932-34 (2008) (noting that traumatic experiences place individuals at an increased risk of developing profound emotional and behavioral disturbances). There is a "reasonable probability" that the result of both phases of trial would have been different if counsel had investigated and presented the history and circumstances of Petitioner's dealings with the police. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

B. The district court's rulings

Petitioner conceded that this claim is procedurally defaulted, and the district court assumed that it was. App. 71. The court nevertheless refused to excuse the default under *Martinez*, concluding that the claim of trial counsel's ineffectiveness is not a "substantial" one. App. 71. Having refused to excuse the procedural default under *Martinez*, the district court denied an evidentiary hearing on the claim. *Id*. App. 71.

The district court also considered the much narrower claim that previous counsel asserted on post-conviction review but abandoned on appeal, i.e., that trial counsel failed to rebut the prosecution's "good character" evidence describing Sgt.

McEntee. *See* Respondent Ex. V at 295-303 (Rule 29.15 motion). The court agreed with the post-conviction motion court's view of the merits, reasoning that "trial counsel acted competently in raising the issue only briefly as opposed to attacking the victim and the police department as a central feature of the defense case." App. 71. In neither state nor federal court has Petitioner been granted an evidentiary hearing in order to ascertain counsel's strategy and the limited investigation supporting it.

The district court later denied a COA on the claim. App. 139-40. The court adhered to its view that it was "strategically appropriate" for counsel "not to attack the victim and the police department as a central feature of the defense case." App. 139. The court added that Petitioner's statements to police interrogators would have contradicted the accounts of Sgt. McEntee's bad character, and that Petitioner "acknowledged that he did not have any problems with Sgt. McEntee, that McEntee was always smiling, and that he treated Johnson with respect in an earlier encounter." App. 140.

C. The district court's decision is debatable among reasonable jurists.

Further proceedings are justified on Claim 20 because "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. First, the district court credited trial counsel with a "strategically appropriate" decision to present a narrow sliver of Sgt. McEntee's

misconduct, even though trial counsel did not investigate and discover readily available evidence of Sgt. McEntee's brutal dealings with broad members of the Meacham Park community – let alone connect Sgt. McEntee's misconduct to Petitioner's state of mind on the day of the crime. That ruling is wrong. "Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991). Prevailing norms require trial counsel to explore "family and social history, including … neighborhood environment [and]… experiences of racism or other social or ethnic bias[.]" *ABA Guidelines*, *supra*, § 10.7 Commentary. The community of Meacham Park experienced widespread police brutality for years on end, and Kevin Johnson was part of that community. The evidence is relevant, admissible, and a persuasive rebuttal to the prosecutor's argument for death. *Cf. Simmons v. Luebbers*, 299 F.3d 929, 936 (8th Cir. 2002) (evidence of "neighborhood frequented by street violence").

Second, the district court took Petitioner's pretrial statement out of context in its order denying a COA. Far from demonstrating Sgt. McEntee's good character, a full reading of Petitioner's statement shows that Petitioner had problems with Sgt. McEntee and other Kirkwood officers. Petitioner told the police that Sgt. McEntee showed him respect once because he was on camera. Resp. Habeas Corpus Ex. G. Pt. 2 at 203. Otherwise, "on the street [McEntee] wasn't

talking like that." *Id.* Petitioner feared Sgt. McEntee and talked about a time when he smacked and maced Petitioner's friend; Petitioner said, "[McEntee] can do that to him he could do to me [*sic*]". *Id.* at 169. Petitioner mentioned other officers "harassing" him, *id.* at 206-07, getting stopped when he rode a bike after dark without a light, *id.* at 170, and getting ticketed for parking too close to a fire hydrant when his car was more than fifteen feet away, *id.* at 171-72. Petitioner's statement, then, was consistent with other evidence of violent misconduct by Sgt. McEntee and his fellow Kirkwood officers.

1. The district court wrongly upheld as "strategically appropriate" a decision that trial counsel based on inadequate investigation.

The district court found that trial counsel acted reasonably in presenting only a small sliver of evidence concerning Sgt. McEntee. Claim 20 asserts that trial counsel were ineffective for failing to investigate and present evidence of widespread police brutality in the neighborhood in which Petitioner was raised, in which the crime occurred, and in which only hours earlier Petitioner's brother had suddenly died under circumstances that led Petitioner to blame the police.

But Claim 20 is much broader than the insignificant claim from the Rule 29.15 motion. Resting on the testimony of 36 witnesses, Claim 20 describes the community's long history of police brutality (both before and after the City of Kirkwood annexed Meacham Park in the 1990s); Sgt. McEntee's reputation for racism and violence within the community; and Petitioner's own experience of

racism and violence at the hands of Kirkwood police officers (including Sgt. McEntee and others). *See* ECF Doc. 94 at 22-39. Claim 20 was not "fairly presented" to the state courts because Petitioner did not raise "the same factual grounds and legal theories" that he now asserts. *Forest v. Delo*, 52 F.3d 716, 719 (8th Cir. 1995).

Petitioner's claim is defaulted because the bulk of its substance was never presented in any state court. The default is excused under *Martinez* because post-conviction counsel performed deficiently by their own admission, as discussed below. Moreover, precisely because Petitioner brings a new and unexhausted claim, it is irrelevant whether the post-conviction court reasonably rejected the narrow and McEntee-specific claim before it, as the district court concluded. *See* App. 71.

2. *Martinez* excuses the procedural default of Claim 20, which is a substantial claim that justifiably attacks trial counsel's limited investigation of Sgt. McEntee's misconduct and that of his fellow officers who patrolled the Meacham Park neighborhood.

Petitioner has "cause" to overcome the default if (a) he brings a "substantial" claim of trial counsel's ineffectiveness, (b) his Rule 29.15 proceedings were the exclusive and "initial" avenue in which to present the claim, and (c) post-conviction counsel performed ineffectively with respect to the claim. *Martinez*, 566 U.S. at 14; *Dansby*, 766 F.3d at 834. Petitioner has already explained, above, the substantial merits of his claim. And there is no dispute that the Rule 29.15

proceedings were the exclusive and "initial" avenue in which to present the claim. *Martinez*, 566 U.S. at 14; Mo. Sup. Ct. R. 29.15(a); *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012) ("Missouri law does not allow a claim for ineffective assistance of counsel to be raised on direct appeal.").

Finally, Rule 29.15 counsel were deficient in their investigation and claim development. Post-conviction counsel must conduct "an aggressive investigation of all aspects of the case," ABA *Guidelines*, *supra* § 10.15.1(E)(4), paralleling trial counsel's duty to seek out "all reasonably available mitigating evidence." *Id.* § 10.7(A). Rule 29.15 counsel knew about "racial tension" in Meacham Park and that people were "mad about the police," but they did not undertake a "thorough investigation of the Kirkwood police in general," even though they "knew that there was something more to develop concerning matters of police practices." ECF Doc. 88-1 at 357 (per post-conviction attorney Willibey); *accord id.* at 192 ("We knew that … Meacham Park residents felt harassed by the police, and there was no particular reason that we focused on Sgt. McEntee instead of the Kirkwood police more generally.") (per post-conviction attorney Leftwich).

Post-conviction counsel's admitted deficiency is supported by the record. Reasonable jurists could debate whether to excuse the default of Petitioner's substantial claim under *Martinez*, and the Court should grant a COA on Claim 20.

III. The Court should grant a COA on Petitioner's claim that trial counsel were ineffective in failing to investigate, develop, and present evidence of the severe abuse and neglect – including horrific physical, emotional, and sexual abuse – that Petitioner suffered and witnessed throughout his childhood (Habeas Corpus Claim 19)

Trial counsel presented only a limited, generalized and de-contextualized account of abuse and neglect from Petitioner's childhood. The superficial evidence presented by trial counsel did not begin to account for the distinct and corroborated evidence of extreme abandonment, neglect, and emotional, physical, and sexual abuse that marked Petitioner's childhood. As detailed in Petitioner's filings below – *see* ECF Doc. 35 at 235-247; ECF Doc. 88 at 29-33; ECF Doc. 94 at 14-18 – the newly-developed evidence would have been readily available to counsel had they conducted a thorough investigation of Petitioner's life history as they were constitutionally required to do. *See Wiggins*, 539 U.S. at 524 (capital counsel is required to seek out "*all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor") (emphasis in original); *Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir.1991) (counsel must "explore all avenues leading to facts relevant to guilt and degree of guilt or penalty"). The evidence would have shed light at the guilt phase on Petitioner's state of mind at the time of the shooting, and it would have been critical at the penalty phase, squarely rebutting the prosecution's penalty phase arguments that portrayed Petitioner's great-aunt Edythe and his grandmother Pat as having done "everything [they] could possibly do" and having gone "out of the

way" to help Petitioner. Trial Tr. 2321, 2324.

A. Petitioner's claim

As a result of counsel's limited investigation, the jury did not grasp the horrific and ongoing physical abuse Petitioner suffered at the hands of his caregivers, nor of the multi- and inter-generational history of physical and sexual abuse and violence within Petitioner's family, which Petitioner suffered and witnessed throughout his childhood. Because they cut off their investigation at an unreasonable juncture, trial counsel could offer no meaningful answer to the prosecutor, who belittled their mitigation evidence as "boil[ing] down" to Aunt Edythe having rules that "he doesn't want to follow" and to Petitioner "want[ing] to use that as an excuse to escape the appropriate punishment." Trial Tr. 2324.

Had counsel conducted the constitutionally-requisite investigation, they would have learned through available records and willing witnesses that:

> •Petitioner's mother, Jada, and her three children lived in a very small, one-room shack behind the adjacent houses of Jada's mother, Pat Ward, and her grandmother, Henrietta Kimble, in the poorest and most run-down section of Meacham Park. The shack's living space was filthy, and it was infested with mice, rats, and bugs; food bags and scraps were all over the floor where the children were crawling. There were no private spaces in the shack, and the kids shared a bed with the adults. There were almost always other people – usually different men each time – in and out of the shack. ECF Doc. 88-1 at 218-19, 221, 300, 311-12, 783 (per Marcus Tatum, Candace Tatum, Tresa McCallie, and DFS records).
>
> •To support her drug habit, Jada was prostituting herself for money or crack, and exposing her young children to drugs and sex. Once, Jada took Petitioner's brother, Marcus, with her while she had sex for money with a

tow-truck driver in an empty house in Meacham Park. Marcus, who was only four or five years old at the time, saw his mother wearing a pink jumpsuit, bent over the bed while the man had sex with her. Jada would take Petitioner out with her for long, unexplained periods as well. Another time, Jada had sex with a neighbor for money, in full view of Petitioner, Marcus, and their sister Kanesha. While Petitioner and Marcus lived in the shack with Jada, a sixty-year-old man named Julius Waller often slept over. Jada was likely prostituting herself with Waller for either money or drugs. At times, Jada left the children home alone with Waller. *Id.* at 299-300, 312-13, 643-47 (per Marcus Tatum, Candace Tatum, and DFS records).

•DFS placed Petitioner with his Aunt Edythe Richey when he was four-and-a-half years old. Although Edythe provided Petitioner with bare necessities, she was not a warm person, and she did not provide Petitioner with a loving and caring environment. Edythe seemed bitter over her breakup with her husband Kevin Richey. Over time, Edythe became extremely physically and psychologically abusive to Petitioner. *Id.* at 45, 78, 300 (per Charisse Clark, Lawanda Franklin, Candace Tatum).

•By the time Petitioner was in Kindergarten, Aunt Edythe beat him nearly every day, either with a paddle, a belt, or a switch. She even had a paddle made with Petitioner's name on it. Rachel Jenness, Petitioner's teacher, knew that Petitioner was being whipped and beaten by Edythe. Whenever Edythe came around, Petitioner cowered from her. Jenness spoke to a school counselor about whether they should call the police about the abuse Petitioner was experiencing at home, but there was no intervention. Jenness never saw Edythe be loving or affectionate toward Petitioner, and it appeared to her that Petitioner was an obligation Edythe did not want. Petitioner was on "punishment" all the time at Edythe's. *Id.* at 66, 130-33, 172-73, 256-57, 284, 317 (per Seretha Curry, Rachel Jenness, Brittany Jones, Barbara Pickett-Champion, Edythe Richey, and Marcus Tatum).

•Because of Aunt Edythe's second-shift work schedule, Petitioner spent a lot of time at Grandma Pat's home, where his brother Marcus was. Pat's house, like the shack in back, was infested with cockroaches and mice, with trash and clothes covering the floor. Grandma Pat did not seem to care. Similarly,

anything went at (great grandmother) Henrietta's house next door. The kids ran in and out as they wanted, and basically raised themselves. There were so many people in the houses at any given time that they would sleep on couches, chairs, and the floor. None of the children, including Petitioner and his brother, bathed regularly or wore clean clothes. There was never enough food for the kids. When the kids got hungry, they scrambled to find food stamps, which were strewn about the house. If they did not have food stamps, they stole food. Plenty of times the kids just went hungry. Like her daughter Jada, Grandma Pat – who had ten children of her own – frequently left the children alone and unattended. ECF Doc. 88-1 at 171-72, 283-84, 301-02, 314-17, 349, 643, 648, 663, 666-67 (per Brittany Jones, Edythe Richey, Candace Tatum, Marcus Tatum, Cameron Ward, DFS records).

•Grandma Pat physically abused her children and grandchildren, including Petitioner. She beat at least one of the kids nearly every day, using whatever she could get her hands on, including switches, extension cords, belts, bottles, and shoes. Pat once threw a doll at her son, which hit him so hard it cut his head open. Another time, Pat threw a knife at her son Cameron ("Wayne-Wayne"), which stuck in the side of his head. She went after Marcus with a box cutter. *Id.*at 315-16, 348-49 (per Marcus Tatum and Cameron Ward).

•The Ward house was filled with violence between the children. The Ward children used to tease Petitioner and Marcus about their mother Jada being a crack addict. Sometimes, the older Ward children were left in charge of the younger children. Pat's daughter Maudis once told Marcus she was going to whip him, and she grabbed him. Marcus yelled that she wasn't his mother, so Maudis grabbed a knife and went after Marcus, who was so scared he went upstairs and grabbed a BB gun and pointed it at the door, ready to shoot if Maudis came through the door. On another occasion, Maudis got into a fight with Pat's boyfriend Flip, and stabbed him. The Kirkwood Police were called once when Pat's sons Christopher ("Tink") and Wayne-Wayne got into a fight over who was going to get to sleep on the couch that night. *Id.* at 316, 1080-82 (per Marcus Tatum and court records).

•Petitioner's family has a multi-generational history of incest and sexual

> violence, and Petitioner himself was exposed to and forced to participate in sexual and incestuous acts from early in his childhood. When Petitioner was only about six or seven years old, he was directed by uncles and cousins to join in sex acts. Marcus and Petitioner were directed to have sex with a girl their age, which they did on an old mattress outside Grandma Pat's house. At Grandma Pat's house, the many children there would sometimes "rub" on each other. Petitioner's cousin Regina Tatum, the daughter of Jada's brother Reggie, had sex with a number of her cousins, including Petitioner's brother Marcus. Regina also had sex with her brother, Jamar ("L.B.") King. When Marcus had sex with Regina, who was only about ten years old at the time, Regina was no longer a virgin and had significant knowledge about sex, which led Marcus to believe she had been molested. Marcus later learned that Regina's father, Reggie, had molested her. *Id.* at 318-19 (per Marcus Tatum)

Psychiatrist Richard S. Dudley, M.D., describes Petitioner's childhood history as revealed by this new evidence as "among the most extreme cases that this psychiatrist has ever seen in his 40 years of practice and 30+ years of performing psychiatric evaluations in connection with capital litigation." *Id.* at 3. This is the kind of mitigating evidence that any "competent attorney, aware of this history, would have introduced … at sentencing." *Wiggins*, 539 U.S. at 535.

B. The district court's rulings

The parties agree that Claim 19 is defaulted because it was not presented in state post-conviction proceedings. The district court refused to find the default excused under *Martinez*, concluding that there was "no substantial showing of the denial of a constitutional right." App. 67. The court concluded that this claim was "without merit," reasoning that trial counsel conducted a reasonable investigation

of Petitioner's childhood history by obtaining a partial set of DFS records and made a "strategic choice" to present at least some evidence of childhood abuse in mitigation. App. 67-68. After refusing to excuse the procedural default, the district court denied an evidentiary hearing. App. 68. The district court later denied a COA on Claim 19, but without providing additional reasoning beyond its previous rulings. App. 138-39.

C. This Court should grant a COA on Claim 19 because Petitioner brings a substantial claim of trial counsel's ineffectiveness, and the district court's refusal to forgive the procedural default under *Martinez* is debatable among reasonable jurists.

By upholding trial counsel's "strategic choice" despite the limited investigation supporting that choice, the district court contravened binding authority requiring capital counsel to undertake a "thorough" search for "all reasonably available mitigating evidence." App. 68; *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Wiggins*, 539 U.S. at 524. Counsel in this case overlooked entire avenues of mitigation that they failed to investigate and present, including Petitioner's history of sexual abuse, as well as the fact that Petitioner was routinely and sadistically beaten by his Aunt Edythe – whom the prosecutor praised for giving Petitioner a chance to succeed in life. Trial Tr. 2321-24. Counsel's performance was also deficient in its temporal scope: although trial counsel presented evidence of Petitioner's abuse and severe neglect at the hands of his mother, the fact remains that he was removed from his mother's legal custody at

the age of four, which was *fifteen years* before the crime occurred. Trial Tr. 2088, 2127, 2243-45. It was incumbent on counsel to investigate the deep, horrific, and inescapable abuse and neglect Petitioner suffered both before *and* after he was removed from his mother's custody. *See Wiggins*, 539 U.S. at 525-26. The ruling below is debatable among reasonable jurists, and a certificate of appealability should issue. *Slack*, 529 U.S. at 484.

1. The claim of ineffective assistance is a substantial one.

The district court's ruling wholly ignored the documented evidence of extreme emotional, physical, and sexual abuse underlying Claim 19, which differs in kind, severity, and time-frame from the scant evidence trial counsel presented. *See Strickland*, 466 U.S. at 690-691 ("strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"); *Wiggins*, 539 U.S. at 527-28 ("In light of what the [family and social history] records actually revealed, however, counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible"). The fact that trial counsel presented *some* evidence of abuse and neglect does not suffice under the constitutional standards governing counsel's duty to investigate. *See Sears v. Upton*, 561 U.S. 945, 955 (2010) (the fact that some evidence was introduced in mitigation at trial does not "foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the

defendant"); *Porter v. McCollum*, 558 U.S. 30, 40-44 (2009) (counsel presented a superficially reasonable mitigation theory during the penalty phase but failed to discover other significant mitigation evidence that came to light only during post-conviction proceedings).

The district court's ruling to the contrary is at least debatable among reasonable jurists. The mere fact that trial counsel reviewed a portion of the available social service records or that such records exceeded 1600 pages – *see* App. 67-68 – does not mean that counsel's investigation was per se adequate or that their resulting strategy was per se reasonable. To the contrary, "[a] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. In this case, counsel knew that Petitioner suffered at least some abuse and neglect, that a state agency removed him from his mother's custody, and that DFS did not solve Petitioner's problems. Nevertheless, counsel failed to interview most of Petitioner's closest relatives and friends, and among those whom they did interview, counsel failed to ask critical questions about the abuse and neglect suffered by Petitioner. *See* ECF Doc. 88 at 33-34 & n.8; ECF Doc. 88-1 at 50-51, 53, 55-57, 62-63, 65-66, 70, 74-79, 81-82, 87-88, 90-91, 93, 96-98, 127-28, 130-34, 136-38, 142-43, 150-55, 159-60, 171-73, 181, 183-84, 186-89, 218-24, 229-30, 233, 239, 242, 253-55, 273-74, 278-79, 281-87, 299-305, 310-19, 327, 329-36, 348-49, 351.

Counsel's limited investigation left entire categories of mitigating evidence undiscovered. For example, trial counsel never interviewed Petitioner's brother, Marcus Tatum. ECF Doc. 88-1 at 332. Among many other things, Marcus could have explained that Petitioner and his extended family were "very sexual from a young age," and that Petitioner both witnessed and suffered acts of sexual abuse at Grandma Pat's home and elsewhere. *Id.* at 318-19. The district court was simply mistaken in upholding counsel's investigation as "reasonable," and in concluding that the new evidence "merely bolsters that which was already introduced in mitigation." App. 67-68. Counsel cannot have made a reasonable "strategic choice" on how to describe Petitioner's childhood, *id.*, without investigating the relevant witnesses. *See* ABA Guidelines, *supra*, § 10.7 ("It is necessary to locate and interview the client's family members … and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others."). Counsel in this case "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524.

Moreover, the evidence underlying Claim 19 does not "merely bolster" the limited trial testimony as the district court remarked. *See* App. 68. The new new evidence describes entire avenues of mitigation that counsel did not discover and present – including the fact that Aunt Edythe severely abused Petitioner by

whipping and beating him, that Petitioner's mother engaged in prostitution with her children present, and that Petitioner's family has a generations-long history of sexual abuse and incest. Counsel's performance is prejudicially deficient when, as here, the mitigating evidence at trial is materially incomplete. *See, e.g.*, *Outten v. Kearney*, 464 F.3d 401, 421 (3d Cir. 2006) (brief evidence of "abusive childhood" does not mean the jury had "a comprehensive understanding of Outten's abusive relationship with his father or other aspects of his troubled childhood"); *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001) (counsel's "cursory examination" merely "touched upon general areas of mitigation").

Far from merely "bolstering" the trial testimony, the evidence would have corrected the prosecutor's misleading argument that Petitioner's caregivers had done "everything they could possibly do" to help Petitioner. Trial Tr. 2323 (prosecutor's closing argument). *See*, *e.g.*, *Williams v. Allen*, 542 F.3d 1326, 1340 (11th Cir. 2008) (trial counsel "obtained an incomplete and misleading understanding of Williams' life history" by relying solely on the defendant's mother). Petitioner's abuse at the hands of his Aunt Edythe exemplifies trial counsel's failure to set the record straight. By the time Petitioner was in kindergarten, Edythe beat him nearly every day, either with a paddle, a belt, or a switch; she even had a paddle made with Petitioner's name on it. *Id.* at 16, 172, 284-85, 317 (per Dr. Dudley, Brittany Jones, Edythe Richey, Marcus Tatum). Rachel Jenness, Petitioner's teacher, knew that Petitioner was being beaten and

whipped by Edythe. Whenever Edythe came around, Petitioner cowered from her. *Id.* at 130. Jenness spoke to a school counselor about whether they should call the police about the abuse Petitioner was experiencing at home, but there was no intervention. *Id.* at 132-33. Jenness never saw Edythe be loving or affectionate towards Petitioner, and it appeared that Petitioner was an obligation Edythe did not want. *Id.* at 131. Other teachers of Petitioner made similar observations. *Id.* at 66, 256-57 (per Seretha Curry, Barbara Pickett-Champion). Petitioner's jurors were simply misinformed about his background.

2. *Martinez* allows for full review of Claim 19, which was procedurally defaulted through Rule 29.15 counsel's deficient performance.

Petitioner has "cause" to overcome the default if (a) he brings a "substantial" claim of trial counsel's ineffectiveness, (b) his Rule 29.15 proceedings were the exclusive and "initial" avenue in which to present the claim, and (c) post-conviction counsel performed ineffectively with respect to the claim. *Martinez*, 566 U.S. at 14; *Dansby*, 766 F.3d at 834. Petitioner has already explained why Claim 19 is "substantial," and it is undisputed that the Rule 29.15 proceeding was the "initial" proceeding in which Petitioner could have brought his claim under Missouri law. Mo. Sup. Ct. R. 29.15(a) ("exclusive remedy").

On the question of performance, post-conviction counsel failed to conduct "an aggressive investigation of all aspects of the case" and to seek discovery of "all reasonably available mitigating evidence" – even though they breviewed social

service records beyond the incomplete set obtained by trial counsel. ABA Guidelines, *supra*, § 10.15.1(E)(4); *see also Trevino v. Davis*, 829 F.3d 328, 348-49 (5th Cir. 2016); *McLaughlin v. Steele*, 173 F. Supp. 3d 855, 872-73 (E.D. Mo. 2016). Post-conviction counsel did not interview family members, including Petitioner's brother Marcus, about the ongoing sexual abuse and incest within the family, or the family's troubling and decades-long history of mental illness and criminality. ECF Doc. 88-1 at 62-63, 193-94, 281, 311-32, 356-59 (per Carmen Cooper-Crenshaw, Edythe Richey, Marcus Tatum, and attorneys Leftwich and Willibey); *see also* ABA Guidelines, *supra* § 10.7 & Commentary (requiring a multi-generational investigation, which "frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment"). Neither did post-conviction counsel consult Petitioner's teachers or other important witnesses mentioned in DFS records, who had knowledge of the violent abuse and neglect that Petitioner was suffering at the hands of all of his caregivers. ECF Doc. 88-1at 191-94 (per Leftwich); *id.* at 356-59 (per Willibey).

Post-conviction counsel thereby omitted critical details of Petitioner's troubled history, including the disturbing sex acts to which Petitioner was exposed as a young child and the brutal abuse that he suffered at the hands of Aunt Edythe. *See id.* at 3, 16, 66, 130-33, 172, 284-85, 317-19 (per Dr. Dudley, Seretha Curry, Rachel Jenness, Brittany Jones, Edythe Richey, Marcus Tatum). The evidence

underlying Claim 19 was available to both trial and post-conviction counsel through a reasonable investigation. The available records support post-conviction counsel's ineffective assistance in failing to investigate and present this claim. Reasonable jurists could debate whether to excuse the default of Petitioner's substantial claim under *Martinez*.

IV. The Court should grant a COA on Petitioner's defaulted claim that trial counsel failed to investigate and present evidence of Petitioner's long-term trauma, dissociation, and frontal lobe impairment – as distinct from the state-court claim that trial counsel failed to show that Petitioner acted from an "acute" stress disorder from his brother's sudden death in the hours before the crime (Habeas Corpus Claim 18)

Trial counsel had notice that Petitioner suffered from mental illness. Their own evidence showed that Petitioner had been admitted to a psychiatric hospital in the eighth grade, had attempted suicide at 14, had a history of hearing voices, and, of course, had suffered the sudden and unexpected death of his own brother only hours before the crime. Trial Tr. 2259, 2263-64; PCR Tr. 466-469; ECF Doc. 35 Ex. 5, at 5. Counsel chose not to present evidence of a mental illness, but they made that choice without even having their client evaluated. PCR Tr. 468-69, 510-11. Counsel believed that Petitioner's "story" was already "compelling in the sense of this happening very soon after he lost his brother," and counsel wished to avoid losing that "story" by "turning this into a battle of mental health experts." PCR Tr. 484. Trial counsel were ineffective for not investigating Petitioner's chronic and ongoing symptoms of severe mental illness. Trial counsel also failed to discover

that Petitioner suffers from a frontal lobe dysfunction that impairs his impulse control and that he was acting in a dissociative state at the time of the crime. Moreover, because post-conviction counsel were also ineffective for failing to conduct such an investigation, there is cause and prejudice to excuse their default of the claim under *Martinez*.

A. Petitioner's claim

Trial counsel made a "deliberate choice" not to present evidence of a mental illness, App. 110, but without knowing the evidence that they were rejecting. That choice is highly suspect and itself justifies further proceedings on Petitioner's claim. *See Jones v. Delo*, 258 F.3d 893, 902 (8th Cir. 2001) ("[A]lthough we would not lay down any per se rule, it is probably true that defense counsel in a capital case should routinely have their client evaluated by a mental-health professional.").

Solely as a "fact witness," PCR Tr. 167-68, trial counsel enlisted Dr. Daniel Levin, a psychologist who had evaluated Petitioner in 2003 at the request of the Department of Family Services. Dr. Levin did not evaluate Petitioner after the crime and did not provide a diagnosis or non-diagnosis to trial counsel. PCR Tr. 167-68, 468-69, 510-11. Testifying during the penalty phase, Dr. Levin described Petitioner's state of mind in the most vacuous of terms:

> I believe that the death of Kevin's brother was a major trauma and that it stirred up in Kevin a number of complex, painful, intense and overwhelming feelings that have a direct – that directly affected what

happened and why he shot Mr. McEntee.

Trial Tr. 2271. The prosecution belittled Dr. Levin's testimony as "psychobabble." Trial Tr. 2323.

Previous counsel's failures left critical evidence undiscovered and undeveloped at trial and on post-conviction review. Forensic psychiatrist Richard S. Dudley, M.D., has examined Petitioner and has considered his history of hearing voices as well as the wide-ranging traumas that Petitioner experienced from childhood until his age of 19 at the time of the shooting. Dr. Dudley describes those traumas as follows:

> Kevin was whipped, beaten, and maced by various caregivers; directed by uncles and cousins to join in sex acts as a prepubescent child; and left home alone as a toddler for days without food or heat. This abuse was followed by neglect in the form of rejection and abandonment. This history of repeated exposure to violent abuse in the absence of the type of parental protection, nurture and support that might have mitigated the impact of the repeated exposure to violence is among the most extreme cases that this psychiatrist has ever seen.

ECF Doc. 88-1 at 3.

Dr. Dudley emphasizes that, independent of a diagnosis of acute stress disorder or posttraumatic stress disorder, "the traumatic experiences that caused [Petitioner's] psychiatric difficulties occurred when he was a child," including "very prominent dissociative symptoms that are different than those seen" in ASD or PTSD. *Id.* at 10. Bam Bam's death was not the "precipitating traumatic event" of these psychiatric impairments. *Id.* Rather, Petitioner has a "long history of

experiencing two distinct personality states," *id.* at 9-10, symptomatic of a deep-rooted and debilitating mental illness. In moments where his depression, suicidality, or impulse control are worst, one personality state, "Kris," controls Petitioner's faculties and leaves Petitioner with "a less than fully clear memory of what has happened when he is being controlled by Kris." *Id.* Dr. Dudley states, to a reasonable degree of medical certainty, that Petitioner developed a dissociative identity disorder. *Id.* at 10. At the time of the crime, Petitioner underwent a "dissociative episode where Kris took control." *Id.* at 11. When "Kris" takes over, he responds to the triggering event "in a way that the other personality states would never be able to respond." *Id.*

Trial and post-conviction ounsel also failed even to consider a neuropsychological evaluation, despite available funding. *Id.* at 194, 355, 359. That step would have revealed yet additional dysfunction. Psychologist Daniel A. Martell, Ph.D., has since examined Petitioner and administered a standard battery of neuropsychological tests. *Id.* at 14-15, 24-30. Dr. Martell observed a "focal deficit in frontal lobe executive functioning," which impairs planning, response inhibition, and impulse control. *Id.* at 32. Focal frontal lobe dysfunction is associated with "aggressive dyscontrol," intermittent explosive disorder, and a tendency for subjects to be "oblivious to the future consequences of their actions" and to be "guided by immediate prospects only." *Id.* at 32-33. The combination of Petitioner's psychiatric disorders, frontal lobe impairment, and severe impulsivity

"greatly contributed" to the crime, Dr. Martell observed. *Id.* at 34. Petitioner's "moral compass was effectively 'offline' at the time of the instant offense." *Id.*

B. The district court's rulings

Having upheld as "reasonable" the state court's determination that trial counsel were not ineffective for failing to present a defense of acute stress disorder, the district court denied Petitioner's request for an evidentiary hearing in order to consider Petitioner's broader and longer-term impairments. *Id.* Citing *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), the district court stated that its review of the reasonableness of the state court's decision is limited to the state court record. App. 107-11. The district court therefore concluded that it could not consider any new evidence. App. 111. The court later denied a COA, again upholding the state court's ruling on Petitioner's claim concerning acute stress disorder as a theory of diminished capacity. App. 145. At no point did the district court consider Petitioner's long term impairments as giving rise to a separate *claim* for habeas relief, as opposed to new *evidence* supporting the claim about *acute* stress disorder. App. 48-52, 107-11, 145.

C. The district court's decision is debatable among reasonable jurists and justifies a COA.

Petitioner need only show that "reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to

proceed further." *Miller-El I*, 537 U.S. at 336. That standard is easily satisfied for the reasons explained below.

1. Petitioner brings a "substantial" and otherwise cognizable claim of trial counsel's ineffectiveness under *Martinez*.

Petitioner brings a new, unexhausted, and procedurally defaulted *claim* as supported by Dr. Dudley's and Dr. Martell's diagnoses, and which is separately cognizable under *Martinez*. The claim is that trial counsel failed to discover and present evidence that Petitioner suffers from chronic and long-term conditions beyond the "acute" disorder described on state post-conviction review – specifically, that he was in a dissociative state at the time of the shooting secondary to longstanding psychiatric illness, and that brain dysfunction impaired his ability to make sound and rational decisions. ECF Doc. 88 at 22-28; ECF Doc. 94 at 4-5; ECF Doc. 88-1 at 1-35. The combination of Petitioner's psychiatric disorders, frontal lobe impairment, and severe impulsivity "greatly contributed" to the crime, according to Drs. Martell and Dudley. ECF Doc. 88-1 at 34. Petitioner's "moral compass was effectively 'offline' at the time of the instant offense." *Id.*

Petitioner's claim satisfies the requirements of *Martinez*. First, Petitioner brings a "substantial" claim of trial counsel's ineffectiveness, which means that his claim of prejudicially deficient performance has at least "some merit." *Martinez*, 566 U.S. at 14; *Dansby*, 766 F.3d at 834. Trial counsel wholly failed to investigate mental health defenses before deciding to forgo them. A reviewing court must

consider the adequacy of counsel's investigation, which depends on "whether the known evidence would lead a reasonable attorney to investigate further." *Id.* Petitioner's trial counsel were aware of numerous indications of serious mental illness, including Petitioner's history of suicidality, hearing voices, and his traumatic childhood experiences in his family and while in DFS's custody. PCR Tr. 466-69; Trial Tr. 2259-64; ECF Doc. 35 Ex. 5 at 5. Trial counsel, then, "chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Wiggins*, 539 U.S. at 527-28. That failure left the jury with "no testimony to assist the jurors in making an educated determination about [Petitioner's] mental condition and whether it mitigated the offense." *Hutchison v. State*, 150 S.W.3d 292, 306-307 (Mo. 2004). Taken as a whole, the undiscovered evidence of Petitioner's severe and long-term impairments "'might well have influenced the jury's appraisal' of [Petitioner's] moral culpability." *Wiggins*, 539 U.S. at 538 (quoting *Williams v. Taylor*, 529 U.S. 362, 398 (2000)).

Second, the Rule 29.15 proceedings were the exclusive and "initial" avenue in which to present the claim. *Martinez*, 566 U.S. at 14; Mo. Sup. Ct. R. 29.15(a).

Third, post-conviction counsel performed deficiently by not investigating and presenting evidence of Petitioner's long-term impairments. Post-conviction counsel had notice of Petitioner's psychotic symptoms. Petitioner shared with them a "particularly detailed description of going out into the woods and speaking with

an imaginary friend." *Id.* at 355-56 (per attorney Willibey). Petitioner reported hearing voices to psychologist Richard Taylor, when he was 15 years old, and his peers recount episodes of dissociative or psychotic behavior. Pet. Habeas Corpus Ex. 5 at 5; ECF Doc. 88-1 at 20, 317, 346-47. An "intake" evaluation taken when Petitioner entered the Potosi Correctional Center in 2008 observed that Petitioner "may have delusions of reference and thinking that is disorganized, bizarre, disoriented, and circumstantial." ECF Doc. 88-1 at 555. The Potosi report recommended further evaluation of Petitioner's "bizarre and possibly psychotic experiences/ideations." *Id.* at 556.

Petitioner also has a "genetic vulnerability to the development of psychiatric difficulties," including psychosis. ECF Doc. 88-1 at 9 (Dr. Dudley). The twin brother of Petitioner's father has been diagnosed with paranoid schizophrenia, and Petitioner's sister was prescribed anti-psychotic drugs and admitted to a psychiatric hospital after she set fire to her foster mother's home at age five. *Id.* at 888-99, 922-86. Rule 29.15 counsel's failure to investigate Petitioner's non-acute disorders was ineffective. Post-conviction counsel regret that they "did not conduct a more thorough development of Kevin's mental health history." *Id.* at 359 (per attorney Willibey).

Neuropsychological difficulties, too, were within post-conviction counsel's notice. Petitioner's case was "the type of case in which we might obtain such an evaluation[.]" ECF Doc. 88-1 at 194 (per attorney Leftwich). The testimony

elicited by post-conviction counsel proved the need for further inquiry. Post-conviction expert Dr. Cross noticed a disparity between Petitioner's performance and verbal IQ scores, which is a symptom of "executive function difficulties" involving "the frontal lobe of the brain." PCR Tr. 355. Those difficulties could impair Petitioner's decisionmaking and judgment, especially in times of "great" stress. *Id.* Petitioner also has a history of head injuries as reported to Dr. Taylor in 2001, including concussions with and without the loss of consciousness. ECF Doc. 35 Ex. 5 at 5; ECF Doc. 88-1 at 18. Multiple head injuries are known to increase the "risk for psychiatric and behavioral disorders, as well as chronic brain dysfunction." ECF Doc. 88-1 at 31 (per Dr. Martell); *Harries v. Bell*, 417 F.3d 631, 639-40 (6th Cir. 2005) ("Frontal-lobe damage can result from head injuries and can interfere with a person's judgment and decrease a person's ability to control impulses."). Just as their trial predecessors did, post-conviction counsel cut short their investigation "at an unreasonable juncture." *Wiggins*, 539 U.S. at 527.

2. *Pinholster* does not forbid an evidentiary hearing or other proceedings on Petitioner's procedurally defaulted claim concerning his long-term psychosis and frontal lobe dysfunction, which are distinct from the claim of "acute" stress disorder that was litigated on state post-conviction review.

Pinholster does not apply to Petitioner's new and distinct claim that trial counsel failed to investigate and present evidence of Petitioner's brain dysfunction and dissociative identity disorder. The claim is procedurally defaulted and yet excused under *Martinez*, rather than merits-reviewed under *Pinholster*. The fact

that Petitioner brought *some* mental health claim in state court does not mean that all such evidence describes the same claim. *See, e.g.*, *Dansby*, 766 F.3d at 837-40 (treating claims that counsel failed to investigate early life or prepare social history as unexhausted for *Martinez* purposes but treating a closely related claim – that trial counsel failed to properly prepare for the penalty phase or call certain witnesses – as exhausted because it was raised on post-conviction).

The decision in *McLaughlin v. Steele*, 173 F. Supp. 3d 855 (E.D. Mo. 2016) (per Perry, J.), issued by the same district court that denied relief in this case, illustrates the point that Petitioner brings a new and defaulted claim instead of merely supporting an old and exhausted claim with new evidence. The court in *McLaughlin* treated an ineffective assistance claim regarding psychiatric testimony as unexhausted and eligible for a *Martinez* analysis; on the other hand, it rejected on the merits an exhausted claim concerning trial counsel's failure to obtain a neuropsychological evaluation. *Id.* at 869-87. McLaughlin's psychiatric-evidence theory was a new and unexhausted "claim" for relief, despite the fact that post-conviction counsel had already litigated another mental health claim concerning McLaughlin's neuropsychological impairments.

The same result is justified here: Petitioner brings a new and unexhausted claim with evidence that he suffers from neuropsychological deficits, long-term trauma, and dissociative identity disorder, as distinguished from his exhausted and non-defaulted claim that he suffered from "acute stress disorder" following his

brother's sudden and unexpected death on one particular day. The two claims both involve mental illness and expert testimony, but that does not make them the same claim, particularly as the core operative facts differ for each claim. Precisely because Petitioner did not bring the new claim in state court on post-conviction, it makes no sense to limit a federal court's review to the state court record under *Pinholster*. *See*, *e.g.*, *Bey v. Sup't Green SCI*, 856 F.3d 230, 237-40 (3d Cir. 2017) (granting relief under *Martinez* based on trial counsel's failure to raise a particular objection to a jury instruction regarding eyewitness testimony, despite the litigation of other ineffectiveness claims concerning the same instruction). The district court's decision to the contrary is debatable among reasonable jurists.

V. It is at least debatable that the prosecution used its peremptory strikes in a racially discriminatory manner (Habeas Corpus Claim 1)

This was a racially charged case that occurred in a black neighborhood long-tormented by racial hostility, often fomented by a largely white police force. *See* Arguments I-II, *supra*. In Petitioner's first trial, a racially balanced jury struggled with the question of intent under the unique circumstance of this case, and it deadlocked 10-2 in favor of second degree murder. *See* PCR Tr. 453, 491-92; *Johnson II*, 406 S.W.3d at 914 (Breckenridge, J., dissenting).[5] Notably, this balanced jury was picked with selection commencing on March 26, 2007 – or just six days after Prosecuting Attorney Robert McCulloch's office was rebuked for the

[5]At least six of the jurors from the initial trial were African American, including Allen McCarter, Omar Simms, Keisha Reeves-Davis, Lisa Lavender, Anitra Mahari, and Gloria Wilcox.

second time in as many years for employing race as a criterion in jury selection. *See State v. McFadden*, 216 S.W.3d 673, 677 (Mo. 2007) (decided March 20, 2007) (reversing on *Batson* grounds and noting, in the previous year's opinion, "five *Batson* violations by the same prosecutor who tried the present case"). McCulloch was not about to make the same mistake twice. This time he used peremptory strikes to ensure a predominately white jury. Equal protection was violated, and a COA should be granted.

A. Petitioner's claim

Exclusion of even a single juror on the basis of race requires a new trial. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) ("A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions") (internal citation omitted); *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (discriminatory strike of one juror required a new trial); *see also Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) ("Two peremptory strikes on the basis of race are two more than the Constitution allows."). This bedrock rule was violated in this case by the prosecution's strike of Debra Cottman, an African-American prospective juror. The district court's decision to uphold the state court's rejection of Petitioner's *Batson* claim is debatable and justifies a COA for the reasons explained below.

1. Prosecutor McCulloch overwhelmingly struck black venirepersons.

Petitioner easily demonstrated a prima facie case of purposeful discrimination, thus shifting the burden to the prosecution to explain its strikes. The primary panel of 30 was comprised 24 whites and six blacks.[6] 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,[7] 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%). In the combined panel, the prosecution's strike rate against black was *seven times* its rate

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[6] Jury selection in this case proceeded as follows: After venirepersons were eliminated for cause, a "primary" panel of thirty strike eligible venirepersons was established, allowing for a maximum of 18 strikes (nine per side) plus twelve jurors. The prosecution exercised its peremptory strikes first, striking John Earl Clark Sr. (12) (black); Stacy Lynn Cushman (30) (white); Cleetta Jackson (41) (black); Debra A. Cottman (49) (black). As the state did not exhaust all its strikes, the court randomly struck five additional venirepersons: Anne Marie Murray (5) (white); Jane M. Dalba (11) (white); Thomas Patrick Gibbons III (14) (white); Amy C. Gleason (19) (white); Myron E. Niebrugge (28) (white). *See* ECF Doc. 88-1 at 520-21. The defense struck Virginia Lee Blakely (2) (white); Robert H. Bayer (6) (white); Marcia M. Hecker (21) (white); Jeffrey A. Hercules (22) (white); Susan Joan Duggan (27) (white); Kathleen A. Ullrich (44) (white); Gareth Torrey Munger (50) (white); Karrie L. Lehman (53) (white); Jeffrey J. Ostmann (58) (white).

The final jury included: Elizabeth Broome (4) (white), Jason P. Berra (7) (white); Prather H. Alexander (15) (black); Zehainesh T. Kidane (17) (black); Rebecca J. Boedeker (24) (white); Rence C. Morrow (25) (black); Kimberly R. Windler (36) (white); Stephan B. Georger (37) (white); Robert Henry Fredericks (39); (white); Mark Anthony Ochanpaugh (43) (white); Andrew C. Worland (47) (white); Eugene Kevin Rosales (56) (white). *Id.*

[7] The alternate panel was comprised of the next eight venirepersons who survived challenges for cause (allowing for four alternates and a maximum of four combined strikes). The prosecution struck Harry Stephenson (62) (black) and Katherine A. Stasiak (69) (white). The defense then struck James Douglas Stack Jr. (61) (white) and David Michael Will (65) (white). The seated alternates were Paul Robert Kaveler (60) (white); Patricia G. Whitley (66) (black); Mary A. Oster (74) (white); Thomas Clark Myers (75) (white).

against whites. As the Supreme Court has recognized, "happenstance is unlikely to produce this disparity," and consequently, statistical disparity such as this "alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." *Miller-El I*, 537 U.S. at 342.

2. Historical discrimination in St. Louis County

St. Louis County has an extensive history of prosecutorial efforts to disenfranchise African-Americans from their right to participate in jury service. The Supreme Court has held that such evidence is relevant, even if it cannot be tied conclusively to the prosecutors involved in the particular case. *See Foster*, 136 S. Ct. at 1748 ("[a]t a minimum, we are comfortable that all documents in the documents in the [prosecution's] file were authored by someone in the district attorney's office"); *Miller-El I*, 537 U.S. at 334-35 (relying on Dallas County's history of excluding black jurors, including training materials instructing prosecutors to strike them); *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005) ("*Miller-El II*") (same).

Under the leadership of former Prosecuting Attorney Robert McCulloch, St. Louis County prosecutors have routinely discriminated. Reported cases of *Batson* reversals supply a window into just how prevalent the practice is. *See State v. McFadden*, 216 S.W.3d 673 (Mo. 2007); *State v. McFadden*, 191 S.W.3d 648 (Mo. 2006); *State v. Hampton*, 163 S.W.3d 903 (Mo. 2005); *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. E.D. 2004); *State v. Holman*, 759 S.W.2d 902 (Mo. App.

E.D. 1988); *State v. Robinson*, 753 S.W.2d 36 (Mo. App. E.D. 1988); *State v. Williams*, 746 S.W.2d 148 (Mo. App. E.D. 1988).

But nearly as telling are the sheer number of additional cases where the racial disparities compelled a finding of a *prima facie* case of discrimination (as evidenced by the advancement to *Batson* step-two), even though the defendant ultimately could not prove the reasons supplied were pretextual. In numerous St. Louis County capital cases prosecuted under McCulloch's reign, the disparities were sufficiently large to permit an inference of discrimination, even though ultimately not proved due to prosecution-friendly credibility rulings. *See State v. Smulls*, 935 S.W.2d 9, 14 (Mo. 1996) (inquiry advanced to *Batson* step-two; pretext not proved); *State v. Johnson*, 207 S.W.3d 24, 37 (Mo. 2006) (same); *State v. Shurn*, 866 S.W.2d 447, 456 (Mo. 1993) (same); *State v. Strong*, 142 S.W.3d 702, 713 (Mo. 2004) (same); *State v. Brooks*, 960 S.W.2d 479, 488 (Mo. 1997) (same); *State v. Gray*, 887 S.W.2d 369, 384 (Mo. 1994) (same); *State v. Cole*, 71 S.W.3d 163, 172 (Mo. 2002) (same); *State v. Morrow*, 968 S.W.2d 100, 113 (Mo. 1998) (same); *State v. Roberts*, 948 S.W.2d 577, 601 (Mo. 1997) (same); *State v. Williams*, 97 S.W.3d 462, 471 (Mo. 2003) (same); *State v. Hall*, 955 S.W.2d 198, 204 (Mo. 1997) (same); *State v. Weaver*, 912 S.W.2d 499, 510 (Mo. 1995) (same); *State v. Barnett*, 980 S.W.2d 297, 302 (Mo. 1998) (same) (gender discrimination).

Another telling tactic ascribed to prosecutors under McCulloch's tutelage was the resort to the so-called "postal gambit" to eliminate African-American

jurors. *See* Fair Punishment Project, "Wharton County Assistant DA Outs Boss for Racist Jury Selection," Mar. 29, 2016, *available at* <<http://fairpunishment.org/whartonda/>>. Postal workers in St. Louis County are disproportionately African-American, and the prosecutor's office routinely struck all prospective jurors who were postal workers – at least until the Missouri Supreme Court disapproved the practice. *See State v. Edwards*, 116 S.W.3d 511, 528 (Mo. 2003); *but see Smulls v. State*, 71 S.W.3d 138, 159 (Mo. 2002) (Wolff, J., concurring) ("[R]acial profiling, while not exactly invented by trial lawyers, is alive and well in the jury selection process … If *Batson* has any effect in this state, it is simply trial court law where even rumors of sustained *Batson* challenges are hard to come by.").

3. The strike of Debra Cottman and Prosecutor McCulloch's pretextual grounds

When compelled by the trial court to justify his strikes of African-Americans, McCulloch said 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 Petitioner briefly stayed during his troubled childhood. Trial Tr. 1051.

The prosecutor's first reason proved to be wholly unsupported in the record. On the question of Cottman's purported "unwillingness" to answer questions, her death-qualification testimony was indistinguishable from that of numerous other

veniremembers who were not struck. The prosecutor questioned almost every juror about the death penalty. *E.g.*, Trial Tr. 100-20, 168-210, 279-316, 391-418, 516-47. Jurors Haber, Blakely, Broome, Schlenk, Kidane, Grant, Hecker, Ostmann, Kaveler, and Stack gave one- or two-word answers to these questions. Trial Tr. 90-94, 97-98, 118-19, 171-77, 184-86, 524-26, 529-33. Jurors Cottman, Dalba, Gleason, Morrow, Duggan, Stenslokken, Georger, Hunt, Fredericks, Jackson, Peters, Knoepfel, Becherer, Munger, Stasiak, Oster, Fenton, Molnar, and Desloge occasionally modified their "yes" or "no" answers with a simple sentence such as, "I could," "I would," "I do," or "I can." Trial Tr.112- 14, 177-80, 197-200, 203-06, 279-85, 302-16, 397-99, 404-12, 546-47, 635-37, 640-43. Jurors Gibbons, Alexander, Queen, Aikman, Boedeker, Niebrugge, Lehman, and Nunez further modified their responses by repeating the prosecutor's question in their answers. Trial Tr. 120-21, 168-71, 180-83, 191-93, 194-97, 206-10, 415-19. There is no principled way to distinguish Juror Cottman's responses from the others. *See* Trial Tr. 406-07.

As to the second purported reason, Cottman testified that she had been a foster parent for children from the Annie Malone Children's Home. But her association with Annie Malone itself was nominal at best. Cottman was what was known as a "visiting foster parent." Trial Tr. 1010. She explained, "They come visit at my home, stay at my home for the weekend." Trial Tr. 1010. Cottman did not know anyone from Annie Malone that was associated with the case, including

Kevin Johnson. Trial Tr. 1011.

The prosecutor nevertheless seized on this supposed link. McCulloch said, "I don't want anyone associated with Annie Malone," because Petitioner had stayed there as a child, through placement by the DFS. Trial Tr. 1003-04, 1051, 2112-13. In fact, Petitioner had spent all of one week at Annie Malone's when he was seventeen years old. Trial Tr. 2270. Without a scintilla of support, the prosecutor "assumed" that Cottman had a favorable view of the children's home, and he claimed that such a view is "not something that would be favorable to our position regarding the Defendant's time away from home." Trial Tr. 1051. But the prosecutor did not actually question Cottman or any jurors about their experiences with state-affiliated agencies, shelters, group homes, or other foster-care facilities. If the prosecutor were genuinely concerned about the issue, he would have asked about it. "The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El II*, 545 U.S. at 246 (quoting *Ex parte Travis*, 776 So.2d 874, 881 (Ala. 2000)).

More troublingly, McCulloch did not strike other white jurors who had experience with DFS. Like Cottman, Juror Bayer answered affirmatively when asked about any experience with foster children ("Has anyone ever been in a foster parent situation? Trial Tr. 1009). And like Cottman, he also had been a "weekend foster parent," but for a different home, St. Vincent Home for Children. Trial Tr.

1009-10. Also like Cottman, Bayer did not express any views, favorable or unfavorable, about the placing agency.

Still other similarly-situated white jurors were not struck. Juror Duggan, a teacher, had contacts with DFS relating to her students. Trial Tr. 1005. She was "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." *Id.* Juror Georger was a mentor for the Family Court for two or three years "about nine, ten years ago" and had worked with kids "all over the place." Trial Tr.1003-04, 1006-07. Georger's Family Court mentoring occurred during the time the Family Court placed and maintained Petitioner in DFS custody. Trial Tr. 2088, 2096, 2107. 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." Trial Tr. 1007-08.

B. The state court's ruling

The Missouri Supreme Court upheld the trial court's ruling and rejected Petitioner's *Batson* claim on direct appeal. *See Johnson I*, 284 S.W.3d at 570-71. The court credited the prosecutor's explanation that he struck Juror Cottman because of her experience with Annie Malone's Children Home. *Id.* at 571. It observed that "no other venire member was involved with Annie Malone Children's Home, which was significant because it previously provided services to Appellant." *Id.* The court therefore concluded that the trial court did not err by

finding that the "Annie Malone" explanation was not pretextual. *Id.* The court declined to consider the prosecutor's other explanations for the strike, reasoning that a *Batson* claim fails whenever a court credits any single race-neutral reason. *Id.* The state court also refused to consider St. Louis County's history of *Batson* errors: "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." *Id.*

C. The district court's rulings

The district court upheld the Missouri Supreme Court's ruling as a reasonable application of *Batson*. App. 83-84. It explained that the record "fully supports" the state court ruling that no white jurors were similarly situated to Cottman, since "[n]one had any connection with Annie Malone's Children's Home and only had connections with the Division of Family Services in other contexts." *Id.* The district court also rejected Petitioner's argument, based on *Miller-El II*, that the state court wrongly refused to consider St. Louis County's history of excluding black jurors. App. 84. The court below described the facts of *Miller-El II* as uniquely "egregious" and "altogether distinguishable from the case at hand." *Id.*

The district court adhered to its reasoning when it later denied a COA. *See* App. 141-42. It nevertheless added an additional rationale concerning the state court's refusal to consider St. Louis County's history of excluding black jurors. The district court reasoned that many of the appellate cases and newspaper articles

relied on by Petitioner were not cited to the trial court and "were not in front of the Missouri Supreme Court on appeal." App. 141. The district court otherwise persisted in its belief that *Miller-El* and its "egregious facts" were distinguishable. App. 141-42.

D. By upholding the Missouri Supreme Court's legally and factually problematic ruling as "reasonable" under AEDPA, the district court's decision is debatable and justifies a COA.

The state court's rationales – as endorsed by the district court – are questionable in numerous respects, and this Court should authorize further proceedings on this claim.

1. The state court refused to consider the prosecution's historical pattern and practice of discriminatory strikes.

The state court was wrong when it declined to consider whether past conduct of the "prosecutor's office warrants [a finding of] pretextual behavior." *Johnson I*, 284 S.W.3d at 571; *id.* ("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."). The Supreme Court has expressly found such evidence to be relevant. *See Miller-El I*, 537 U.S. at 347 ("[T]hat the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection … is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case."); *Miller-El II*, 545 U.S. at 266 (considering Dallas County's history of

discrimination, including the office's twenty-year-old manual on jury selection). Whether or not the facts underlying Petitioner's claim are as "egregious" as those in *Miller-El II* – *see* App. 84, 142 – the state court was nevertheless required to consider the plausibility of the prosecutor's claimed reason "in light of *all evidence* with a bearing on it." *Miller-El II*, 545 U.S. at 252 (emphasis added). Nothing in *Miller-El II* limits its directives to cases with equally "egregious" facts, as the district court's order suggests. App. 84, 142.

The district court likewise erred in its ruling denying a COA. The district court reasoned that Petitioner withheld some of the historical evidence that he now relies upon when litigating his *Batson* claim in the trial court and the Missouri Supreme Court. *See* App. 141. But the fact remains that Petitioner offered four recent *Batson* violations from St. Louis County to the Missouri Supreme Court, whose ruling governs AEDPA review under 28 U.S.C. § 2254(d)(1). *See* Resp. Habeas Corpus Ex. P (direct appeal brief), at 57-58; *see also, e.g.*, *Shere v. Sec'y, Fla. Dep't of Corrs.*, 537 F.3d 1304, 1310 (11th Cir. 2008) ("[O]ur review is limited to examining whether the highest state court's resolution of a petitioner's claim is contrary to, or an unreasonable application of, clearly established law, as set forth by the United States Supreme Court."); *Vazquez v. Wilson*, 550 F.3d 270, 276 (3d Cir. 2008) (same). The Missouri Supreme Court, in turn, categorically refused to consider *any* such evidence because it lacked a specific connection to the case at hand: "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 I*, 284 S.W.3d at 571. That reasoning directly contravenes the United States Supreme Court's decisions in both *Miller-El* cases. *See Miller-El I*, 537 U.S. at 347; *Miller-El II*, 545 U.S. at 266.

2. The state court's acceptance of the "Annie Malone" explanation is unreasonable because the prosecution declined to strike numerous white jurors with similar experiences in the same child welfare system that was implicated at Petitioner's trial, regardless of whether the white jurors had experiences with the Malone facility itself.

The prosecutor's claimed reservation about Juror Cottman's association with a child services organization does not survive scrutiny. Jurors Bayer, Duggan, Georger, and Boedeker all had associations with, or responsibility for, children coming under the auspices of DFS, and yet they were not struck. The state court remarked that the other jurors had no association with Annie Malone's, where Petitioner had spent a week. *Johnson I*, 284 S.W.3d at 571; Trial Tr. 2270. But the white comparison jurors are not irrelevant simply because they did not foster children with a connection to Annie Malone's. Indeed, Cottman never worked at Annie Malone's itself and never had any contact with Petitioner. "A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." *Miller-El II*, 545 U.S. at 247. The comparison jurors need only be "similarly situated" to Cottman, *id.*, not "identically situated" to her.

By refusing even to *consider* four jurors who were similar to Cottman, the state court failed to assess "all of the circumstances that bear upon the issue of racial animosity." *Snyder*, 552 U.S. at 478. Both Cottman (black) and Bayer (white) had experience as "visiting foster parents" and had little or no actual association with the placing agency. Indeed, both Annie Malone (identified by Cottman) and St. Vincent (identified by Bayer) are part of the same coalition of DFS-authorized agencies, the Foster & Adoptive Care Coalition, that serve foster children in greater St. Louis.[8] Tellingly, the prosecutor defended the DFS system itself and not simply Annie Malone's, blaming Petitioner for his own problems and arguing on closing that "there were plenty of people there offering him help." Trial Tr. 2321. That theory implicates any juror with experience in the same child welfare system that failed Petitioner during his youth. The prosecutor's explanation for striking Cottman but passing the similar white jurors defies his theory of the case. "The credibility of reasons given can be measured by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El II*, 545 U.S. at 247 (quotation omitted).

3. The "Annie Malone" explanation is not race-neutral.

Any claim that the association with Annie Malone Children & Family Service Center is somehow qualitatively different from those experienced by other

[8] A list of the Coalition's member agencies can be found at <<https://www.foster-adopt.org/member-agencies/>>.

jurors smacks of discriminatory purpose. The Center's namesake, Annie Malone, was the daughter of escaped slaves, and was herself orphaned at a young age. *See* <<https://en.wikipedia.org/wiki/Annie_Malone >>. From its inception, and as commonly known even today, the Center principally serves the African-American community. *See* <<http://www.anniemalone.com>>.

Thus, the only distinction among jurors who had experience with child services was that Cottman's experience was with a provider that principally served the African-American community, and thus fails the test for race-neutrality. Supposed reliance on a factor closely associated with race is not race-neutral, and is tantamount to using that factor as a proxy for discrimination. *See, e.g.*, *State v. McFadden*, 216 S.W.3d 673, 677-78 (Mo. 2007) (finding pretextual the strike of an African-American woman on the grounds she had a hair style fashionable in the African-American community; court noted "whether the State's explanation is race-neutral … is dubious"); *Jessie v. State*, 659 So. 2d 167, 168-69 (Ala. Crim. App. 1994) (prosecutor's peremptory strike of a black venireperson because she lived in a "high crime" area was not a valid race-neutral reason); *Frazier v. State*, 899 So. 2d 1169, 1173-74 (Fla. Dist. Ct. App. 2005) (prosecutor's explanation that a juror was struck because of her Jamaican heritage not race-neutral); *State v. Cook*, 312 P.3d 653, 655 (Wash. App. 2013) (supposed "energy" between black juror and black defense counsel not race-neutral).

4. The state court refused to consider all of the evidence.

The state court rejected Petitioner's claim of pretext, finding, "[b]ecause the trial court found one race-neutral reason to strike Cottman, it is unnecessary to review Appellant's argument that Cottman's unwillingness to answer death qualification questions was pretextual." *Johnson I*, 284 S.W.3d at 571. Under the state court's formulation, if the trial court credits one ground, even prematurely, it is at liberty to disregard all other evidence of pretext.

The state court misstated the controlling law. To credit one rationale in isolation, without consideration of all the evidence, is contrary to, and an unreasonable, application of *Batson*. *See Miller-El II*, 545 U.S. at 252 ("*Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason *in light of all evidence with a bearing on it*.") (emphasis added); *Snyder*, 552 U.S. at 478 ("[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted"); *Foster*, 136 S. Ct. at 1748 (same); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) ("[R]ejection of the defendant's proffered [nondiscriminatory] reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination").

VI. The district court's disputed reading of state law justifies a COA on Petitioner's claim that the jury unconstitutionally sentenced him to death without finding, beyond a reasonable doubt, that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, which the Missouri Supreme Court defined as a death-qualifying factual issue four years before Petitioner's trial (Habeas Corpus Claim 16)

Claim 16 asserts a violation of Petitioner's Sixth Amendment right to a jury trial. Under *Ring v. Arizona*, 536 U.S. 584 (2002), "[c]apital defendants … are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. Therefore, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Id.* at 602 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 482-83 (2000)).

A. Petitioner's claim

Under Missouri law, the comparative weight of aggravating and mitigating circumstances is itself a factual question that potentially authorizes a greater punishment. *State v. Whitfield*, 107 S.W.3d 253, 258-60 (Mo. 2003). After finding at least one statutory aggravating circumstance, the jury must "determine whether the evidence in mitigation outweighs the evidence in aggravation" – *id.* at 259 – an issue that Petitioner's jury was not required to find beyond a reasonable doubt. If the mitigating evidence outweighs the aggravating evidence, "the defendant is not eligible for death, and the jury must return a sentence of life imprisonment." *Id.*

Weighing requires a "factual finding" as a "prerequisite to the trier of fact's determination that a defendant is death-eligible." *Id.* at 261. Only after the weighing step does the jury determine whether to impose a sentence of death, based on its consideration of "all of the circumstances." *Id.* (quoting Mo. Rev. Stat. § 565.030.4 (West 2001)). Petitioner's death sentence violates the Sixth Amendment under *Ring*.

B. The state court's ruling

Despite the Missouri Supreme Court's clear holding in *Whitfield*, both that court and the trial court refused to require the jury to find the comparative weight of aggravating and mitigating circumstances beyond a reasonable doubt. *Johnson I*, 284 S.W.3d at 588-89. In relevant part, the state court reasoned that the issue was controlled by *Kansas v. Marsh*, 548 U.S. 163 (2006), under which the Eighth Amendment allows the death penalty when the mitigating circumstances do not outweigh the aggravating circumstances. *Johnson I*, 284 S.W.3d at 588-89. But the rule of *Marsh* does not resolve Petitioner's claim, which is that a Missouri jury must find, beyond a reasonable doubt, that the mitigating circumstances are insufficient to outweigh the aggravating circumstances before considering whether to impose a death sentence under "all of the circumstances." *Whitfield*, 107 S.W.3d at 261. The allocation of the burden of proof under the Eighth Amendment is a separate issue from the standard of proof under the Sixth Amendment.

Elsewhere in its opinion, the state court addressed Petitioner's *entirely*

separate claim that the jury was not instructed that it must find non-statutory aggravating circumstances – in this instance, victim-impact evidence – beyond a reasonable doubt. *Id.* at 584-85. That issue is not present in these federal proceedings. The state court rejected the claim, relying on its own precedent that "[t]he reasonable doubt standard does not apply to mitigating evidence … or non-statutory aggravating factors, including victim impact statements." *Id.* at 585. The state court remarked that the claim's reliance on *Ring*, *Apprendi*, and *Whitfield* "is misplaced" because "under *Ring* and *Apprendi* only evidence functionally equivalent to an element, including statutory aggravating circumstances, must be found beyond a reasonable doubt." *Id.*

C. The district court's rulings

The district court rejected Petitioner's claim based on its reading of the state court's rulings in Petitioner's case and others. First, the district court pointed to the earlier portion of the Missouri Supreme Court's opinion, which was addressing Petitioner's complaint that the jury did not find victim impact evidence beyond a reasonable doubt. *See* App. 105-06, 129-30; *Johnson I*, 284 S.W.3d at 584-85. The district court interpreted the state court's ruling as holding that the fact of weighing "is not functionally equivalent to an element and is not subject to the beyond-a-reasonable-doubt-standard." App. 106 (quoting *Johnson I*, 284 S.W.3d at 585); App. 129-30. Because the state court found that the "weighing step" does not require proof beyond a reasonable doubt, the district court continued, the state

court necessarily found that the comparative weight of circumstances is not a finding of fact that authorizes an increase in the defendant's punishment. App. 106-07, 130-31.

The district court imputed the same holding to various post-*Whitfield* decisions from the Missouri Supreme Court. *See* App. 105-06 (citing *State v. Glass*, 136 S.W.3d 496, 521 (Mo. 2004); *State v. Gill*, 167 S.W.3d 184, 193 (Mo. 2005); and *State v. Zink*, 181 S.W.3d 66, 74 (Mo. 2005)). In those decisions, the state court refused to require that the weighing step be found beyond a reasonable doubt. Implicit in those post-*Whitfield* holdings, the district court surmised, is a ruling that "evidentiary weighing is not a fact *necessary to increase the range of punishment*." App. 106 (emphasis in original). If the law were otherwise, the district court acknowledged, Missouri's death penalty statute would violate *Ring*. *Id.* The district court therefore rejected Petitioner's claim, reasoning that it cannot reexamine the state-law rationales that it imputed to the Missouri Supreme Court. App. 106-07, 131. The district court later denied a COA on the claim but without providing additional reasons for its merits ruling. App. 144-45.

D. The district court's decision on Claim 16 is debatable among reasonable jurists because it misreads the underlying state law on which Petitioner's *Ring* claim depends.

Under *Ring*, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." 536 U.S. at 602

(citing *Apprendi*, 530 U.S. at 482-483). The district court correctly identified the controlling issue: "The dispositive question is whether Missouri law 'makes an increase in a defendant's authorized punishment contingent on the finding of a fact.'" App. 106, 131 (both quoting *Ring*, 536 U.S. at 602). Nevertheless, the district court's answer to that "dispositive question" rests on a deeply problematic and disputed reading of state law, as explained below.

1. The district court misread the Missouri Supreme Court's opinion on direct appeal.

The district court rested its ruling on a plain misreading of the state court's opinion. It is true, as the court below pointed out, that the Missouri Supreme Court remarked that Petitioner's "reliance on *Ring*, *Apprendi*, and *Whitfield* is misplaced." *Johnson I*, 284 S.W.3d at 585; App. 105, 129. And it is also true that the state court reasoned that non-statutory aggravating circumstances and mitigating circumstances do not need to be proven beyond a reasonable doubt, and that such a requirement of *Ring* and *Apprendi* applies only to "evidence functionally equivalent to an element, including statutory aggravating circumstances." *Johnson I*, 284 S.W.3d at 585.

But those remarks have nothing to do with Petitioner's claim. They instead provide the Missouri Supreme Court's basis for rejecting an entirely separate claim that is not currently at issue, i.e., that *Ring*, *Apprendi*, and *Whitfield* required the state to prove the non-statutory aggravating circumstance of victim impact beyond

a reasonable doubt. That is why the state court's analysis appears under the heading of "Point Eight: Aggravating Circumstances" instead of "Point Ten: Mitigating Circumstance Instruction," under which Petitioner complained that the trial court refused his instruction that the jury find the comparative weight of aggravating and mitigating circumstances beyond a reasonable doubt. *Compare Johnson I*, 284 S.W.3d at 583-85 (addressing Point 8), *with id.* at 587-88 (addressing Point 10); *see also* Resp. Habeas Corpus Ex. P (direct appeal brief) at 29, 124-31 (concerning Point 8); *id.* at 31, 137-43 (concerning Point 10).

The district court wrongly conflated the state court's two separate rulings. *See* App. 130 ("[O]n direct appeal, the Missouri Supreme Court held that this weighing 'fact' at step three is not functionally equivalent to an element."). In doing so, the district court wrongly imputed to the state court a ruling that *Whitfield* does not consider the comparative weight of aggravators and mitigators to be a factual issue that is "necessary to increase the range of punishment." App. 106. The state court said nothing of the kind, and there is no such ruling that binds this Court the district court on federal habeas review.

The plain text of *Whitfield* casts further doubt on the district court's interpretation of *Johnson I*, which itself does not purport to reject or overrule *Whitfield* in any respect. In *Whitfield*, the Missouri Supreme Court made clear that the weighing step is factual question and that a finding in the state's favor increases the defendant's possible punishment – a principle gleaned from the

court's comparison of Missouri's weighing process to Arizona's. *See Whitfield*, 107 S.W.3d at 260-61. The court noted the Arizona Supreme Court's refusal to reweigh aggravating and mitigating circumstances as an appellate tribunal, and instead to grant a new sentencing trial, in light of the defendant's Sixth Amendment right to have a jury determine the weighing:

> [T]he [Arizona Supreme] Court held that, even were the presence of a statutory aggravator conceded or not contested, resentencing would be required unless the court found that the failure of the jury to make these factual findings was harmless on the particular facts of the case … This was a necessary result of applying *Ring*'s holding that "[c]apital defendants ... are entitled to a jury determination of ***any fact on which the legislature conditions an increase in their maximum punishment***." *Ring*, 536 U.S. at 589.
>
> Missouri's steps 1, 2, and 3 are the equivalent of the first three factual determinations required under Colorado's death penalty statute, so that, as in Colorado, the jury is told to find whether there are mitigating and aggravating circumstances and to weigh them to decide whether the defendant is eligible for the death penalty. ***These three steps are also similar to the aggravating and mitigating circumstance findings required under Nevada and Arizona law. As in those states, these three steps require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible***.

Whitfield, 107 S.W.3d at 261 (emphases added).

The weighing step increases the maximum punishment not only because *Whitfield* expressly says so, but also because weighing is a "prerequisite" to the jury's finding that the defendant is "death-eligible." *Id.* A "prerequisite" is "something that is necessary before something else can take place or be done." *Black's Law Dictionary* (2014). A jury cannot consider a death sentence unless it

first finds that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. Without that finding, the defendant is not eligible for death. That finding therefore "increases" the defendant's punishment under *Whitfield*, 107 S.W.3d at 261, without which the *Whitfield* majority would have had no basis for imposing a jury requirement under *Ring*.

Further clarification comes from the *Whitfield* dissent. If the majority had not ruled that weighing permits an "increase" in the defendant's possible punishment, then former Chief Justice Limbaugh would not have dissented on the point:

> Even if the majority is correct and step 3 does entail a factual finding, it cannot be construed as the kind of factual finding under *Ring* that ***increases*** the maximum punishment. Instead, a finding in favor of the defendant under step 3 acts only to ***decrease*** the punishment, subjecting an otherwise death-eligible defendant to life imprisonment … The "finding" required under step 3 is not whether aggravating factors outweigh mitigating factors in order to subject defendant to the death penalty, but whether mitigating factors outweigh aggravating factors in order for defendant to avoid the death penalty despite being death-eligible.

Id. at 278-79 (Limbaugh, C.J., dissenting) (emphases in original).

Judge Limbaugh's later understanding of the *Whitfield* majority is just the opposite, guided by the district court's erroneous reading of the direct appeal opinion: "[I]t is clear that *Whitfield* does not stand for the proposition that the weighing 'fact' at step three is a fact necessary to increase the range of punishment." App. 106. That view is at least debatable among reasonable jurists. It

conflicts with *Whitfield*, it rests on language from *Johnson I* that does not even address Petitioner's claim, and it questionably imputes to the state court the implied overruling of its own precedent. *See* App. 106-07 ("The jury need not find beyond a reasonable doubt that mitigating evidence does not outweigh aggravating evidence, so says the Missouri Supreme Court, because this weighing *apparently* is not a fact necessary to increase the range of punishment.") (emphasis added); *but see State ex rel. Beisly v. Perigo*, 469 S.W.3d 434, 440 (Mo. 2015); *State v. Honeycutt*, 421 S.W.3d 410, 422 (Mo. 2013) (both disfavoring the implied overruling of precedent).

In fact, the state court on direct appeal did *not* deny that the weighing fact is necessary to increase the defendant's maximum punishment from life imprisonment to the death penalty. It simply failed to recognize that the death-enabling status of the weighing fact required the jury to find that fact beyond a reasonable doubt, and that *Marsh* does not resolve that question. *See Johnson I*, 284 S.W.3d at 588-589. That failure contravenes and unreasonably applies *Ring*, which states that any factual finding that authorizes an increase in the defendant's punishment "must be found by a jury beyond a reasonable doubt." 536 U.S. at 602.

2. The district court misread the Missouri Supreme Court's post-*Whitfield* authorities, and in a manner that directly conflicts with the ruling of a different judge from the same district court in *McLaughlin v. Steele*, 173 F. Supp. 3d 855 (E.D. Mo. 2016).

The district court interpreted other Missouri precedent in a similarly flawed

way. Although it acknowledged *Whitfield*'s ruling about death-eligibility, the district court interpreted later state court opinions as follows:

> In *Whitfield* … the Missouri Supreme Court held that this evidentiary weighing step of the death sentencing process is a fact the jury must find before determining a defendant is death-eligible. *Whitfield*, 107 S.W.3d at 261. The next year, however, the Missouri Supreme Court explicitly held this weighing is not subject to the beyond a reasonable doubt standard. Specifically, the court stated that "[n]othing in *Whitfield* … requires the jury to make findings [on the weighing of mitigating and aggravating evidence step] beyond a reasonable doubt." *State v. Glass*, 136 S.W.3d 496, 521 (Mo. banc 2004); *see also State v. Gill*, 167 S.W.3d 184, 193 (Mo. banc 2005); *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005). Implicit in this holding is that the evidentiary weighing is not a fact *necessary to increase the range of punishment*. Otherwise, Missouri's death penalty statute—as interpreted by the Missouri Supreme Court—would violate *Ring*.

App. 105-06 (emphasis and alterations in original).

Again, the district court is mistaken. To be sure, there are several post-*Whitfield* cases in which the Missouri Supreme Court has declined to require a beyond-a-reasonable-doubt finding on the comparative weight of aggravating and mitigating circumstances. *Id.* But that does not mean that the state court repudiated *Whitfield*'s recognition that the weighing fact increases the defendant's available punishment, or, as the district court stated it, that the state courts have "implicitly" ruled "that the evidentiary weighing is not a fact necessary to increase the range of punishment." As explained above, such an "implicit" ruling would contradict the letter of *Whitfield*, which makes it unlikely that the state court would adopt such a holding without expressly overruling itself. *See Honeycutt*, 421 S.W.3d at 422 ("If

the majority chooses to overrule [a case] it is far preferable to do so by the front door of reason rather than the amorphous back door of *sub silentio*.").

Were there any doubt on the question, it is erased by the Missouri Supreme Court's opinion in *State v. Nunley*, 341 S.W.3d 611 (Mo. 2011). The *Nunley* court held that the prisoner waived any Sixth Amendment claim to jury findings by pleading guilty. In the course of its ruling, though, the court acknowledged and expressly declined to overrule *Whitfield*'s holding that weighing is a question of fact on which death-eligibility depends. *Id.* at 626 n.3. The court described numerous cases to the contrary – including cases holding that the weighing fact does not "increase" the prisoner's punishment. *Id.* To that effect the *Nunley* opinion quoted *State v. Fry*, 126 P.3d 516 (N.M. 2005), as stating that "[T]he weighing of aggravating and mitigating circumstances is thus not a fact that ***increases the penalty*** for a crime beyond the prescribed statutory maximum." *Nunley*, 341 S.W.3d at 626 n.3 (emphasis added). And it quoted *Brice v. State*, 815 A.2d 314 (Del. 2003), for the proposition that "*Ring* does not apply to the weighing phase because weighing does not ***increase the maximum punishment***." *Nunley*, 341 S.W.3d at 626 n.3 (emphasis added).

The district court's reasoning is incompatible with *Nunley*. If it were true that the Missouri Supreme Court had repeatedly and implicitly held that weighing does not involve an increase in the defendant's punishment – and that the state court first did so in the *Glass* opinion in 2004 – then it would make no sense for

the Missouri Supreme Court to consider and then decline to adopt that very position in 2011. *Nunley* means that the Missouri Supreme Court had not adopted this Court's "no increase in punishment" view at the time of Petitioner's direct appeal in 2009. Neither does any post-*Nunley* authority adopt such a view. The district court's dispositive reading of Missouri law is, at the very least, debatable among reasonable jurists. *See* App. 106 ("Implicit in this holding [from various state court opinions, that the weighing step need not be determined beyond a reasonable doubt] is that the evidentiary weighing is not a fact necessary to increase the range of punishment. ***Otherwise, Missouri's death penalty statute—as interpreted by the Missouri Supreme Court—would violate Ring***.") (emphasis added).

The district court's reasoning also conflicts with its own precedent, which independently justifies a COA. *See*, *e.g.*, *Murray v. DiGuglielmo*, No. 09–4960, 2013 WL 1809444, at *1 n.2 (E.D. Pa. Apr. 29, 2013) (COA justified by "conflicting authority" within the Third Circuit). Petitioner again refers the Court to Judge Perry's ruling in *McLaughlin v. Steele*, 173 F. Supp. 3d 855 (E.D. Mo. 2016). The jury in *McLaughlin* did not unanimously find that the mitigating evidence failed to outweigh the aggravating evidence. Because "[u]nder Missouri law, the weighing of aggravating and mitigating circumstances is a finding of fact," the trial court violated *Ring* by imposing a death sentence itself in the absence of qualifying jury findings. *Id.* at 896. By finding a *Ring* error based on the

weighing step, *McLaughlin* necessarily recognized that weighing involves an increase in the defendant's available punishment. That, anyway, is how Judge Perry described *Ring*'s holding: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 893.

Mr. McLaughlin would have been denied habeas corpus relief under the district court's orders in Petitioner's case. Those orders reason that Missouri law does not consider the weighing fact to increase the defendant's possible punishment – *see* App. 105-07, 130-31 – in which case *Ring* would not require the jury finding that was lacking in *McLaughlin*. The district court's rulings in this case and *McLaughlin* cannot both be correct, but the immediate point is not that Judge Perry's view is superior to Judge Limbaugh's. It is that this Court should certify Claim 16 because "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

VII. The dissenting opinion of two judges on the Missouri Supreme Court shows that reasonable jurists could disagree with the district court's adverse merits ruling on Petitioner's claim that counsel failed to object to the presence of uniformed police officers throughout the courtroom (Habeas Corpus Claim 5)

Issuance of a COA requires a modest showing: the prisoner need only demonstrate that the district court's ruling is "debatable among jurists of reason,"

that reasonable jurists could debate whether the petition should have been resolved "in a different manner," or that the issues presented are "adequate to deserve encouragement to proceed further." *Miller-El I*, 537 U.S. at 336; *Slack*, 529 U.S. at 484. In this case, two reasonable jurists from the Missouri Supreme Court agreed with the merits of Petitioner's claim and disagreed with the reasoning later adopted by the district court. *See Johnson II*, 406 S.W.3d at 909-14 (Breckenridge, J., dissenting, joined by Stith, J.). That circumstance itself justifies further review. "When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine." *Rhoades v. Davis*, 852 F.3d 422, 429 (5th Cir. 2017); *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011).

A. Petitioner's claim

Claim 5 asserts that trial counsel stood idly by in the face of numerous uniformed police officers who were present throughout the courtroom and created an "an unmistakable symbol of state authority," *Johnson II*, 406 S.W.3d at 912 (Breckenridge, J., dissenting). In a death penalty trial involving the killing of a police officer, uniformed police "took up at least a quarter of the courtroom." ECF Doc. 88-1 at 100 (per Charles Howard). The uniformed officers conveyed a message that "the officers wanted a conviction followed by the imposition of the death penalty." *Woods v. Dugger*, 923 F.2d 1454, 1459-60 (11th Cir. 1991). This Court should certify Claim 5 because reasonable jurists could, and have, disagreed

with the district court's merits ruling. *See Johnson II*, 406 S.W.3d at 909-14 (Breckenridge, J., dissenting).

B. The state court's ruling

The Missouri Supreme Court rejected the claim, stating that Petitioner "failed to demonstrate prejudice," that Petitioner pointed to no evidence that the police officers disrupted the proceedings or interfered with jurors, and that it is otherwise unremarkable for police officers to be present in a courthouse. *Johnson II*, 406 S.W.3d at 903. Judge Breckenridge dissented, joined by Judge Stith. *Id.* at 909-14. The dissent would have remanded Petitioner's claim for an evidentiary hearing. *Id* at 914.

C. The district court's rulings

Respondent argued below that Petitioner defaulted the claim and that the Missouri Supreme Court rejected it on the procedural ground that it was inadequately pleaded. ECF Doc. 63 at 52-53; ECF Doc. 131 at 24. Petitioner argued, among other things, that any default should be excused under *Martinez* because post-conviction counsel performed ineffectively by failing to plead specific facts. ECF Doc. 138 at 30-31; *see also Barnett v. Roper*, 941 F. Supp. 2d 1099, 1113-14 & n.17 (E.D. Mo. 2013). Petitioner also sought an evidentiary hearing, based on the first-hand observations of those who attended and/or testified at trial. *See* ECF Doc. 94 at 48-50; ECF Doc. 88 at 11-12. Charles Howard could testify that police "took up at least a quarter of the courtroom." ECF Doc. 88-1 at

100. Dr. Daniel Levin recalls that "at least 10 to 20" uniformed officers were present during his trial testimony. *Id.* at 197. Terron Coleman states that the courtroom was "extremely segregated," and Romona Miller remembers that it was "very tense" in the courtroom "with all those officers present." *Id.* at 59, 238.

The district court adopted neither party's position in its original order denying habeas corpus relief. It interpreted the Missouri Supreme Court's opinion as a merits ruling, and it upheld as "reasonable" the state court determination that Petitioner did not demonstrate prejudice. App. 32-33. The district court therefore denied an evidentiary hearing under *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), observing that federal review of the reasonableness of the state court decision is limited to the state court record. App. 33-34.

The district court somewhat expanded its reasoning in post-judgment orders. Denying Petitioner's motion to alter or amend the judgment, the court ruled that the Missouri Supreme Court did not unreasonably apply *Holbrook v. Flynn*, 475 U.S. 560 (1986), or *Estelle v. Williams*, 425 U.S. 501 (1976), by limiting the prejudice inquiry to the possibility of the officers' direct contact with jurors. App. 127-28; *see Holbrook*, 475 U.S. at 570 (jurors' denial of prejudice is not dispositive when "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process"). Distinguishing *Holbrook*, the district court ruled that the officers were "just spectators" and were not "a procedure employed by the state." App. 127. Because

the officers were mere "spectators," the district court reasoned, the Supreme Court gives no clear guidance concerning the "potentially prejudicial effect of spectators' courtroom conduct." App. 127-28 (quoting *Carey v. Musladin*, 549 U.S. 70, 77 (2006)). The district court therefore held that the Missouri Supreme Court did not unreasonably apply clearly established federal law. *Id.*

The district court again expanded its reasoning when it denied a COA. App. 143-44. The court conceded that "reasonable jurists" could "surely" disagree on the merits of the question, as the two dissenting judges did on post-conviction appeal. App. 143. Nevertheless, the district court remarked that it could not "fathom" any reasonable disagreement with its own ruling that the state court's majority opinion was objectively reasonable in the absence of "binding U.S. Supreme Court precedent that would have controlled the Missouri Supreme Court's decision." App. 144.

D. The Court should certify Claim 5 because the district court's merits ruling is debatable among reasonable jurists, including the two who dissented from the state court ruling on post-conviction appeal.

Further proceedings are justified for the straightforward reason that issuance of a COA "should ordinary be routine" when, as here, the state court is divided on the constitutional question. *Rhoades v. Davis*, 852 F.3d 422, 429 (5th Cir. 2017); *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011). On post-conviction appeal, Judges Breckenridge and Stith invoked *Estelle* and other authorities for the

principle that "courts must be alert to factors that may undermine the fairness of the fact-finding process." *Johnson II*, 406 S.W.3d at 910 (Breckenridge, J., dissenting). The dissent reasoned that the officers' uniforms were "an unmistakable symbol of state authority." *Id.* at 912. That authority carried a specific message: jurors should "remember the police officer victim and … convict and harshly punish Mr. Johnson." *Id.* at 910. The dissent therefore distinguished the uniformed officers' presence at Petitioner's trial from the purely private button-wearing spectators in *Musladin*: "While the State may not have directed the numerous uniformed officers to attend Mr. Johnson's proceedings, as spectators, they nevertheless were wearing their uniforms as law enforcement officers, an unmistakable symbol of state authority." *Id.* at 911-12.

The state court dissent squarely conflicts with the district court's merits ruling, which relied on the "very important detail" that the officers "were just *spectators*." App. 127 (emphasis in original). Regardless of whether we attach the label "state," "private," "participant," or "spectator" to uniformed police officers who fill a courtroom in support of their fellow officer and against the defendant who stands convicted of murdering him, jurors would have understood the "unmistakable" message and the "state authority" behind it. *Johnson II*, 406 S.W.3d at 911-12 (Breckenridge, J., dissenting).

A COA should issue when "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at

484. In this case, two such jurists have so found with respect to the reasoning that the district court eventually adopted. Petitioner is entitled to further proceedings on his claim. The point is not that a merits-based dissent in state court requires the "automatic" issuance of a COA, as the district court framed the question. App. 144. It is instead that reasonable jurists could *and did* conclude, based on the Supreme Court's precedents in *Estelle* and *Holbrook*, (a) that trial judges and defense counsel alike must "be alert to factors that may undermine the fairness of the fact-finding process," *Johnson II*, 406 S.W.3d at 910 (Breckenridge, J., dissenting); (b) that the particular circumstances of Petitioner's trial for killing a police officer gave rise to such dangers in light of the uniformed officers' presence throughout the courtroom and the the resulting "unmistakable symbol of state authority," *id.* at 912; and that (c) the state court majority violated Supreme Court precedent through its announced indifference to police-based influences in the courtroom other than direct *ex parte* contact with jurors, *id.* at 903.

It makes no difference that the Supreme Court's *due process* cases do not clearly govern the conduct of private courtroom spectators. *See Musladin*, 549 U.S. at 77. Leaving aside the fact that government-employed police officers who wear government-issued uniforms are not strictly "private" parties, trial counsel had an obligation to safeguard the fairness of trial with or without a Supreme Court case that squarely forbids the particular disruption at issue: "Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted

practices." *ABA Guidelines*, *supra*, § 10.8. In short, there is nothing that removes Petitioner's claim from the universe of those in which a merits-based dissent in state court "ordinarily" justifies the "routine" issuance of a COA. *Rhoades*, 852 F.3d at 429; *Jones*, 635 F.3d at 1040. Claim 5 satisfies the threshold to warrant additional proceedings.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner respectfully requests that the Court grant him a COA on the following claims from his petition below: Claim 1 (*Batson*), Claim 5 (ineffective assistance – uniformed police officers in the courtroom), Claim 16 (Sixth Amendment – weight of aggravating and mitigating circumstances), Claim 18 (ineffective assistance – mental illness), Claim 19 (ineffective assistance – abuse and neglect), Claim 20 (ineffective assistance – police brutality), Claim 21 (ineffective assistance – community violence); and that the Court grant such other and further relief as law and justice require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, the foregoing and the accompanying appendix were filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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CERTIFICATE OF COMPLIANCE

Appellant Kevin Johnson's Application for Certificate of Appealability contains 23,005 words, and thus exceeds the word limitation that governs motions under Fed. R. App P. 27(d)(2)(A). A motion to exceed the word limitation has been filed alongside this Application. This Application complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14.

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