

IN THE SUPREME COURT OF MISSOURI

State of Missouri,)	
)	
Respondent,)	
)	
vs.)	Case No. SC89168
)	
Kevin Johnson,)	
)	
Appellant)	

SUGGESTIONS IN OPPOSITION TO STATE’S MOTION TO SET AN EXECUTION DATE

The Court should decline to set an execution date against Kevin Johnson, whose remedies meritoriously challenge his conviction and death sentence.

Johnson responds as follows to the state’s motion:

I. Johnson’s conviction and sentence are under review by the St. Louis County Prosecutor’s Office.

On December 1, 2021, or more than six months before the state moved for an execution date, Johnson filed an application with the Conviction and Incident Review Unit (“CIRU”) within the office of the St. Louis County Prosecuting Attorney, requesting that the CIRU investigate allegations of pervasive racial discrimination during the tenure of former Prosecuting Attorney Robert P. McCulloch, and if warranted, that it file an action in the Circuit Court of St. Louis County under Mo. Rev. Stat. § 547.031. That statute allows for a conviction to be set aside upon a showing of “clear and convincing evidence of actual innocence or constitutional error at the original trial or plea that undermines the confidence in

the judgment.” Mo. Rev. Stat. § 547.031.3. Johnson filed a supplement to his application on April 21, 2022.

The CIRU is considering three claims: first, that trial prosecutor McCulloch purposefully eliminated one or more Black jurors from Johnson’s trial and otherwise developed and supported office-wide practices aimed at diminishing Black jury service; second, that the office’s offense-charging and capital-sentencing decisions under McCulloch’s leadership were racially biased as demonstrated by evidence showing an enhanced likelihood that prosecutors would charge first degree murder, seek the death penalty, and obtain a death sentence in death-eligible cases involving white victims in comparison to those involving minority victims;¹ and third, that McCulloch engaged in selective prosecution by seeking the death penalty against all four Black defendants whom his office prosecuted for killing a police officer (Kevin Johnson, Lacy Turner, Dennis Blackman, and Todd Sheppard) but not against the only such White defendant (Trenton Forster), whose offense was no less serious than the other four. Johnson has requested that the CIRU investigate his claims by reviewing case files and other materials within the custody of the prosecutor’s office.

Although the allegations have been under submission since December 2021,

¹A preliminary report examining in depth approximately 400 McCulloch-era death eligible homicides in St. Louis County has been submitted to the CIRU. The report includes a number of statistical analyses from Frank R. Baumgartner, a professor of political science at the University of North Carolina.

the CIRU has advised Johnson’s counsel that it has a conflict of interest because one of Johnson’s trial attorneys (Robert Steele) is employed by the prosecutor’s office. Nevertheless, CIRU Director Jessica Hathaway explains that the Unit has undertaken a “preliminary investigation,” believes that “further investigation may be warranted,” and intends to secure the appointment of a special prosecutor. *See* Ex. 1 (Letter from Ms. Hathaway to Clerk of the Court, July 11, 2022). On behalf of the CIRU, Ms. Hathaway asks that the Court refrain from setting an execution date “until we have a special prosecutor in place to take any further action he or she deems appropriate with respect to Mr. Johnson's case.” *Id.* Johnson concurs that it would be fair and appropriate to defer the scheduling of an execution date so as not to impede the investigation by the soon-to-be-appointed special prosecutor.

II. Johnson brings meritorious claims in his motion to recall the mandate and petition for writ of habeas corpus.

Concurrently with this response, Johnson has filed a motion to recall the mandate and petition for writ of habeas corpus in this Court. The pleading raises three separate claims against Johnson’s conviction and sentence, and it explains that all three claims are cognizable under the remedies invoked.

Johnson’s first claim concerns the events of his initial trial, which ended with a hung jury divided 10-2 in favor of second degree murder over first degree murder. Based on affidavits from jurors who served at the first trial, the pending motion and petition urges that the holdout jurors voiced racially biased opinions during deliberations and effectively forced a mistrial. Two White jurors “kept

loudly repeating that they couldn't vote for 2nd degree because Kevin would get out and hunt them down,” and one of them “kept yelling things about ‘your neighborhoods,’ and ‘you people,’ when talking to Black jurors.” Motion & Pet'n Ex. 1 (Declaration of Allen McCarter) at 2. University of California psychology professor Jason Okonofua explains that the terms “you people” and “your neighborhoods” are familiar “codewords” that reflect an “othering” process in which “people like the speaker (white people) are generally perceived as superior, while people being described by the speaker (in this case Black people) are perceived as inferior.” Motion & Pet'n Ex. 9 (report of Jason Okonofua, Ph.D.), at 3–4. Those perceived as inferior include “Black jurors and a Black defendant.” *Id.* at 4.

But for the holdout jurors' racial biases, Johnson would have been convicted of second degree murder instead of being retried by a second jury who convicted Johnson of first degree murder and sentenced him to death. When even a single juror makes a statement “evinced ethnic or religious bias or prejudice during deliberations,” it “den[ies] the parties their constitutional rights to a trial by 12 fair and impartial jurors and equal protection of the law.” *Fleshner v. Pepose Vision Institute*, 304 S.W.3d 81, 89 (Mo. banc 2010). The Court should “neutralize[s] the taint of a constitutional violation,” *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), by reducing Johnson's conviction to second degree murder. Alternatively, the Court should reduce Johnson's sentence to life imprisonment, because his death sentence

reflects the “influence of passion, prejudice, or any other arbitrary factor.” Mo. Rev. Stat. § 565.035.3.

Johnson’s second claim is that the first jury’s 10-2 split in favor of second degree murder precludes Johnson’s death sentence. When ten jurors concluded that Johnson was not guilty of first degree murder, they necessarily concluded that the state had not proven any of the alleged aggravating circumstances. *See* Mo. Rev. Stat. § 565.032.2(3) (“The offender by his or her act of *murder in the first degree* knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person”); Mo. Rev. Stat. § 565.032.2(7) (“*The murder in the first degree* was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind”); Mo. Rev. Stat. § 565.032.2(8) (“*The murder in the first degree* was committed against any peace officer, or fireman while engaged in the performance of his or her official duty”) (emphases added). A defendant cannot be sentenced to death when, as here, one or more jurors finds a complete absence of aggravating circumstances. *State v. Thompson*, 85 S.W.3d 635, 639 (Mo. banc 2002); Mo. Rev. Stat. § 565.030.4(2). Johnson was acquitted of the death penalty by the jury’s non-unanimity. *State v. Storey*, 40 S.W.3d 898, 915 (Mo. banc 2001).

Johnson’s third claim is that the Eighth Amendment and Mo. Const. Art. I, § 21 forbid his proposed execution because of his age at the time of the offense (19) and his mental impairments. Newly available scientific evidence conclusively

proves that the brain does not complete its development until after a person is beyond the age of 21. *See* Motion & Pet'n Ex. 10 (report of neuropsychologist Erin Bigler), at 7. A late adolescent of 18 to 20 years has the intellectual maturity of an adult but the emotional maturity and response-inhibition of a younger teenager. *See* Motion & Pet'n Ex. 11 (report of developmental psychologist Laurence Steinberg) at 11–12. Those deficits are especially pronounced in Johnson's case, as neuropsychologist Daniel Martell has identified a "focal deficit in frontal lobe executive functioning," which impairs planning, response inhibition, and impulse control. Motion & Pet'n Ex. 20 (Martell Report) at 20. As a result of his frontal lobe impairment and related mental illnesses, Johnson's "moral compass was effectively 'offline' at the time of the instant offense." *Id.* at 22. Johnson's death sentence is both unconstitutional and "excessive [and] disproportionate to the penalty imposed in similar cases." Mo. Rev. Stat. § 565.035.3(3).

III. Conclusion

The state's request for an execution date is premature in light of the claims that are under consideration by this Court as well as by the same prosecutor's office that brought the underlying murder charge and obtained the resulting death sentence. Johnson respectfully requests that the Court deny the state's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2022, I filed the foregoing pleading electronically with the clerk of the court to be served by operation of the court's electronic filing system upon all attorneys of record.

/s/ Joseph W. Luby
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