

IN THE MISSOURI SUPREME COURT

In re MICHAEL WHITE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. _____
	)	
DORIS FALKENRATH, Superintendent,	)	
Jefferson City Correctional Center,	)	
	)	
Respondent.	)	

PETITION FOR A WRIT OF HABEAS CORPUS

COMES NOW petitioner, Michael White, a Missouri prisoner in respondent's custody and petitions this Court, pursuant to Rule 91, for a writ of habeas corpus vacating his 1980 conviction for capital murder and his sentence of life imprisonment without parole for fifty years and remanding his case for a new trial in light of the Missouri Supreme Court's intervening decisions in *State v. O'Brien*, 857 S.W.2d 212 (Mo. banc 1993), *State v Ferguson*, 887 S.W.2d 585 (Mo. banc 1994), and *Booker v. State*, 552 S.W.3d 522, 530 (Mo. banc 2018). In support of this petition, Mr. White respectfully states as follows:

SUGGESTIONS IN SUPPORT

I.

INTRODUCTION

This habeas corpus case presents the court with an obvious and egregious claim of instructional error involving Instructions No. 7 and No. 8, which instructed

petitioner's jury that the elements of deliberation required to convict him as an accessory of capital murder could be imputed to him based solely upon his co-defendant, triggerman's intent. (See Exhs. 1, 2). The undisputed facts in the present case are virtually identical to the facts that the Missouri Supreme Court confronted in *O'Brien*.

In this petition, Mr. White is raising a single claim for relief: a due process claim involving the trial court's submission of Jury Instructions No. 7 and No. 8 that permitted the jury to convict based solely upon the intent of petitioner's co-defendant. More than a decade after the Missouri Supreme Court rejected this claim in petitioner's direct appeal¹, the court found that nearly identical instructions violated due process and constituted reversible error in *O'Brien* and *Ferguson*. There is no procedural impediment to the reexamination of this claim by way of habeas corpus based upon the fact that intervening caselaw, issued after petitioner exhausted his appeals, provided petitioner a legal basis to seek reconsideration of a meritorious claim of error that was wrongly denied in his original direct appeal. See *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. banc 2003).

As a result, petitioner respectfully requests that this Court direct the State of Missouri to respond to this petition, and after conducting appropriate review of the facts and law, grant the petition for a writ of habeas corpus, and grant a new trial.

¹ See *State v. White*, 622 S.W.2d 939 (Mo. banc 1981).

II.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Relevant Facts

On February 4, 1979, co-defendant Hardy Bivens threatened Janice Thompson while the two were having a disagreement. (Tr. 80).² The following day, Ms. Thompson received a phone call in her home at 8915 Halls Ferry Road, St. Louis, Missouri from Mr. Bivens. (Tr. 73, 80). Shortly after receiving this phone call, Ms. Thompson and her stepsister Susie Hawkins walked to the store. (Tr. 74, 81-82). When Ms. Thompson was on the phone with Mr. Bivens, she told him that she was going to the store and would call him back when she got home. (Tr. 81).

Around 5:30 p.m., petitioner received a telephone call from Charles White, his brother-in-law, who said he needed to see petitioner that evening. (Tr. 194, 196). Petitioner called Mr. Bivens to ask if he could drive him to Charles White's home. (Tr. 196). Mr. Bivens agreed and arrived at petitioner's house between 8:30 p.m. and 9:30 p.m. (Tr. 197). Mr. Bivens asked petitioner if he was ready to go over to Charles White's home, and petitioner stated that he needed to change his clothes. While he was changing, Mr. Bivens suggested that they stop by the store on their way to Charles White's house. (Tr. 197). Petitioner had a pistol with him, which he carried

² The trial transcript will be abbreviated as "Tr."

for self-protection after he had some trouble with boys at school and testified that he had no intention whatsoever that the gun would be used to hurt someone or on either of the girls. (Tr. 199).

When petitioner got into the car, he placed the pistol on the front seat of the car so that he would not get charged for carrying a concealed weapon. (Tr. 200). The girls went into the store, and Mr. Bivens instructed petitioner to park the car at the side of the store building. (Tr. 81, 199-200). Mr. Bivens got out of the car and followed the girls into the store. (Tr. 81, 199-200). Mr. Bivens returned to the car and told petitioner to wait in the car for the girls. (Tr. 82, 200-201). When the girls exited the store, Mr. Bivens told them to get inside the car and that he would give them a ride home. Ms. Thompson got into the car first, followed by her stepsister Ms. Hawkins. (Tr. 82, 201). Petitioner did not know Ms. Hawkins, and only knew Ms. Thompson through school. (Tr. 201-202). Mr. Bivens got in the car last and started to drive. (Tr. 82, 201).

In the car, Mr. Bivens began to question Ms. Thompson about their telephone conversation the previous night. (Tr. 203). Mr. Bivens drove past the girls' home and stated that he was just going to turn back around. (Tr. 83). At this point, Ms. Thompson and Mr. Bivens got into an argument and he stopped the car. (Tr. 83, 204). Mr. Bivens told petitioner to drive because he couldn't drive and talk to Ms.

Thompson at the same time. (Tr. 204). Mr. Bivens told petitioner to turn left on Old Halls Ferry Road and go down Broadway. (Tr. 205).

Mr. Bivens and Ms. Thompson got into an argument again, and Mr. Bivens picked up the pistol and shot both girls without saying anything to petitioner. (Tr. 85-86, 204). At this point, petitioner panicked. (Tr. 205). Mr. Bivens hung the gun over the seat and pointed it toward petitioner's neck and told him to "shut the fuck up and drive." (Tr. 205). Petitioner thought that Mr. Bivens might hurt him and followed his directions out of fear. (Tr. 205). Petitioner had never been convicted of a crime in his life. (Tr. 192). Mr. Bivens instructed both girls to get on the floor of the car and gave driving directions to petitioner. (Tr. 87, 205). Petitioner told the girls that they were going to be taken to a hospital. (Tr. 88). However, Mr. Bivens overruled petitioner and told the girls that they would instead be taken to a house from which they could call an ambulance. (Tr. 88).

Mr. Bivens told petitioner to stop in front of a vacant house on 23rd and Howard and Mullanphy. (Tr. 206). When they got to the location, Mr. Bivens got out of the car, opened the door for Ms. Thompson and Ms. Hawkins, and instructed petitioner to drive around the block. (Tr. 207). Mr. Bivens took the girls into the building and led them to a small upstairs room. (Tr. 89). Ms. Hawkins tried to walk past the room, and Mr. Bivens threatened to "blow her head off" if she did not return to the room he told her to enter. (Tr. 89).

While petitioner was driving around the block, Mr. Bivens instructed the girls to sit down on the floor. (Tr. 90). At this point, petitioner had completed his trip around the block and returned to the building. (Tr. 207). Mr. Bivens demanded that petitioner give him bullets but did not tell him what they were for. (Tr. 207-208). After receiving the bullets, Mr. Bivens ran upstairs as petitioner drove around the block again. (Tr. 208). Mr. Bivens fired more shots which struck both girls in the arm. (Tr. 90).

When Ms. Thompson realized that Mr. Bivens was returning, she ran upstairs and jumped out of a second story window just as Mr. Bivens entered through the door. (Tr. 81). As Ms. Thompson fled, she heard shots coming from the apartment building. (Tr. 91). Mr. Bivens returned the car and told petitioner that Ms. Thompson had gotten away. (Tr. 208). Mr. Bivens told petitioner to throw Ms. Hawkins' bags out of the vehicle. (Tr. 208). Mr. Bivens told petitioner to "follow him", and the two went back to look for Ms. Thompson. Mr. Bivens said, "come on, let's go" when police sirens started and the two left the house. (Tr. 208).

Mr. Bivens and petitioner drove first to the home of Mr. Bivens' friend, then to Charles White's home where Mr. Bivens scrubbed the blood off of his car seat without help from petitioner. (Tr. 209). Ms. Thompson had fled to a nearby liquor store where an ambulance and police arrived. (Tr. 120-121). Ms. Thompson directed

the ambulance to the vacant apartment building at 23rd and Cass. (Tr. 24). Officer Riley entered the building and found the body of Ms. Hawkins. (Tr. 24).

Late that same evening, Mr. Bivens was picked up in connection with the murder of Ms. Hawkins. (Tr. 130). Mr. Bivens was arrested in a green 1972 Chevrolet. Later on, petitioner was asked if he was willing to give a statement, but told that if he refused, he would be arrested. (Tr. 209). Petitioner went with police voluntarily. (Tr. 209).

On February 6, 1979, petitioner was released after he agreed to make a videotaped statement about what happened. (Tr. 153-154, 210-211). Petitioner was living at his parent's house at the time and had not been hiding from police. (Tr. 212). After hearing that police were looking for him, petitioner turned himself in on March 5, 1979, and was rearrested. (Tr. 211). Petitioner was subsequently charged in an indictment with one count of capital murder and one count assault in the first degree. (Tr. 50). Based upon the foregoing facts indicating his codefendant was the triggerman, Mr. White was charged and tried as an accomplice.

B. Procedural History

On May 13, 1980, petitioner proceeded to jury trial before the Honorable P.F. Palumbo of the Circuit Court of the City of St. Louis, Missouri. (Tr. 57). At trial, petitioner was represented by Richard Rodemyer, and the state by Thomas Dittmeier. (Tr. 57). The jury found petitioner guilty of capital murder in violation of § 565.001

RSMo (1984) by aiding one who committed capital murder with the requisite intent of reflecting coolly and fully upon the matter by the jury in Cause No. 79100762 for the February 5, 1979, death of Ms. Hawkins. On June 20, 1980, petitioner was sentenced to life imprisonment without the possibility of parole for fifty years under § 565.008 RSMo (1978). (Tr. 375-376).

Thereafter, on June 27, 1980, petitioner filed a notice of appeal with the Missouri Supreme Court. That court affirmed petitioner's conviction on October 13, 1981. *State v. White*, 622 S.W.2d 939 (Mo. banc 1981). However, Judge Seiler, joined by Judge Bardgett, dissented on the instructional error claim raised in this petition. *Id.* at 948-956. Petitioner, thereafter, unsuccessfully sought post-conviction relief in both state and federal court.

Last year, through undersigned counsel, petitioner filed a motion to recall the mandate in the Missouri Supreme Court seeking a new trial based upon the intervening decisions in *O'Brien* and *Ferguson* that indicated that the court committed a clear legal error in failing to reverse petitioner's capital murder conviction due to instructional error. The Missouri Supreme Court ordered the state to respond and, thereafter, petitioner filed a reply. On June 28, 2022, the Missouri Supreme Court denied the motion without explanation in a one line order.

Shortly after his motion to recall the mandate was denied, petitioner filed the present petition for a writ of habeas corpus in the Circuit Court of Washington

County. The case was assigned to Judge Anthony Dorsett. On June 12, 2023, Judge Dorsett summarily denied the petition in a two sentence order without addressing the merits of the claim. Exh. 4. Petitioner filed the petition in the Missouri Court of Appeals, Eastern District on July 14, 2023, it was subsequently denied July 20, 2023.

III.

REASON FOR GRANTING THE WRIT

PETITIONER’S CONVICTION AND SENTENCE FOR THE OFFENSE OF CAPITAL MURDER WAS IMPOSED IN VIOLATION OF PETITIONER’S RIGHT TO DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1 § 10 OF THE MISSOURI CONSTITUTION DUE TO THE TRIAL COURT’S INSTRUCTIONAL ERROR THAT DIRECTED THE JURY TO CONVICT PETITIONER AS AN ACCOMPLICE BASED SOLELY UPON THE INTENT OF HIS CO-DEFENDANT IN DIRECT CONFLICT WITH THE MISSOURI SUPREME COURT’S SUBSEQUENT DECISIONS IN *O’BRIEN*, *BOOKER*, AND *FERGUSON*.

In *State v. O’Brien*, 857 S.W.2d 212, 218 (Mo. banc 1993), the Missouri Supreme Court held that a jury must find three elements to convict a defendant as an accomplice or accessory to first degree murder: (1) that the accomplice committed acts that aided the murderer in the killing, (2) that it was the accomplice’s conscious object that the victim be killed, and (3) *that the accomplice committed the acts after coolly deliberating on the victim’s death for some amount of time, no matter how short. Id.* at 218, (emphasis added).

O'Brien makes clear that while the act of homicide may be imputed to an accessory, deliberation may not. *Id.* Instead, to convict on a theory of accomplice liability, the state must prove that the accomplice himself deliberated on the killing. *Id.* This is required because deliberation is what differentiates first degree murder from all lesser forms of homicide: “[o]nly first degree murder requires the cold blood, the unimpassioned premeditation that the law calls deliberation. Only where the defendant himself harbors this most despicable mental state does society inflict its severest punishments.” *Id.* at 218.

O'Brien cemented the importance of basing premeditation only on the acts of the accessory himself in Missouri’s patterned jury instructions. *Id.* at 217; *State v. Ervin*, 835 S.W.2d 905 (Mo. banc 1992), *cert. denied*, 507 U.S. 954, 113 (1993). “A first-degree murder instruction premised on accessory liability *must ascribe deliberation to the defendant.*” *Id.* at 217 (emphasis added).

In no uncertain terms, the Court announced the effect that *O'Brien* had on its earlier decision in this case, *State v. White*, 622 S.W. 2d 939 (Mo. banc 1981). The Court wrote: “...to the extent that *White* has been read to require less than proof of the defendant's own premeditation in every case, it too was overruled. *O'Brien*, 857 S.W.2d at 218 (Mo. banc 1993).

In the Rule 91 proceeding before the circuit court, respondent predictably advanced a number of procedural hurdles in order to attempt to thwart merits review

of the underlying constitutional claim in this case. None of these arguments have any merit. Despite the fact that this instructional error was advanced by petitioner on direct appeal, respondent argues that this claim is procedurally barred because this claim was rejected by the Supreme Court in petitioner's original direct appeal and in a recently filed motion to recall the mandate. Neither of these arguments are persuasive.

As noted earlier, the Missouri Supreme Court's decision in petitioner's direct appeal was initially explicitly abrogated by *O'Brien* and later in *Ferguson* and *Booker*. As a result, there is no procedural bar to this claim under *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 400-401, n. 3 (Mo. banc 2003). When there is intervening case law that either explicitly overrules or calls into question the correctness of a prior decision in the case, Missouri courts under *Simmons* may reexamine a constitutional issue by way of habeas corpus that had been previously rejected. *Id.*

Respondent also argued in the Circuit court that the courts do not have the authority to grant habeas relief because this claim was summarily rejected by the Missouri Supreme Court in a recently filed motion to recall the mandate. This argument is meritless because it is well-settled that doctrines such as res judicata, collateral estoppel, and law of the case do not apply in habeas corpus actions.

Under common law, res judicata is inapplicable to habeas corpus proceedings. *See e.g. Sanders v. United States*, 373 U.S. 1, 7-8 (1963). For over a century, the Missouri Supreme Court has also followed the same rule, that there is no limit by res judicata or any other doctrine to the number of applications a prisoner may file to secure his release by writ of habeas corpus, or any other viable post-conviction remedies such as a motion to recall the mandate here. *In re Breck*, 157 S.W. 843, 849 (Mo. banc 2013); *see also State ex rel. O'Connell v. Nangle*, 280 S.W.2d 96, 99 (Mo. banc 1955).

Since petitioner's prior motions to recall the mandate were denied summarily without explanation, it is also clear that under state law, a litigant is not foreclosed by res judicata from pursuing other viable avenues to obtain the same relief. It is well-settled that an unexplained denial of an extraordinary writ or other extraordinary remedies such as a motion to recall the mandate, has no preclusive effect as to any future litigation involving the same subject matter. *See e.g. Nichols v. McCarthy*, 609 S.W.3d 483 (Mo. App. E.D. 2020).

Respondent's final procedural defense, as advanced in the court below, is the assertion that the Missouri Supreme Court's decision in *O'Brien* is not retroactive. As respondent candidly admitted, however, this argument is foreclosed by the Missouri Supreme Court's subsequent decision in *Ferguson*. *Ferguson* explicitly held that the *O'Brien* decision is retroactive because it is a substantive rule of law

that must be applied both prospectively and retrospectively. *Ferguson*, 887 S.W.2d at 887. As the court in *Ferguson* explicitly stated, retroactive application is appropriate because the defects in the verdict directing instructions for first degree murder are “indisputably substantive.” *Id.*

Notwithstanding this language in *Ferguson*, respondent argues that the *O’Brien* decision is not retroactive based upon the subsequent decision from the Missouri Supreme Court in *State ex rel. Windeknecht v. Mesmer*, 530 S.W.3d 500 (Mo. banc 2017). *Windeknecht*, which held that the court’s prior decision in *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016), was not retroactive, has no bearing on this case. *Windeknecht* found that *Bazell* could be applied prospectively without violating due process because it overruled a previous decision of the court of appeals that had interpreted the stealing statute differently. *Windeknecht*, 530 S.W.3d at 502-503, n. 5. *Windeknecht* has no relevance to the distinct issue here regarding whether a new decision involving a substantive issue of constitutional law must be applied retroactively.

In opposition to petitioner’s motion to recall the mandate and the merits of his habeas petition filed in the circuit court in this Rule 91 action, the attorney general contended that the language in the second paragraph in the challenged jury instruction, indicates that the jury, by its verdict, must have found that petitioner acted with the purpose to cause premeditated murder. The state also argued that the

evidence presented at trial presented “ample” and “sufficient” evidence to support a jury finding that petitioner acted with premeditation.

Both of these arguments are foreclosed by the Missouri Supreme Court’s decision in *Ferguson*, 887 S.W.2d 585. In *Ferguson*, the court held that a nearly identical instructional error³ involving the failure to properly instruct the jury on the element of deliberation in an accomplice liability case requires reversal unless the instructional error is deemed to be harmless beyond a reasonable doubt. *Id.* at 587.

The evidence of petitioner’s lack of deliberation, as pointed out in Judge Seiler’s dissent, was much more favorable to the accused than the circumstantial evidence that the court considered in *Ferguson* that led the court to conclude that the instructional error in that case was not harmless. *Id.*; *See also State v. White*, 622 S.W.2d 939, 948-949 (Mo. banc 1981)(Seiler, J., dissenting).

As Judge Seiler also pointed out, the jury could have certainly elected to disbelieve Mr. White’s testimony. However, the tainted instructions, even if the jury believed petitioner’s testimony was true, allowed them to convict petitioner based solely upon the crimes it “believes Bivens is guilty of.” *Id.* at 954-956. In light of *Ferguson*, a non-harmless due process violation occurred as a result of the defective jury instruction submitted in this case.

³ The second paragraph in the verdict director here is substantially the same as the fourth paragraph of the unconstitutional jury instruction at issue in *Ferguson*. 887 S.W.2d at 586.

More recently, in *Booker v. State*, 552 S.W.3d 522, 530 (Mo. banc 2018), the Missouri Supreme Court again recognized that *White* was abrogated by *O'Brien*. The Court wrote: "...to be found guilty as an accomplice, one must have the culpable mental state to have acted with the purpose of promoting the particular underlying offense. *State v. White*, 622 S.W.2d 939, 945 (Mo. banc 1981), *overruled on other grounds by State v. O'Brien*, 857 S.W.2d 212 (Mo. banc 1993)." *Booker*, 552 S.W.3d at 530. Petitioner has received no form of relief for years despite the fact his trial was tainted by the same reversible error that the Court confronted in *O'Brien* and *Ferguson*.

Petitioner's jury was expressly directed in Instruction No. 7, submitted by the state, that it could find petitioner guilty as an accessory based on Mr. Biven's premeditation and not his own. Instruction No. 7 reads in pertinent part:

If you find and believe from the evidence beyond a reasonable doubt. . . [I]n that Hardy Biven with the aid or attempted aid of the defendant considered taking the life of Susie Hawking and *reflected upon this matter coolly and fully before doing so. . . then you will find the defendant guilty of capital murder.* (Exh. 1) (emphasis added).⁴

In direct conflict with the holding of *O'Brien*, Instruction No. 7 allowed petitioner's jury to find him guilty as an accomplice of capital murder if Mr. Bivens alone coolly

⁴ Instruction No. 7 was derived from MAI-CR2.12 (derived from § 562.041, RSMo (1978)) and combined with MAI-CR2d 15.02.

reflected on Ms. Hawkins' death. (Exh. 1). Habeas relief is warranted to rectify this error.

Like Instruction No. 7, Instruction No. 8 (a converse instruction) also reinforced in the jury's collective minds that it could convict Mr. White as an accomplice based solely upon Mr. Biven's intent. Instruction No. 8 read:

If you do not find and believe from the evidence beyond a reasonable doubt that Hardy Bivens with the aid or attempted aid of the defendant did consider taking the life of Susie Hawkins and did reflect upon this matter coolly and fully before doing so, you must find the defendant not guilty of capital murder. (Exh. 2) (emphasis added).

Recognizing a problem with this jury instruction, defense counsel proposed Instruction B to be used in place of or in addition to instruction No. 8, but the instruction was rejected by the trial court. Instruction B would have clarified to the jury that petitioner could be found not guilty of capital murder as an accessory if he did not coolly deliberate upon the crime himself. Instruction B reads as follows:

If you do not find and believe from the evidence beyond a reasonable doubt that Defendant did consider taking the life of Susie Hawkins and did reflect upon the matter coolly and fully before doing so, you must find the Defendant not guilty of Capital Murder. (Exh. 3) (emphasis added).

The trial court's rejection of Instruction B, and the use of Instruction No. 7 and Instruction No. 8 directly conflicts *O'Brien* and *Ferguson* which prohibits the imputation of the deliberation element in a capital murder case from the principal to an accomplice who did not personally kill the victim. Judge Seiler's dissent in

petitioner's direct appeal highlights serious and compelling concerns with petitioner's jury instructions which led the jury to convict him of capital murder as an accessory without finding that petitioner personally deliberated on Ms. Hawkins' eventual death:

Michael White as an inactive participant was charged with and convicted of capital murder in the death of Susie Hawkins under § 565.001, RSMo 1978 which provides that "[a]ny person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder." The principal opinion sets forth the evidence that the state introduced to support a conviction of capital murder. There was, however, conflicting evidence from which the jury, if properly instructed, could have found the defendant not guilty or guilty of a lesser offense. . . . By definition, capital murder is committed by one who "unlawfully, willfully, knowingly, deliberately, and with premeditation kills" another. Section 565.001. Beyond question it requires a culpable mental state, and evil intent.

This necessarily must be true of one who aids in a capital murder as well as of the one who actually does the killing. **It is unthinkable that it would require less in the way of a culpable mental state to be convicted as an aider in capital murder, where the death penalty is possible, than it does to be convicted as the principal.**

State v. White, 622 S.W. 2d 939, 949 (Mo. banc 1981) (Seiler, J., dissenting, joined by Bardgett, J.)

As this dissent notes, had petitioner's jury been properly instructed, evidence existed from which the jury could have found petitioner not guilty as charged:

The defendant, who had no prior convictions, testified that he did not know that Hardy Bivens intended to shoot the girls; he testified that he carried the gun because of trouble in school; he testified that he placed the gun on the seat of the car because he did not want to get arrested for carrying a concealed weapon; he testified that he obeyed Hardy Bivens

in driving around the block and giving him bullets because of fear, that Bivens threatened him with the weapon several times. Furthermore, Janice Thompson testified that Hardy Bivens, not Michael White, was the person who threatened and ultimately shot her and killed Susie Hawkins, her step-sister.

The defendant did not know Susie Hawkins and knew Janice Thompson only through Hardy Bivens and school. There was no evidence of any motive for Michael White to kill the girls, other than that White and Bivens were friends. Michael White did not kill Susie Hawkins; Hardy Bivens killed Susie Hawkins. *Id.*

Petitioner is serving life imprisonment without the possibility of parole for fifty years. It cannot be overemphasized that petitioner would likely be a free man had his jury been properly instructed.⁵

When Mr. White got in the car with Mr. Bivens, he thought he was getting a ride to his brother-in-law's home. Through a terrible turn of events, he ultimately was convicted as an accomplice to capital murder based solely upon the acts and intent of Hardy Bivens. His conviction and incarceration for more than forty years for a crime he did not commit is fundamentally unjust. Habeas relief is warranted.

CONCLUSION

⁵ It is a cruel irony that co-defendant Hardy Bivens, because he was under eighteen, was resentenced on September 26, 2019, to life imprisonment for second degree murder and subsequently released on parole. *Bivens*, No. 22791-00709-01.

WHEREFORE, for all the foregoing reasons, petitioner respectfully requests that this Court require the State of Missouri to show cause as to why habeas relief should not be granted and thereafter, after a thorough review of the facts and law, the writ of habeas corpus should be granted, and an order should issue directing the Supreme Court of Missouri to vacate petitioner's conviction and order a new trial.

Respectfully Submitted,

/s/ Kent E. Gipson
KENT E. GIPSON, #34524
Law Office of Kent Gipson, LLC
121 East Gregory Boulevard
Kansas City, Missouri 64114
816-363-4400 • Fax: 816-363-4300
kent.gipson@kentgipsonlaw.com

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 2023, the foregoing was filed via case.net and the writ summary, petition, exhibit list, and exhibits, were sent via email to Jeffrey.suddy@ago.mo.gov.

/s/ Kent E. Gipson
Counsel for Petitioner