IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

Kevin Johnson,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 4:13-CV-2046-CEJ**
	)	
Troy Steele,	)	
	)	
Respondent.	)	

MOTION FOR EVIDENTIARY HEARING

Petitioner Kevin Johnson respectfully requests that the Court conduct an evidentiary hearing in relation to Claims 3, 5, and 18-21 of his Petition for Writ of Habeas Corpus, for the reasons set forth below.

Legal Standards Governing an Evidentiary Hearing

An evidentiary hearing is proper when the habeas petition alleges facts which, if proved, would entitle the petitioner to relief, and there is a material dispute about those facts. *Townsend v. Sain*, 372 U.S. 293, 312-19 (1963). "[H]earings are particularly important in capital cases ..., where the 'irremediable' penalty demands factfinding at a 'heightened standard of reliability.'" *Parkus v. Delo*, 33 F.3d 933, 939 n.6 (8th Cir. 1994).

Under the AEDPA, district courts retain discretion to grant evidentiary hearings in federal habeas proceedings, subject to specific restrictions. *Schriro v.*

Landrigan, 550 U.S. 465, 473 (2000). The primary consideration under AEDPA, as before, is whether "a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Id.* at 474. A court "must" conduct a hearing when the statute does not prohibit it and when the prisoner alleges disputed facts that would entitle him or her to relief if proven true. *Smith v. Bowersox*, 311 F.3d 915, 921 (8th Cir. 2002).

AEDPA also enacted 28 U.S.C. § 2254(e)(2), which usually prohibits a hearing where the petitioner "has failed to develop the factual basis of a claim in state court proceedings." Section 2254(e)(2), however, does not prohibit a hearing where the petitioner sought to develop the facts in state court but was rebuffed by the state court's refusal to hold a hearing. *Williams v. Taylor*, 529 U.S. 420, 437 (2000) (usually no (e)(2) bar to a hearing where the petitioner "seek[s] an evidentiary hearing in state court in the manner prescribed by state law."). A prisoner has not "failed to develop" the underlying facts if "he diligently sought, but was denied" the opportunity to do so in state court. *Smith*, 311 F.3d at 921, or if his request to develop the facts was denied on the basis of an inadequate state procedural ground. *Morris v. Beard*, 633 F.3d 185, 194-95 (3d Cir. 2011).

In *Cullen v. Pinholster*, 563 U.S. 170 (2011), the Supreme Court held that, where a state court has adjudicated a federal constitutional claim on the merits, a habeas court's review of that claim under § 2254(d) is limited to the record before

the state court at the time of the decision. *Id.* at 181-82. *Pinholster* thus only applies to claims subject to § 2254(d) review, i.e., where the state court adjudicated the federal constitutional claim on the merits. *Id.* at 185-86. Moreover, if the state court's merits decision is found to be unreasonable under § 2254(d) based on the state court record, this Court's review of the claim is *de novo*. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (noting that when a habeas court finds an unreasonable application of controlling federal law, the court must then "resolve the claim without the deference AEDPA otherwise requires."). Nothing in *Pinholster* bars the federal court from conducting a hearing on any such claim and considering the evidence adduced when deciding the merits. *See Pinholster*, 563 U.S. at 184-85; *see also, e.g.*, *Harris v. Haeberlin*, 752 F.3d 1054, 1058 (6th Cir. 2014) (considering new evidence on *Batson* claim that was unreasonably decided in state court); *Smith v. Cain*, 708 F.3d 628, 634-35 (5th Cir. 2013) (same).

These standards are explored more fully below as they relate to the particular claims on which a hearing is sought.

I. The Court Should Grant an Evidentiary Hearing on Kevin's Claim that Trial Counsel Performed Ineffectively by Failing to Investigate and Present Evidence of His Long-Term Mental Illness and Brain Dysfunction, Which Post-Conviction Counsel Also Failed to Investigate and Present (Regarding Claim 18).

In Claim 18, Petitioner contends that trial counsel performed deficiently by not investigating and presenting evidence of his severely impaired mental state.

The merits of Petitioner's claim have been described at length in the Petition and Traverse – both in light of the record developed in state court, as well as the additional record that Petitioner seeks to develop on habeas corpus. *See* Doc. 35 at 213-33; Doc. 88 at 18-28. Undersigned counsel assume the Court's familiarity with these filings, which assert that post-conviction counsels' ineffectiveness allows Kevin to broaden and develop his claim in federal court. *See* Doc. 88 at 22-28 (relying on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and related authorities).

A. The Court should hear testimony describing Petitioner's impairments and post-conviction counsel's deficient performance.

A hearing is required on Claim 18 because Petitioner has alleged facts that entitle him to relief if they are proven true. *Smith v. Bowersox*, 311 F.3d 915, 921 (8th Cir. 2002); *Bliss v. Lockhart*, 891 F.2d 1335, 1338 (8th Cir. 1990). The evidence at a hearing will establish that Kevin has a history of hearing voices and suffering dissociative symptoms, that he was acting under a dissociative identity disorder at the time of the shooting, and that a frontal lobe dysfunction impairs Kevin's decisionmaking and contributes to his severe impulsivity.

Petitioner seeks to present the following witnesses at a hearing:

•**Richard Dudley, M.D.**, forensic psychiatrist, will testify in accordance his report. *See* App. 1-12; *see also* Ex. 1 (curriculum vitae). Dr. Dudley will explain that Kevin's post-conviction diagnosis of acute stress disorder fails to account for the fact that Kevin's childhood psychiatric difficulties stem from the traumatic experiences he endured as a child, that Kevin displayed "very prominent dissociative symptoms" that are different from those associated with acute stress disorder, and that Kevin has a "long history of

experiencing two distinct personality states" (specifically "Kris," who takes over when Kevin's depression, suicidality, and impulse control are at their worst). App. 9-10. Dr. Dudley will testify that Kevin developed a dissociative identity disorder, and at the time of the offense, Kevin underwent a "dissociative episode where 'Kris' took control." App. 10-11.

•**Daniel A. Martell, Ph.D.**, neuropsychologist, will describe the findings from his evaluation of Kevin and review of records. App. 13-35; *see also* Ex. 2 (curriculum vitae). Following a battery of neuropsychological tests, Dr. Martell observed a "focal deficit in frontal lobe executive functioning," which impairs an individual's planning, response inhibition, and impulse control. App. 32. Focal frontal lobe dysfunction tends to make the subject "oblivious to the future consequences of their actions." App. 32-33. Dr. Martell concludes that Kevin's psychiatric disorders, severe impulsivity, and frontal lobe impairment "greatly contributed" to the crime, and that Kevin's "moral compass was effectively 'offline'." App. 34.

•**Valerie Leftwich**, and **Jeannie Willibey**, state post-conviction counsels, will describe the nature and scope of their investigation of Kevin's mental health and clinical history. App. 190-95, 354-60. Post-conviction counsel will testify that they knew about Kevin's history of hearing voices, and that Kevin shared with them a "particularly detailed description of going out into the woods and speaking to an imaginary friend." App. 355-56. They also reviewed a 2008 intake mental health evaluation from the Potosi Correctional Center, which states that Kevin "may have delusions of reference and thinking that is disorganized, bizarre, disoriented, and circumstantial," and that Kevin should be evaluated for "bizarre and possibly psychotic experiences/ideations." App. 356, 555-56. Counsel also declined to seek medical or mental health records on any relatives of Kevin other than one sister. App. 356. Counsel focused on "acute stress disorder" and the "time of the crime," but they "should have focused more on mitigation and Kevin's history." App. 194, 356. Counsel also failed to obtain a neuropsychological evaluation for Kevin, even though funding was available for such an evaluation, and even though Kevin's was the "type of case" in which counsel would consult a neuropsychologist. App. 194, 355, 359. Counsel regret that failure. App. 194, 359.

B. Neither *Cullen v. Pinholster*, 563 U.S. 170 (2011), nor 28 U.S.C. § 2254(e)(2), precludes a hearing on Claim 18.

Respondent is likely to assert procedural defenses against Kevin's request for a hearing, but these will not prevail. The Supreme Court's opinion in *Cullen v. Pinholster*, 563 U.S. 170 (2011), does not forbid a hearing under the circumstances of this case. By its own terms, *Pinholster* limits habeas review to the state court record only when the court is assessing whether the state court's decision is legally or factually "unreasonable" under 28 U.S.C. §§ 2254(d)(1)-(2). *See* 563 U.S. at 181 ("We now hold that *review under § 2254(d)(1)* is limited to the record that was before the state court that adjudicated the claim on the merits.") (emphasis added).

Petitioner does not seek to present new mental health evidence in order to show that the state court's decision was unreasonable. He has already made that showing on the state court record. *See* Doc. 35 at 226-27; Doc. 88 at 20-21. Specifically, the Missouri Supreme Court upheld trial counsel's claimed "strategy" of not presenting mental health evidence, even though counsel did not request or obtain any evaluation of Kevin's mental health despite multiple diagnoses in his history and records:

> The record indicates trial counsel was aware of a potential diminished capacity defense. However, counsel made a deliberate choice to not pursue this strategy. Counsel was concerned that the jury would lose focus or become alienated. Counsel also knew that if they presented expert testimony regarding Movant's diminished capacity, the State could then introduce its own experts, challenging the diagnosis of ASD.

Johnson v. State, 406 S.W.3d 892, 900 (Mo. 2013).

There is no genuine dispute that trial counsel never had Kevin evaluated. *See* PCR Tr. 510-11, 469 (counsel did not seek an evaluation, but they might have presented the results of the evaluation depending on what it said); Respondent's Response (Doc. 63) at 180 ("Trial counsels were generally aware of Johnson's mental health background but decided against having a mental health evaluation … Trial counsels acknowledged that they could have had an evaluation done and then decided whether or not to use the results of the evaluation."). Without the benefit of an evaluation, counsel chose their "strategy" without knowing their client's mental state. "[C]ounsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to [trial] strategy impossible." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Because the state court's ruling is unreasonable under section 2254(d)(1), this Court must review *de novo* the question of whether trial counsel rendered prejudicially ineffective assistance, in both stages of the trial, by failing to investigate and present evidence of Kevin's mental illness and impairments. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (noting that when a habeas court finds an unreasonable application of controlling federal law, the court must then "resolve the claim without the deference AEDPA otherwise requires"); *Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013) ("AEDPA permits *de novo* review in those rare cases when a state court decides a federal claim in a way that is 'contrary to'

clearly established Supreme Court precedent."); *Harrington v. Richter*, 562 U.S. 86, 100 (2011) (acknowledging that § 2254(d)(1)'s exception "permit[s] relitigation where the earlier state decision resulted from an 'unreasonable application of clearly established federal law").

In the course of such *de novo* review, a federal court is free to undertake discovery, an evidentiary hearing, or other means of factual development notwithstanding *Pinholster*. *See Harris v. Haeberlin*, 752 F.3d 1054, 1058 (6th Cir. 2014); *Smith v. Cain*, 708 F.3d 628, 634-35 (5th Cir. 2013); *Skipwith v. McNeil*, No. 09-60361-CIV, 2011 WL 1598829, at *4-*6 (S.D. Fla. Apr. 28, 2011) (allowing hearing and granting relief on ineffectiveness claim despite *Pinholster*, because the state court unreasonably determined the facts under 28 U.S.C. § 2254(d)(2)); *Hearn v. Ryan*, No. CV 08–448–PHX–MHM, 2011 WL 1526912, at *2 (D. Ariz. Apr. 21, 2011) (same, when state court has unreasonably applied federal law under 28 U.S.C. § 2254(d)(1)); *Williams v. Houk*, No. 4:06 CV 451, 2012 WL 6607008, at *5 (N.D. Ohio Dec. 18, 2012) (collecting cases).

The reason for allowing discovery and a hearing is straightforward: *Pinholster* limits habeas review to the state court record only when the court is determining whether the state court unreasonably decided the law or facts under 28 U.S.C. §§ 2254(d)(1)-(2). *See Pinholster*, 563 U.S. at 181-82. When the state court's decision is legally or factually unreasonable, the prisoner must still show

that his custody violates the Constitution. 28 U.S.C. § 2254(a); *Pinholster*, 563 U.S. at 563 U.S. at 186 n.9. That ultimate merits inquiry often requires a hearing: "[I]f after review solely on the state court evidence, it appears the state court contravened or unreasonably applied clearly established federal law, the federal court may then consider additional evidence to determine whether habeas relief should be granted." *Caudill v. Conover*, 871 F. Supp. 2d 639, 649 (E.D. Ky. 2012). Such new evidence may be "obtained by way of discovery or an evidentiary hearing." *Id.*; *Lopez v. Miller*, 906 F. Supp. 2d 42, 56-58 (E.D.N.Y. 2012) (endorsing view that "*Pinholster* is limited to § 2255(d) and does not preclude a district court from considering evidence produced at an evidentiary hearing to determine whether a petitioner is entitled to habeas relief under § 2254(a)").

Neither is a hearing precluded by 28 U.S.C. § 2254(e)(2). The statute sharply limits a hearing when the petitioner has "failed to develop the factual basis of a claim in State court proceedings." *Id.* But it does not apply when, as here, the "failure" is the result of post-conviction counsel's ineffective assistance under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). *See, e.g.*, *Kemp v. Hobbs*, No. 5:03–cv–55–DPM, 2014 WL 4079020, at *2 (E.D. Ark. Aug. 14, 2014) ("The failure to develop the facts behind these claims in state court was not due to Kemp's lack of diligence; it was the result of the alleged ineffectiveness of trial counsel and post-conviction counsel. In these

circumstances, the statute authorizes the Court to hold an evidentiary hearing on these claims."). Petitioner has elsewhere explained that post-conviction counsel performed ineffectively by failing to investigate Kevin's long-term impairments, to follow up on his history of hallucinations, and to obtain a neuropsychological evaluation despite notice of brain dysfunction and the resources to evaluate it. *See* Traverse (Doc. 88) at 22-28.

The Court should reject Respondent's argument that *Martinez* applies only when a prisoner has wholly defaulted a claim on post-conviction review, and not when post-conviction counsel asserted a claim but litigated it ineffectively. *See* Response (Doc. 63) at 54-55. This Court's rulings disprove Respondent's contention. In *Barnett v. Roper*, 941 F. Supp. 2d 1099 (E.D. Mo. 2013), and *Barnett v. Roper*, No. 4:03CV00614 ERW, 2016 WL 278861 (E.D. Mo. Jan. 22, 2016), the Court excused death-sentenced prisoner David Barnett's failure to plead specific facts in his Rule 29.15 petition as state law requires. It did so because post-conviction counsel's deficient pleading and litigation of the claim amounted to ineffective assistance under *Martinez*. *See Barnett I*, 941 F. Supp. 2d at 1114 & n.17; *Barnett II*, 2016 WL 278861, at *7-*11 ("The Memorandum and Order … outlines the Court's determination of ineffective assistance of post-conviction counsel and is not based solely on counsel filing a deficient pleading.").

Barnett is significant because a failure to plead specific facts on post-

conviction reflects a "lack of diligence" under which the prisoner has "failed to develop the factual basis of his claim." *Smith v. Bowersox*, 311 F.3d 915, 921-22 (8th Cir. 2002). Prior to *Martinez*, that failure precluded Smith from obtaining an evidentiary hearing in federal court. *Id.* (citing 28 U.S.C. § 2254(e)(2)). This Court has nevertheless employed *Martinez* to excuse the very defect identified in *Smith*. *See Barnett II*, 2016 WL 278861, at *8-*11. The point is that when post-conviction counsel's ineffective performance results in a failure to develop the facts, that failure is not attributable to the prisoner after *Martinez* – including failures that stem from counsels' inadequate investigation. *See McLaughlin v. Steele*, ___ F. Supp. 3d ___, No. 4:12CV1464 CDP, 2016 WL 1106884, at *8 (E.D. Mo. Mar. 22, 2016) (stating that Rule 29.15 counsel should seek to litigate "all arguably meritorious issues" and must bear in mind that "a trial record may be incomplete because the trial attorney did not conduct an adequate investigation in the first instance"); *McNish v. Westbrooks*, 149 F. Supp. 3d 847, 852 (E.D. Tenn. 2016) (default overcome where "none of Petitioner's [post-conviction] counsel thoroughly investigated the lack of mitigating evidence in [the] form of Petitioner's social, mental, and family history."); *accord Trevino v. Davis*, ___ F.3d ___, No. 15-70019, 2016 WL 3710083, at *16 (5th Cir. Jul. 11, 2016) (holding that post-conviction counsel has the same duty to investigate as trial counsel does).

Aside from *Barnett* and *Smith*, nothing in AEDPA prevents a court from

holding a hearing to determine whether a petitioner has "cause" to overcome a procedural default. *See, e.g.*, *McLaughlin*, 2016 WL 1106884, at *7-*8 (E.D. Mo. Mar. 22, 2016) (describing hearing and testimony establishing Rule 29.15 counsel's ineffectiveness). Such a default exists here: as "newly enhanced" by the evidence from Dr. Dudley and Dr. Martell, *see Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (en banc), Kevin's *Strickland* claim is procedurally defaulted because the new facts "fundamentally alter the legal claim already considered by the state courts." *Id.* at 1319-20; *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). To establish "cause" for the default, Kevin must show that (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 were performed ineffectively with respect to the claim. *Martinez*, 132 S. Ct. at 1318-19; *Trevino*, 133 S. Ct. at 1918; *Dansby v. Hobbs*, 766 F.3d 809, 833-34 (8th Cir. 2014).

A "substantial" claim is one that has "some merit." *Martinez*, 132 S. Ct. at 1318; *Dansby*, 766 F.3d at 834. Therefore, in order to determine whether Kevin has "cause" to overcome the default of his federally-broadened claim, the Court must necessarily consider the merits of that claim. *Dickens*, 740 F.3d at 1321-22. An argument of "cause" under *Martinez* is not a "claim" for habeas corpus relief within the meaning of section 2254(e)(2) (hearing limited when "the applicant has

failed to develop the factual basis *of a claim* in State court proceedings") (emphasis added). The Court may conduct a hearing on the merits in order to determine whether Kevin shows "cause" and "prejudice." *See Dickens*, 740 F.3d at 1321-22 (section 2254(e)(2) "does not bar a cause and prejudice hearing on Dickens's claim of PCR counsel's ineffectiveness, which requires a showing that Dickens's underlying trial-counsel IAC claim is substantial").

II. The Court Should Conduct an Evidentiary Hearing on Kevin's Claim that Trial Counsel Performed Ineffectively by Failing to Investigate and Present Evidence of the Severe Abuse and Neglect Kevin Suffered and Witnessed Throughout His Childhood (Regarding Claim 19).

Claim 19 asserts that trial counsel failed to investigate, develop and present detailed evidence of Kevin's history of extreme abuse and neglect, as well as his history of hearing voices. As explained in the Petition and Traverse, such evidence would have been critical at the guilt phase relative to Kevin's state of mind at the time of the shooting, and the evidence would have squarely rebutted the prosecutor's penalty-phase theory that portrayed Kevin's great-aunt Edythe and his grandmother Pat as having done "everything [they] could possibly do" to help Kevin. Doc. 35 at 234-251; Doc. 88 at 28-34.

The facts alleged in Claim 19 and the Traverse demonstrate trial counsels' ineffective assistance that prejudiced Kevin. Counsel failed to investigate the violent abuse and neglect that Kevin suffered as a child at the hands of all of his caregivers, and failed to interview Kevin's teachers, friends, family members, or

other important witnesses who had knowledge of the horrendous facts of abuse and neglect. Nor did counsel interview any witness about Kevin's experiences with and exposure to ongoing sexual abuse and incest within the family, or about the family's history of mental illness and criminality. Doc. 88 at 30-33. Counsel also failed to investigate Kevin's history of hearing voices, even though this serious "red flag" was documented in the DFS records that trial counsel had in their possession. Doc. 35 at 227; Doc. 88 at 32; Habeas Corpus Ex. 5 at 5. A hearing is required because "the petitioner has alleged disputed facts which, if proved, would entitle him to habeas relief." *Smith v. Bowersox*, 311 F.3d 915, 921 (8th Cir. 2002).

Counsel intend to introduce DFS records, court records and other documents described in the Traverse, and, in addition, to call the below-identified witnesses, to testify in a manner consistent with their sworn written statements, to prove the following facts:

> •When Kevin was born on September 23, 1985, his mother Jada had already given birth a year earlier to Kevin's brother Marcus by another man, Myron Hodges, who was married and much older than Jada's sixteen years. Hodges, a successful drug dealer in Meacham Park, was never around after Marcus was born. Kevin's father, Kevin Johnson, Sr., was in jail for burglary and stealing at the time of Kevin's birth, and before Kevin turned one year old, his father pleaded guilty to shooting and killing a woman after a night of partying and using drugs, and was sentenced to twenty years in prison after pleading guilty to second-degree murder. Around this time, Jada became addicted to crack cocaine, which was then becoming rampant in Meacham Park. Kevin's sister Kanesha was born with drugs in her system, and placed in the custody of her great-great aunt Bettye Phillips when she was less than a year old. (**Myron Hodges**, App. 96-97; **Marcus Tatum**, App. 311-12; **Bettye Phillips**, App. 254; App. 900-921(Court Records)).

•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 infested with mice, rats, and bugs, with food bags and scraps 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. (**Marcus Tatum**, App. 311-12; **Candace Tatum**, App. 300; **Tresa McCallie**, App. 218-19, 221; App. 783 (DFS Records)).

•On many of the nights when Jada disappeared without telling anyone, Kevin would go to bed next to his mother and siblings, but would wake up to find his mother gone. There was often no food in the house, and the children went hungry. While Kanesha was taken out of the house and cared for weeks at a time by Kevin's great-great aunt Bettye Phillips, Kevin and Marcus were often left alone to fend for themselves. (**Bettye Phillips**, App. 254; App. 639-41, 648, 653 (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 Marcus with her while she had sex for money with an old 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 Kevin out with her for long, unexplained periods as well. Another time, Jada had sex with a neighbor man for money, in full view of Kevin, Marcus, and Kanesha. While Kevin 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. (**Marcus Tatum**, App. 312-13; **Candace Tatum**, App. 299-300; App. 643, 645-47 (DFS Records)).

•When Kevin was four-and-a-half years old, DFS finally took custody, and Kevin was placed with his great-aunt Edythe Richey. On March 1, 1990, the day Kevin was taken to live with Aunt Edythe, Kevin and his brother Marcus went to court. Marcus went off with his grandmother Pat Ward, while Kevin was left crying at court with a white woman he did not know. Kevin did not have any clothing to take with him, and the family was

uncertain whether Jada even had any clothing for Kevin. Eventually, the woman dropped Kevin off at Aunt Edythe's house. Edythe was very surprised when the DFS lady showed up with little Kevin and told her that she was given custody of Kevin because Pat's house was too full. Edythe never intended to take custody of Kevin. She thought Kevin was going to be raised by Pat Ward and then be returned to Jada when Jada got herself together. In Kevin's bedroom adjacent to Edythe's, a large clock hung on the wall that depicted different sex positions in place of the numbers marking time. (**Edythe Richey**, App. 282; App. 620, 660 (DFS records); App. 3 (Dudley Report)).

•While Edythe provided Kevin with bare necessities, she was not a warm person, and did not provide Kevin with a loving and caring environment. Edythe also seemed bitter over her breakup with her husband Kevin Richey. Over time, Edythe became extremely physically and psychologically abusive to Kevin. (**Lawanda Franklin**, App. 78; **Charisse Clark**, App. 45; **Candace Tatum**, App. 300).

•Edythe's chief complaint to DFS soon after taking custody of Kevin was that he wet his bed almost every night. Kevin went to school smelling of urine because of his bedwetting. Kevin's bedwetting continued all the way through his teenage years. (**Rachel Jenness**, App. 130-31; **Edythe Richey**, App. 283; App. 621 (DFS Records)).

•By the time Kevin 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 Kevin's name on it. Rachel Jenness, Kevin's teacher, knew that Kevin was beaten and whipped by Edythe. Whenever Edythe came around, Kevin cowered from her. Jenness spoke to a school counselor about whether they should call the police about the abuse Kevin was experiencing at home, but there was no intervention. Jenness never saw Edythe be loving or affectionate toward Kevin, and it appeared to her that Kevin was an obligation Edythe did not want. Kevin was on punishment all the time at Edythe's, which meant that he could not hang out with anyone or do anything. (**Rachel Jenness**, App. 130-133; **Barbara Pickett-Champion**, App. 256-57; **Seretha Curry**, App. 66; **Edythe Richey**, App. 284; **Brittany Jones**, App. 172-73; **Marcus Tatum**, App. 317).

•DFS workers and family began to notice that Kevin was quieter than other kids, and he was sometimes found alone, quietly playing. As young as six

years old, Kevin lived in fear of Edythe, and he felt that no one cared about him or wanted him, and that there must be something seriously wrong with him. He often felt he wanted to kill himself, but didn't know how to go about doing it. Around this same time, a voice named Kris began talking to Kevin. While Kevin was more quiet, passive and suicidal, Kris was tougher, and more angry, independent, and aggressive, and would emerge when Kevin was alone and more depressed. Kevin initially thought that Kris was another person, but he came to realize that Kris was more likely another part of himself.[1] (**Marcus Tatum**, App. 317; App. 3-4 (Dudley Report); Habeas Ex. 5 at 5).

•Because of Edythe's second-shift work schedule, Kevin spent a lot of time at Pat Ward's home, where his brother Marcus was. Pat's and Henrietta's houses stood in stark contrast to the controlling environment of Edythe's house. Pat's house, like the shack in back, was infested with cockroaches and mice, trash and clothes covered the floor, and Pat did not seem to care. Similarly, anything went at Henrietta's house. 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 Kevin and his brother, bathed regularly or wore clean clothes. There was no money, and no supervision. There was always some utility turned off, like gas or water. 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, Pat – who had ten children of her own – frequently left the children alone and unattended. (**Edythe Richey**, App. 283-84; **Marcus Tatum**, App. 314-17; **Brittany Jones**, App. 171-72; **Candace Tatum**, App. 301-302, **Cameron Ward**, App. 349; App. 643, 648, 663, 666, 667 (DFS Records).

•Pat also physically abused her children and grandchildren, including Kevin. 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

[1] Consistent with Kevin's dissociative and psychotic symptoms, Kevin's sister Kanesha experienced similar difficulties. When she was only five years old, Kanesha set fire to the basement of her foster parent and great-great aunt, Betty Phillips, and was placed in a psychiatric hospital and prescribed anti-psychotic drugs. (**Bettye Phillips**, App. 254-55; App. 889-90 (DFS Records)).

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. (**Marcus Tatum**, App. 315-16; **Cameron Ward**, App. 348-49).

•The Ward house was filled with violence between the children. The Ward children used to tease Kevin and Marcus about 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. (**Marcus Tatum**, App. 316; App. 1080-82 (Court records)).

•Kevin's family has a history of inter-generational incest and sexual violence, and Kevin himself was exposed to and forced to participate in sexual and incestuous acts from the time he was just a toddler. When Kevin was only about six or seven years old, he was directed by uncles and cousins to join in sex acts. Marcus and Kevin 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. Kevin's cousin Regina Tatum, the daughter of Jada's brother Reggie, had sex with a number of her cousins, including Kevin'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 the mechanics of sex, which led Marcus to believe she had been molested. Marcus learned later that Regina's father, Reggie, had molested her. (**Marcus Tatum**, App. 318-319).

A hearing is required not only on the merits of Kevin's claim, but also on his showing that the claim was defaulted due to the ineffective assistance of post-conviction counsel. *See, e.g., McLaughlin v. Steele*, ___ F. Supp. 2d ___, No. 4:12CV1464 CDP, 2016 WL 1106884, at *7-*8 (E.D. Mo. Mar. 22, 2016)

(describing hearing and testimony establishing Rule 29.15 counsel's ineffectiveness). Rule 29.15 counsel Jeannie Willibey and Valerie Leftwich will explain that they recognized that trial counsel had not adequately investigated Kevin's family and social history, that they regret their failure to interview Kevin's teachers, friends and relatives, and other important witnesses identified in the DFS records who had knowledge of the relentless, violent abuse and neglect that Kevin suffered at the hands of all of his caregivers, and their failure to interview family members, including Kevin's brother Marcus, about the ongoing sexual abuse and incest within the family that Kevin experienced and was exposed to. App. 62-63, 191-194, 281, 311-32, 356-59. Post-conviction counsel also knew that Kevin hears voices, but they failed to investigate this important indicator of chronic mental illness. App. 355. Counsel thus failed to discover through readily available sources Kevin's history of psychosis, documented during Kevin's childhood in DFS records and as an adult in prison mental health records. App. 355-356, 555-556. Rule 29.15 counsels' ineffectiveness provides "cause" to overcome the default of Claim 19 for the reasons explained in Kevin's Traverse. *See* Doc. 88 at 28-34.

Finally, a hearing on Claim 19 is not barred by 28 U.S.C. § 2254(e)(2). The statute forbids a hearing when the petitioner has "failed to develop the factual basis of a claim in State court proceedings." But it does not apply when, as here, the prisoner's post-conviction counsel has defaulted the claim by wholly failing to

assert it through ineffective assistance within the meaning of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013). *See Sasser v. Hobbs*, 735 F.3d 833, 853-54 (8th Cir. 2013) (prisoner is entitled to a hearing "on the claim" if he demonstrates post-conviction counsel's ineffectiveness for defaulting it); *Roberts v. Howton*, 13 F. Supp. 3d 1077, 1099 (D. Ore. 2014) (when prisoner presents a "new ground for relief that is procedurally defaulted," and when *Martinez* excuses the default, the Court reviews the claim *de novo* and will "consider new supporting evidence").

III. The Court Should Conduct an Evidentiary Hearing on Kevin's Claim that Trial Counsel Performed Ineffectively by Failing to Investigate and Present Evidence Describing the Police Brutality in the Community in which Kevin was Raised (Regarding Claim 20)

Claim 20 asserts that trial counsel failed to describe the police brutality that Kevin and the community in which he was raised experienced. As explained in the Petition and Traverse, such evidence would have supported the guilt phase defense of diminished capacity, and militated strongly in favor of a life sentence – not only because Kevin had been abused by Sgt. McEntee and other police officers, but also because the evidence would have rebutted the prosecutor's incomplete and misleading portrayal of the victim. Doc. 35 at 258-60; Doc. 88 at 41; *see also, e.g.*, Trial Tr. 2041 (testimony that Sgt. McEntee had always wanted to be a police officer since his childhood and "felt lucky because he was getting to do what he

always wanted to do"); *id.* at 2062 (testimony that Sgt. McEntee "was a good person, a good father, a good brother, he was a good son"); *id.* at 2063 (testimony that Sgt. McEntee was "very proud of passing everything and becoming a sergeant"); *id.* at 2341 (argument that Sgt. McEntee was "a family man").

"When an evidentiary hearing is not prohibited by statute, the district court must hold such a hearing if the petitioner has alleged disputed facts which, if proved, would entitle him to habeas relief." *Smith v. Bowersox*, 311 F.3d 915, 921 (8th Cir. 2002). The facts alleged in Claim 20 and the Traverse demonstrate trial counsels' prejudicially ineffective assistance: counsel failed to interview Kevin's family, friends, and neighbors who could explain the generations of police brutality that had plagued the community, and they failed to even question the witnesses who hinted at problems with police in the area at their pre-trial depositions. Doc. 35 at 252-58; Doc. 88 at 35-38.

A hearing is necessary to establish evidence that, if developed by trial counsel, would reasonably likely have convinced the jury to acquit Kevin of first-degree murder and instead convict him of a lesser offense, or to reject a death sentence. Petitioner has asserted that trial counsel was ineffective for not establishing (1) there is a history of tension with the police in Meacham Park; (2) The Kirkwood Police Department exhibited racism and abuse against black members of the community following Kirkwood's annexation of Meacham Park;

(3) Sergeant McEntee had a reputation for racism, harassment, and violence; and (4) Kevin personally experienced and witnessed racism, harassment, and violence at the hands of the police.

A. There is a history of tension with the police in Meacham Park.

To establish Meacham Park's history with police brutality, counsel intend to call the following witnesses at an evidentiary hearing, in order for them to testify in a manner consistent with their sworn declarations: Aaron Harris (Kevin's paternal uncle by marriage); Craig Howard (longtime resident of Meacham Park); Alfred Sylvester Jackson (Kevin's great-uncle); Brittany Jones (Kevin's former girlfriend and longtime resident of Meacham Park); Cecil Jones (longtime resident of Meacham Park and one of the state's witnesses at trial); Harriet Patton (longtime Meacham Park resident and the president of the Meacham Park Neighborhood Improvement Association); Bettye Price (longtime African American resident of Kirkwood); Waddell Savage (father of Kevin's childhood friend and former Meacham Park resident); Roscoe Tatum (Kevin's maternal uncle); Jane Von Kaenel (community activist and resident of Kirkwood); and Colin Gordon (an expert on the historic impact of the relationship between Meacham Park and Kirkwood). These witnesses will testify as follows:

Meacham Park has a long history of abuse by law enforcement, which started back when the St. Louis County Police Department patrolled the

neighborhood. For the most part, the County police largely ignored Meacham Park. Harriet Patton Declaration, App. 246-47. Sometimes fights would break out in front of the County police, and they still would not intervene, which contributed to the increase of crime in the neighborhood. Cecil Jones Declaration, App. 185. The County police were slow to make it out to Meacham Park, and it could take anywhere from twenty minutes to an hour to respond to a call. *Id.*; Patton Dec., App. 247.

The County police were excessively aggressive when they did respond, however. Aaron Harris Declaration, App. 85; Roscoe Tatum Declaration, App. 335. The County police chief was prejudiced against black people. Alfred Sylvester Jackson Declaration, App. 120. The police force also lacked diversity, even though they were meant to serve this predominantly black neighborhood. Craig Howard Declaration, App. 104. While there was one black County officer, he "beat people up when he stopped them. He had the same mentality as other police officers – that he had the power and he could do whatever he wanted to the black people of Meacham Park." *Id.* The County police harassed the Meacham Park residents for minor issues, such as the young men sitting on a popular wall in the middle of the neighborhood and walking in the street. Jackson Dec., App. 120; Waddell Savage Declaration, App. 289.

The aggression of the County police led to several riots. In 1958, Kevin's

great-uncle Syl was the center of one of these riots. A County police officer stopped a car, which Syl's 17-year-old friend was driving, and beat both Syl and the driver. Jackson Dec, App. 121. When other young men in Meacham Park saw this happening, they started throwing rocks at the officer, and a riot ensued. *Id.* The police took Syl and his friend to an isolated and rarely used station in the woods and beat them. *Id.* The community organized to make calls and attract media attention to get the boys returned to the county jail. *Id.* These efforts were successful, but the police charged the boys with inciting a riot. *Id.* There were several other riots against the violence of the St. Louis County police throughout the 1970s and 1980s. A. Harris Dec., App. 85; Cr. Howard Dec., App. 105.

Adding to the community's problems with the police, Meacham Park shared a border, Kirkwood Road, with neighboring Kirkwood. This allowed the Kirkwood police to harass Meacham Park residents before they even had jurisdiction over them. Cr. Howard Dec., App. 105; Jackson Dec., App. 119; Savage Dec., App. 289. As Harriet Patton described:

> We had a tavern [on Kirkwood Road], and if a black man was walking home drunk, the police would arrest him. These men came home beaten, with black eyes and broken arms. If anybody asked the police about it, they would just say, "He fell."

Patton Dec., App. 247. The police also set up patrols at the few black establishments located in Kirkwood and made people go home whenever groups started to form. A. Harris Dec., App. 85-86; Savage Dec., App. 289. The police

often stopped and searched the black residents. When this happened, the police "would grab [them] and slam [them] around. [The police] were always rougher than they had to be." Savage Dec., App. 289; *see also* Bettye Price Declaration, App. 271.

Once the schools were integrated, the police stopped the black children on their way to and from school. Jackson Dec., App. 119. Kevin's great-uncle Syl was once arrested for an incident that happened at the school that he was unaware of. He states, "The police handcuffed me, took me to the station, put me in a cell, and beat me up. The police held me for a night or two at the station and released me without any charges." *Id.* at App. 119-20.

People would discuss their experiences with the police with their family and friends, and parents would relate these stories to their children. Jackson Dec., App. 121. The Meacham Park "[c]hildren 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." Jane Von Kaenel Declaration, App. 343.

Because of this tension with the Kirkwood police, Meacham Park resisted Kirkwood's attempts to expand its police force into Meacham Park, starting in the 1960s. Many of the residents were suspicious that Kirkwood only seemed interested in expanding the police force but not any other services and that this

would cause their tax dollars to fund further discrimination. Colin Gordon Report, App. 604; *see also* Colin Gordon CV, Ex. 3. In the time leading up to the annexation vote in the 1990s, the residents of Meacham Park already had years of deep mistrust for the Kirkwood Police Department. Brittany Jones Declaration, App. 171 ("These were the people that were supposed to protect and serve our community, but instead they harmed us."); Savage Dec., App. 289 (extending Kirkwood police control into Meacham Park "made people in Meacham Park upset because the Kirkwood Police Department had mistreated us for years"); Colin Gordon Report, App. 605 (Meacham Park residents had "come to see the police not as protectors but as aggressors; not as keepers of the peace but as the source of a persistent state of suspicion and surveillance.").

B. The Kirkwood Police Department exhibited racism and abuse against black members of the community following Kirkwood's annexation of Meacham Park.

To establish Kirkwood Police Department's racism and abusive treatment of people in Meacham Park, counsel intend to call the following witnesses at an evidentiary hearing, in order for them to testify in a manner consistent with their sworn declarations: Thelma Allen (Kevin's childhood friend and former resident of Kirkwood); Jason Clark (Kevin's friend and resident of Meacham Park); Justin Clark (Kevin's friend and resident of Meacham Park); Seretha Curry (former assistant principal at Westchester Elementary School); Colin Gordon (expert

witness on the historic impact of the relationship between Meacham Park and Kirkwood); Aaron Harris (Kevin's maternal uncle by marriage); Tausha Harris (Kevin's maternal aunt); Myron Hodges (Kevin's brother Marcus' father); Craig Howard (longtime resident of Meacham Park); Alfred Sylvester Jackson (Kevin's great-uncle); Emmanuel Johnson (Kevin's friend and resident of Meacham Park); Kevin Johnson, Sr. (Kevin's father); Brittany Jones (Kevin's former girlfriend and resident of Meacham Park); Franklin McCallie (former principal of Kirkwood High School); Tresa McCallie (former executive director of Parents as Teachers); Arthur Miller (Kevin's former classmate); Romona Miller (associate principal of Kirkwood High); Harriet Patton (president of the Meacham Park Neighborhood Improvement Association); Bettye Price (longtime resident of Kirkwood); Dameion Pullum (Kevin's childhood friend and resident of Meacham Park); Waddell Savage (father of Kevin's childhood friend and former Meacham Park resident); Florence Sloan (Joseph "Bam Bam" Long's cousin and resident of Meacham Park); Candace Tatum (Kevin's maternal aunt by marriage); Marcus Tatum (Kevin's brother); Roscoe Tatum (Kevin's maternal uncle); Demetrius Taylor (Kevin's friend and former classmate); Charles Howard (longtime Meacham Park resident); Cecil Jones (longtime Meacham Park resident); and Jane Von Kaenel (community activist and Kirkwood resident). These witnesses will testify as follows:

By the mid-1990s, Kirkwood annexed Meacham Park, and the Kirkwood Police Department took control over the neighborhood. Candace Tatum Declaration, App. 307; R. Tatum Dec., App. 335; Gordon Report, App. 605. While they could previously only patrol up to Kirkwood Road, Craig Howard states, "[a]fter the annexation, they could come right to us." Cr. Howard Dec., App. 105.

The Kirkwood takeover was a drastic and noticeable change. Kevin Johnson, Sr. Declaration, App. 157; C. Jones Dec., App. 185; Savage Dec. 289. "It was a struggle for people to adjust when Kirkwood Police came in because [they] were going from no policing to police getting involved for the tiniest things." C. Jones Dec., App. 185. Some residents believed that the Kirkwood police were not prepared to deal with an African American community, so they "resorted to bullying to try and show their power." Cr. Howard Dec., App. 104; *see also* Charles Howard Declaration, App. 100; C. Jones Dec., App. 185.

A large part of this show of power was the constant harassment of Meacham Park residents. Arthur Miller Declaration, App. 232. The Kirkwood police started regular patrols, and many residents felt as if the police were constantly watching. Justin Clark Declaration, App. 52; A. Harris Dec., App. 86; Cr. Howard Dec., App. 105; Florence Sloan Declaration, App. 294. At any given time, there were usually four or five officers over in Meacham Park, Justin Clark Dec., App. 52; A. Harris Dec., App. 86, a small community currently comprised of about 16 blocks. The

police frequently ticketed people for minor offenses. *Id.* One of the most common tickets was for jaywalking, 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." Sloan Dec., App. 293; *see also* Jason Clark Dec., App. 48; A. Harris Dec., App. 86; Tausha Harris Declaration, App. 92; Emmanuel Johnson Declaration, App. 144-45; Johnson, Sr. Dec., App. 158. Officers issued a ticket to a man who stepped out onto the street "to avoid a tree limb that had grown out over the sidewalk," Patton Dec., App. 247, and to others trying to reach their car parked across the street from their house, Sloan Dec., App. 293. Meacham Park only has one way in and out, and the police frequently stopped people to question them as they were coming to and going from the neighborhood. Cr. Howard Dec., App. 105; C. Tatum Dec., App. 307-08.

Kirkwood officers routinely stopped Meacham Park drivers to check their license and registration, even when an officer knew everything was up to date because he had just stopped that person the day before. Cr. Howard Dec. at App. 104; C. Tatum Dec., App. 307-08. Other times, the police made up charges to arrest someone on, Myron Hodges Declaration, App. 97; searched people without a warrant or made up reasons to get a warrant, Cr. Howard Dec., App. 103-04; R. Tatum Dec., App. 335; pulled people over for minor traffic violations in order to search their car, C. Jones Dec., App. 185; and frisked residents to take their pocket

money before letting them go. Ja. Clark Dec., App. 48. Some officers went so far as to plant evidence on people. Sloan Dec., App. 294.

Racism among the Kirkwood police force was widespread. Many officers referred to the black Meacham Park residents as "niggers." *Id.*; Hodges Dec., App. 97; Sloan Dec., App. 295; Von Kaenel Dec., App. 343. There were only a few white residents of Meacham Park at the time, but the police did not treat them as abusively as the black residents. Savage Dec., App. 289. The officers would more heavily police community events in Meacham Park than in Kirkwood, even simple family-friendly celebrations. A. Harris Dec., App. 87.

While the police were not as aggressive with the white Kirkwood community, they still harassed black people who lived in or visited Kirkwood. Dameion Pullum Declaration, App. 276; Savage Dec., App. 288. One black Kirkwood High student started dating another black student who was staying with the high school principal and his wife – both Caucasian, and Kirkwood officers repeatedly stopped him when he went to visit her at home. Franklin McCallie Declaration, App. 212; Tresa McCallie Declaration, App. 224. Another student walking through Kirkwood was stopped by the police and told to "get her black-ass back to Meacham Park." Von Kaenel Dec., App. 343. Even elementary-aged children were stopped and questioned by the police. Seretha Curry Declaration, App. 69. The police also stopped and harassed white Kirkwood citizens who tried

to help people in Meacham Park. Von Kaenel Dec., App. 342.

Even worse, the Kirkwood police often resorted to excessive force and violence. As a result, the Meacham Park residents were afraid of the police. A. Harris Dec., App. 87; E. Johnson Dec., App. 144; Demetrius Taylor Declaration, App. 338. As described by Jason Clark, "The police would drive through Meacham Park in trucks, with binoculars. If they saw an activity or a gathering they didn't like, they would get out of their trucks, put on gloves and other gear, and would yell, curse, threaten, and grab people, even kids . . . ." Jason Clark Dec., App. 48. Some of the officers were quick to draw their guns on people for no reason. A. Harris Dec., App. 86.

Kevin's brother Marcus was involved in an incident in July of 2003 when two officers approached him and his friends as they stood in the street. Marcus Tatum Declaration, App. 331; Ex. 4 (Kirkwood Police Dept. Records), at 1-9. Marcus' use of foul language in public erupted when a Kirkwood officer first sprayed Marcus in the face with pepper spray and then beat him with a baton before arresting him. M. Tatum Dec., App. 331–32. An internal investigation conducted by the department found that the officer had used excessive force on Marcus because "the arrest was the result of a contact that was not based on criminal action or violation of ordinance." Ex. 4 at 8. The officer received a suspension and, at his own request, was transferred out of the district. Ex. 4 at 1-2.

Multiple other residents reported incidents where they were beat by the police. *E.g.*, Thelma Allen Declaration, App. 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."); Hodges Dec., App. 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."); B. Jones Dec., App. 170 (when a police officer came to her uncle's house looking for her cousin, the officer "slammed open the door and came inside, throwing [her] uncle against the wall."); Patton Dec., App. 247 ("One man reported that he was stopped on Tolstoi St. and forced to bend over. The officer searched his rectum right there on the street."); Price Dec., App. 271 (her husband's friend was stopped by the police, and "[t]hey picked him up by his heels and turned him completely over for no reason."); Pullum Dec., App. 276 (grandmother's boyfriend still has scars on his face after police beat him for waxing his car).

The Kirkwood officers created innovative ways to beat the Meacham Park residents so that others would not see their injuries. The police beat and maced darker-skinned people because the bruises and rashes would not show up as easily, Sloan Dec., App. 294-95, and they hit people in the stomach and sides where others could not see the bruises. Jackson Dec., App. 120. The police once forced

Kevin's great-uncle Syl to put a phonebook over his head before they beat his head so that even though his ears rang and he got dizzy, there were not any marks. *Id.* Even when the police did not actually resort to violence, they threatened to do so. A. Harris Dec., App. 87.

When the black residents of Meacham Park or Kirkwood needed police assistance, the Kirkwood officers often dismissed their problems. *See, e.g.*, Allen Dec., App. 38 (after Thelma, her stepmom, and brother went to Kirkwood High School to check on Thelma's niece who had been threatened, police arrested Thelma and her relatives instead); Price Dec., App. 271 (police barely acknowledged her after she was in a car accident with a white Kirkwood resident); Sloan Dec., App. 294 ("The police will sometimes write bad reports when we need them for something. We will call them over here, and then they just make stuff up and don't actually help us."); C. Tatum Dec., App. 308 (a Kirkwood police officer refused to help Candace's niece after she received death threats, and he cussed her niece out instead). The black people in the Meacham Park area felt that if they were white, the police would have done more to help. *Id.*

The Meacham Park Neighborhood Improvement Association started taking complaints from the residents to submit to the Department of Justice's Community Relations Services, and they collected more than eighty complaints about police misconduct over the years. Von Kaenel Dec., App. 343. However, complaints

submitted by residents to the Kirkwood Police Department often went unaddressed. Sloan Dec., App. 294; T. McCallie Dec., App. 224; Romona Miller Declaration, App. 237. Kirkwood officials also used intimidation tactics to discourage such complaints, like imposing unwarranted fines on those who complained. Von Kaenel Dec., App. 342-43.

C. Sergeant McEntee had a reputation for racism, excessive force, and violence.

To establish Sergeant McEntee's reputation for racism, excessive force, and violence in the Meacham Park community, counsel intend to call the following witnesses at an evidentiary hearing, in order for them to testify in a manner consistent with their sworn declarations: Jason Clark (Kevin's childhood friend); Aaron Harris (Kevin's maternal uncle); Tausha Harris (Kevin's maternal aunt); Charles Howard (longtime Meacham Park resident); Craig Howard (longtime resident of Meacham Park); Emmanuel Johnson (Kevin's childhood friend); Brittany Jones (Kevin's former girlfriend); Cecil Jones (longtime Meacham Park resident and one of the state's witnesses at trial); Janet Jones (longtime resident of Meacham Park); Alvin Miller (Kevin's former football coach); Romona Miller (assistant principal of Kirkwood High School); Shalonda Miller (Kevin's brother Marcus' girlfriend); Harriet Patton (president of the Meacham Park Neighborhood Improvement Association and longtime Meacham Park resident); Dameion Pullum

(Kevin's childhood friend); Florence Sloan (Joseph "Bam Bam" Long's cousin and Meacham Park resident); Candace Tatum (Kevin's maternal aunt); Roscoe Tatum (Kevin's maternal uncle); Jane Von Kaenel (community activist and Kirkwood resident); and Matthew Watkins (Kevin's former classmate and teammate). These witnesses will testify as follows:

Sergeant McEntee frequently demonstrated the same racism and violence found in many of the other officers, and indeed was "one of the most notorious on the force." B. Jones Dec., App. 171. Within the Meacham Park community, Sergeant McEntee "was known as a harasser, and someone who planted dope on people." Pullum Dec., App. 276; Cr. Howard Dec., App. 103. People called him Tackleberry, named after a character in the *Police Academy* movies, because he was "really big and tried to use his size to intimidate people." Sloan Dec., App. 293; *see also* A. Harris Dec., App. 86; Ch. Howard Dec., App. 100; C. Jones Dec., App. 185. If he stopped someone over something small, it "could escalate and result in an arrest." E. Johnson Dec., App. 145.

Sergeant McEntee often used excessive force against the Meacham Park residents. He got into fights with people for no reason; Sloan Dec. at 293, threw a pregnant woman onto the ground, B. Jones Dec., App. 171; slammed another pregnant woman into the hood of a car, Shalonda Miller Declaration, App. 241; knocked a teenage boy unconscious for playing dice at the park, then sprayed him

with an entire can of mace once they were at the jail, Pullum Dec., App. 277-78; Ja. Clark Dec., App. 48-49; asked a man for his identification so that as soon as the man reached for his pocket, Sergeant McEntee would have an excuse to tackle him, Cr. Howard Dec., App. 103; broke people's taillights so he would have an excuse to pull them over, *id.*; intentionally tried to hit a man with his car; *id.*; forced his way into a man's home before shoving him into a bookshelf and holding him in a chokehold, A. Harris Dec., App. 86; threatened a man and then chased after him with a gun a month later, *id.* at 86-87; pushed a man down after stopping him, Patton Dec. App. 248; and referred to the young black men in the community as "monkeys sitting on a corner." Janet Jones Declaration, App. 188; B. Jones Dec., App. 171. Sergeant McEntee also manhandled a couple white women who were advocating on behalf of black people's rights. Von Kaenel Dec., App. 341.

Sergeant McEntee had a nearly universal reputation for being racist, and he regularly used racial slurs against the Meacham Park residents. B. Jones Dec., App. 171; Patton Dec., App. 248; Pullum Dec., App. 276; J. Jones Dec., App. 188; Cr. Howard Dec., App. 103; R. Miller Dec., App. 237; A. Harris Dec., App. 86; T. Harris Dec., App. 93; Alvin Miller Declaration, App. 226; Matthew Watkins Declaration, App. 352-53; C. Jones Dec., App. 185; Ja. Clark Dec., App. 48; R. Tatum Dec., App. 335; C. Tatum Dec., App. 307; Von Kaenel Dec., App. 341.

Sergeant McEntee was dismissive of black people who needed police

assistance. Watkins Dec., App. 352-53. Kevin's aunt Candace was once attacked by a white couple in Kirkwood, and Sergeant McEntee responded after the police were called. C. Tatum Dec., App. 307. When she told him that she wanted to press charges against them, he told her, "You get home, nigger." *Id.* at 307. Sergeant McEntee and his prejudice was one of the main reasons she decided to move away from Kirkwood. *Id.*

Sergeant McEntee's reputation extended beyond Meacham Park. School officials heard from their students about Sergeant McEntee's abuse and racism. Al. Miller Dec., App. 226; R. Miller Dec., App. 237. Other officers on the force were also aware of his behavior and warned Meacham Park citizens to try to avoid him. A. Harris Dec., App. 87. The department received complaints about Sergeant McEntee's behavior, but nothing ever changed. Al. Miller Dec., App. 227.

D. Kevin personally experienced and witnessed racism, harassment, and violence at the hands of the police.

To establish Kevin's firsthand experience of abuse and racism at the hands of Kirkwood police officers, counsel intend to call the following witnesses at an evidentiary hearing, in order for them to testify in a manner consistent with their sworn declarations: Thelma Allen (Kevin's childhood friend); Jason Clark (Kevin's childhood friend); Shawn Fields (Kevin's uncle by adoption who grew up in the same household as Kevin); Arthur Miller (Kevin's former classmate and

teammate); Shalonda Miller (Kevin's brother Marcus' girlfriend); Dameion Pullum (Kevin's childhood friend); Florence Sloan (Joseph "Bam Bam" Long's cousin and resident of Meacham Park); Marcus Tatum (Kevin's brother; and Cameron Ward (Kevin's maternal uncle). These witnesses will testify as follows:

Kevin experienced police brutality firsthand, by both McEntee and other members of the police force. One time, Kevin was sitting on the porch with his uncle, his uncle's white girlfriend, and some of their friends. Pullum Dec., App. 277; Cameron Ward Declaration, App. 350. The police came up and told the women they had to leave, so Kevin's uncle, Wayne Wayne, gave his girlfriend a kiss goodbye. Pullum Dec. at 277. The officer grabbed Kevin's uncle and slammed his head into the bumper of a car. *Id.* McEntee and a few other officers showed up, and they drew their guns on the group. *Id.* Kevin's uncle was arrested. *Id.*

Kevin was with Wayne Wayne and his brother Marcus another time when the police were looking for Wayne Wayne. M. Tatum Dec., App. 332. The officer pulled his gun on Kevin and Marcus and said, "Back the fuck up or I'll blow your fucking brains out." *Id.* at 332; Ward Dec., App. 351. Another time, McEntee maced Kevin and a group of his high school friends for sitting in a car and listening to music after a football game. Pullum Dec. App. 276-77. Sergeant McEntee called in other officers with riot gear, and they put the neighborhood on lockdown. *Id.* at 277. Sergeant McEntee once yelled at Kevin's friend Dameion

and then teamed up with other officers to attack the boys, including Kevin, when they spoke up to protect their friend. Ar. Miller Dec., App. 232. In another instance, Kevin was threatened at gunpoint when an officer chased him and his friend and, after catching them, threatened to shoot them. Jason Clark Dec., App. 48.

Even when the police were not violent, they harassed Kevin. The police did not like Kevin's family. Shawn Fields Dec., App. 72; S. Miller Dec., App. 240-41; Ward Dec., App. 350. Kevin "suffered because of his family's reputation. His relatives did drugs and got into a lot of fights, so the police targeted Kevin." Sloan Dec., App. 294. The police would stop and question Kevin when he was just walking down the street talking on the phone with his friends. Allen Dec. App. 38.

E. Nothing in AEDPA prevents the Court from holding a hearing on Claim 20.

Kevin requires a hearing not only on the merits of his claim, but also on his showing that post-conviction counsel performed ineffectively when they defaulted it. *See, e.g.*, *McLaughlin v. Steele*, ___ F. Supp. 2d ___, No. 4:12CV1464CDP, 2016 WL 1106884, at *7-*8 (E.D. Mo. Mar. 22, 2016) (describing hearing and testimony establishing Rule 29.15 counsel's ineffectiveness); *Barnett v. Roper*, 941 F. Supp. 2d 1099, 1113-14 & n.17 (E.D. Mo. 2013) (allowing evidentiary hearing on unpresented mitigation evidence after post-conviction counsel's pleadings were found deficient); *Dietrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (*Pinholster*

does not preclude a hearing to establish "cause" by proving post-conviction counsel's ineffectiveness).

Rule 29.15 counsel Jeannie Willibey and Valerie Leftwich will explain that they recognized that trial counsel had not adequately investigated the abuse and racism at the hands of the Kirkwood and St. Louis County Police Departments, that they themselves did minimal investigation on this topic and limited their search to Sergeant McEntee's actions rather than the entire Kirkwood Police Department and Meacham Park's historic tension with police, that they regret not investigating this issue more extensively and have in fact done so in other cases, and that they failed to interview numerous relatives, friends, and neighbors who lived in the same community as Kevin and had information on these topics. *See* App. 191-92; 357. Post-conviction counsel also failed to hire an expert who could explain the history of the neighborhood and relations between the residents and the local police. App. 191-92 (attorney Leftwich comparing the investigation in Kevin's post-conviction case to that in Vincent McFadden's case). Rule 29.15 counsels' deficient performance provides "cause" to overcome the default of Claim 20 for the reasons explained in Kevin's Traverse. *See* Doc. 88 at 41-42.

Finally, a hearing on Claim 20 is not barred by 28 U.S.C. § 2254(e)(2). The statute presumptively forbids a hearing when the petitioner has "failed to develop the factual basis of a claim in State court proceedings." But it does not apply when,

as here, the prisoner's post-conviction counsel has defaulted the claim by failing to investigate and assert it through ineffective assistance of counsel within the meaning of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013). *See Sasser v. Hobbs*, 735 F.3d 833, 853-54 (8th Cir. 2013) (prisoner is entitled to a hearing "on the claim" if he demonstrates post-conviction counsel's ineffectiveness for defaulting it); *Dickens v. Ryan*, 740 F.3d 1302, 1320-21 (9th Cir. 2014) (en banc) (same).

IV. The Court Should Conduct an Evidentiary Hearing on Kevin's Claim that Trial Counsel Performed Ineffectively by Failing to Investigate and Present Evidence Describing the Violent Community in which Kevin was Raised (Regarding Claim 21).

Claim 21 asserts that trial counsel failed to describe the violent community in which Kevin was raised. As explained in the Petition and Traverse, such evidence would have supported the guilt phase defense of diminished capacity, while rebutting the prosecutor's penalty-phase theory that Kevin merely had a "lousy childhood" and simply failed to "obey the rules." Doc. 35 at 269-72; Doc. 88 at 45-47.

"When an evidentiary hearing is not prohibited by statute, the district court must hold such a hearing if the petitioner has alleged disputed facts which, if proved, would entitle him to habeas relief." *Smith v. Bowersox*, 311 F.3d 915, 921 (8th Cir. 2002). The facts alleged in Claim 21 and the Traverse demonstrate trial counsels' prejudicially ineffective assistance: counsel neglected to interview close

friends and relatives who could describe the community in which the crime took place, and they neglected to ask *any* witnesses about Kevin's exposure to violent crime, gang violence, or child sexuality. Doc. 88 at 45-46.

In addition to introducing and substantiating the newspaper articles, court records, and other documents described in the Traverse, counsel intend to call the following witnesses at an evidentiary hearing, in order for them to testify in a manner consistent with their sworn declarations:

- **Marcus Tatum** (Kevin's brother) will testify concerning the gang affiliations of Kevin's relative and friends, the widespread drug-trafficking and shootings in Meacham Park, numerous robberies and other violent crimes between and involving relatives, and the fact that trial counsel did not contact him and that post-conviction counsel did not ask him about violence, gangs, child sex, or drugs during their one visit with him. *See* App. 321-28, 332, 1243-44. "With the drugs came violence," Marcus explains. "As crack got bigger and bigger, people started getting more territorial … There were shootings and murders in our community. People started turning on each other over money and drugs. Girls turned themselves out for crack." App. 323.

- **Aaron Harris** (Kevin's uncle) will describe the "fist fights [and] … a lot of killings" that occur in Meacham Park, with "bodily harm done out there pretty much every day," as well as the fact that trial counsel and post-conviction counsel never spoke to him about Meacham Park. App. 84-88.

- **Dameion Pullum** (a friend who grew up with Kevin) can explain that "growing up in Meacham Park meant that you or someone you love might die young," that he, Kevin and others got violently "jumped," and that Kevin's attorneys did not ask him about these experiences. App. 273-78.

- **Candace Tatum** (Kevin's aunt) will testify concerning the widespread violent crime in Meacham Park, including "a lot of homicides among friends." App. 303. Ms. Tatum can also describe Meacham Park's epidemic of open prostitution (often involving juveniles), as well as its culture of child

molestation and underage sex. App. 303-04. Neither trial counsel nor post-conviction counsel interviewed Ms. Tatum. App. 310.

•**Roscoe Tatum** (Kevin's uncle) will describe Meacham Park's widespread gang and drug activities, frequent fights in the streets, and "quite a few murders, " most of which are for "something stupid." App. 335. Children start selling drugs around the sixth grade, people sell and use drugs openly in the streets, and women in the area started prostituting themselves after cocaine became popular. App. 336. Previous counsel never spoke with Mr. Tatum. *Id.*

•**Emanuel Johnson** (Kevin's friend from early childhood) will testify that Meacham Park was "full of violence and gangs," and he often heard gunfire when he was in bed at night. App. 144. He was never contacted by trial or post-conviction counsel. App. 146.

•**Jason Clark** (Kevin's childhood friend) will testify that Kevin's uncles sold crack cocaine, that Meacham Park was an "open air drug market," that his peers would rob and fight with each other, that his cousin was fatally shot and another cousin was non-fatally stabbed in relation to drug activities, and that no one from Kevin's trial or post-conviction defense teams ever spoke with him. App. 46-49.

•**Franklin McCallie** (principal of Kirkwood High School) will explain that gangs were prevalent and that they coerced students to join to the point that some students believed they would be "dead by 21." App. 208-09. Neither trial counsel nor post-conviction counsel contacted Mr. McCallie, who also could have explained the still troubling race relations between Meacham Park and the rest of Kirkwood. App. 213-16.

•**Harriet Patton** (former tutor) will testify that Kevin's brother, Marcus, once asked her to be a character witness when he "got into trouble" for possessing an AK-47, that racial tension divides Meacham Park (mostly black) from the rest of Kirkwood (mostly white), and that none of Kevin's previous lawyers ever contacted her. App. 243-44, 249-50.

•**Myron Hodges** (Kevin's uncle) will testify that crack was "everywhere" once it came to Meacham Park; people "smoked it outside on the corners," and "[t]here was no shame about that." App. 96. Trial and post-conviction counsel did not contact Mr. Hodges. App. 98.

> •**Alexander "Syl" Jackson** (Kevin's great uncle) will testify to the family's history of suffering racial violence, including the fact that the Ku Klux Klan drove the family out of Malden, Missouri in the 1940s. App. 111-12, 122. Mr. Jackson will also describe the pervasiveness of crack cocaine in Meacham Park, the role of gangs among family members in the community, and the fact that Kevin's previous attorneys never contacted him. App. 127-28.

Kevin requires a hearing not only on the merits of his claim, but also on his showing that post-conviction counsel performed ineffectively when they defaulted it. *See, e.g.*, *McLaughlin v. Steele*, ___ F. Supp. 2d ___, No. 4:12CV1464 CDP, 2016 WL 1106884, at *7-*8 (E.D. Mo. Mar. 22, 2016) (describing hearing and testimony establishing Rule 29.15 counsel's ineffectiveness); *Dietrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013) (*Pinholster* does not preclude a hearing to establish "cause" by proving post-conviction counsel's ineffectiveness). To that end, Rule 29.15 counsel Jeannie Willibey and Valerie Leftwich will explain that they recognized that trial counsel had not adequately investigated Kevin's family history and violent community, that they regret their failure to investigate Meacham Park, and that they failed to interview numerous relatives and close friends of Kevin who lived there. *See* App. 192, 355-58. Post-conviction counsel also failed to follow up on the facts developed by counsel for Marcus Tatum during his federal gun prosecution. *See* Doc. 88 at 48-49; Traverse Sealed Ex. 1; Ex. 5 (correspondence relating to Marcus's federal public defender, Amy Skrien). Rule 29.15 counsels' deficient performance provides "cause" to overcome the

default of Claim 21 for the reasons explained in Kevin's Traverse. *See* Doc. 88 at 47-50.

Finally, a hearing on Claim 21 is not barred by 28 U.S.C. § 2254(e)(2). The statute forbids a hearing when the petitioner has "failed to develop the factual basis of a claim in State court proceedings." But it does not apply when, as here, the prisoner's post-conviction counsel has defaulted the claim by wholly failing to assert it through ineffective assistance within the meaning of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013). *See Sasser v. Hobbs*, 735 F.3d 833, 853-54 (8th Cir. 2013) (prisoner is entitled to a hearing "on the claim" if he demonstrates post-conviction counsel's ineffectiveness for defaulting it); *Roberts v. Howton*, 13 F. Supp. 3d 1077, 1099 (D. Ore. 2014) (when prisoner presents a "new ground for relief that is procedurally defaulted," and when *Martinez* excuses the default, the Court reviews the claim *de novo* and will "consider new supporting evidence").

V. The Court Should Hold a Hearing to Consider Newly Discovered Evidence Supporting Kevin's *Brady* Claim, as well as Evidence that Prosecutors Knowingly Suborned Perjury from Jermaine Johnson (Regarding Claim 3)

Newly discovered evidence shows that Jermaine Johnson testified under a deal with the prosecution, even while the prosecutor elicited false testimony denying any such "deal." Trial Tr. 1461-62. Jermaine agreed that he would testify to "what they needed me to say," and in return, the prosecution agreed that "they

would take care of my warrants and my probation." App. 148. Jermaine admits that his trial testimony was false, and that he did not actually see Kevin shoot Sgt. McEntee. App. 149. Moreover, Jermaine was facing charges beyond the probation case that was described at trial. App. 148. Documents provided by the Kirkwood Police Department only weeks ago show that Jermaine was booked on charges of setting fire to his jail cell in the Kirkwood Police Department in August 2004, domestic assault for punching and kicking his girlfriend in March 2004, and disorderly conduct by scratching his ex-girlfriend in June 2003. *See* Ex. 6. The defense did not know of Jermaine's deal with the prosecutors or his legal troubles beyond those disclosed. The evidence underlying Kevin's claim, if proven true, entitles him to habeas relief from the prosecution's use of perjured testimony under *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959), as well as from the state's suppression of material exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963).

Respondent cannot meritoriously argue that Kevin "failed to develop" the facts in state court proceedings within the meaning of 28 U.S.C. § 2254(e)(2). Kevin requested a hearing on his post-conviction claim, detailed the allegations that were known to him at the time, was denied a hearing by the motion court, and unsuccessfully appealed that ruling to the Missouri Supreme Court. PCR Tr. 50-52; Resp. Ex. V. at 311-12, 362; Resp. Ex. W at 417; Resp. Ex. BB at 29, 65-67, 73;

Johnson v. State, 406 S.W.3d 892, 901-02 (Mo. 2013). The statute requires no greater showing of diligence. *Smith v. Bowersox*, 311 F.3d 915, 921 (8th Cir. 2002) ("[A] petitioner cannot be said to have 'failed to develop' relevant facts if he diligently sought, but was denied, the opportunity to present evidence at each stage of his state proceedings."); *Williams v. Taylor*, 529 U.S. 420, 437 (2000) (diligence generally requires the petitioner to have sought "an evidentiary hearing in state court in the manner prescribed by state law").

For that matter, respondent serially denied in state court that it had made any sort of deal with Jermaine Johnson. PCR Tr. 51; Resp. Ex. W at 370 ("There is no *Brady* violation because there was no witness agreement between Jermaine Johnson and the State."); Resp. Ex. CC at 41, 49-50. Kevin and his prior counsel need not have continued searching for additional evidence in the face of such denials. *Banks v. Dretke*, 540 U.S. 668, 695 (2004) ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.").

More generally, of course, it is entirely proper for a federal court to consider new *Brady* evidence that surfaces during habeas corpus proceedings. Nothing in *Cullen v. Pinholster*, 563 U.S. 170 (2011), limits the Court's authority to conduct a hearing, where, as here, the prisoner introduces new *Brady* evidence substantially beyond the narrower claim considered in state court. *See Pinholster*, 563 U.S. at

186 n.10 (acknowledging that "new evidence of withheld exculpatory witness statements … may well present a new claim"); *see also, e.g.*, *Jones v. Bagley*, 696 F.3d 475, 486 n.4 (6th Cir. 2012) (broadened *Brady* claim was not "adjudicated on the merits" in state court, so *Pinholster* does not apply); *Mack v. Bradshaw*, No. 1:04 CV 829, 2011 WL 5878395, at *19 n.3 (N.D. Ohio Nov. 23, 2011) (same).

VI. The Court Should Hold an Evidentiary Hearing on Kevin's Claim that Trial Counsel Performed Ineffectively by Not Objecting to the Presence of Uniformed Police Officers Throughout the Courtroom (Regarding Claim 5).

Kevin's fifth claim asserts that numerous uniformed police officers were present throughout the courtroom, creating an "an unmistakable symbol of state Authority," *Johnson v. State*, 406 S.W.3d 892, 912 (Mo. 2013) (Breckenridge, J., dissenting), and conveying a clear 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). The Court should hold a hearing because Claim 5 rests on factual allegations "which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). For the reasons already explained, trial counsel failed in their duty to ensure a fair trial free of the government's coercive influence. *See*, *e.g.*, *Shootes v. State*, 20 So.3d 434, 439 (Fla. Dist. Ct. App. 2009) (officer-spectators left jurors "susceptible to the impression that the officers are there to communicate a message to the jury"). The merits of Claim 5 have already been presented by the parties, and counsel will not

belabor them here. *See* Doc. 35 at 129-34; Doc. 63at 74-79; Doc. 88 at 11-12.

The state court denied a hearing on Kevin's claim, *Johnson*, 406 S.W.3d at 903, and numerous witnesses are prepared to describe the coercive atmosphere at trial – a proceeding in which the state sought the ultimate penalty for the killing of a police officer. Psychologist Daniel Levin, Ph.D., recalls that there were "at least 10 to 20" uniformed officers in the courtroom during his testimony at the end of the penalty phase. App. 197. The officers created a "strong police presence," and Dr. Levin feared that Kevin stood "little chance" at the trial in light of the officers showing their solidarity with Sgt. McEntee. *Id.* Charles Howard states that the police "took up at least a quarter of the courtroom" and "you could feel their presence." App. 100. Romona Miller describes a "very tense" atmosphere in the courtroom and also the hallway because of the uniformed officers. App. 238. Terron Coleman describes an "extremely segregated" courtroom in which the back of the courtroom hosted six to nine additional officers beyond those who were seated. App. 59.

Respondent cannot meritoriously argue that Kevin "failed to develop" the evidence underlying his claim, under 28 U.S.C. § 2254(e)(2). It is true that the state court rejected the claim because counsel did not specifically plead the number of officers who were present in the courtroom. *Johnson* , 406 S.W.3d at 903. But Kevin has already explained that Missouri's fact-pleading rule did not clearly

require such specificity, and indeed, the members of the Missouri Supreme Court were well aware of the legal and factual theory presented even without a specific number of uniformed officers. *See* Traverse (Doc. 88) at 10-11; *Johnson* , 406 S.W.3d at 914 (Breckenridge, J., dissenting) ("The presence of the uniformed officers reasonably may have created an outside influence on the jury, affecting the presumption of innocence necessary for a fair trial and impacting the harshness of the sentence imposed.").

The procedural default asserted by respondent is not "adequate," because its application was "at least arguably confusing" at the time of Kevin's Rule 29.15 proceedings. *Ashby v. Wyrick*, 693 F.2d 789, 793 (8th Cir. 1982). "Where it is inescapable that the defendant sought to invoke the substance of his federal right, the asserted state-law defect in form must be more evident than it is here." *Lee v. Kemna*, 534 U.S. 362, 385 (2002). Moreover, a prisoner has not "failed to develop" the facts within the meaning section 28 U.S.C. § 2254(e)(2) when he requested "a hearing to develop the record on a claim in state court, and … the state courts ... deny that request on the basis of an inadequate state ground." *Morris v. Beard*, 633 F.3d 185, 194-95 (3d Cir. 2011). The Court should conduct a hearing in order to adjudicate Claim 5 on the merits.

WHEREFORE, for the foregoing reasons, petitioner respectfully requests that the Court grant an evidentiary hearing on the Claims 3, 5, and 18-21.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2016, the foregoing was 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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