Case Nos. 22-7700, 22A1046

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL TISIUS, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND MOTION FOR STAY OF EXECUTION

THIS IS A CAPITAL CASE
EXECUTION SCHEDULED FOR JUNE 6, 2023

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CAPITAL CASE

QUESTION PRESENTED

An individual who was not qualified to serve under Missouri law sentenced Michael Tisius to death. This juror was, and is still, illiterate. His participation as a juror violated Mo. Rev. Stat. § 494.425, which automatically disqualifies individuals who cannot "read" from jury service. The juror concealed his illiteracy from the sentencing court by remaining silent to a direct question posed in voir dire regarding literacy. Furthermore, the state assisted the juror in concealing his illiteracy and disqualification by reading him the juror qualification form and filling in the juror's answers for him. In violation of state law, the state improperly destroyed those forms. The state concealed the fact that the juror had disclosed he could not read until the juror finally disclosed the state action 13 years later. After Mr. Tisius raised this issue in state habeas, and then in federal court, the district court granted a stay, but the Eighth Circuit Court of Appeals vacated it and dismissed the petition.

The case presents the following question:

> Whether a federal petition raising a *Hicks v. Oklahoma*, 447 U.S. 343 (1980) claim is "second or successive" under 28 U.S.C. § 2244(b)(2) when (i) an illiterate juror served and rendered a death verdict in violation of law; (ii) the state helped qualify an illiterate juror knowing his statutorily disqualifying status and concealed the assistance; (iii) the juror failed to honestly answer a question on that factor during voir dire and failed to disclose his inability to read to the petitioner until after the conclusion of the petitioner's initial habeas proceedings in the district court, and (iv) the petitioner's subsequent state and federal proceedings were his first fair opportunity to present his claim?

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND MOTION FOR STAY OF EXECUTION

I. The factual dispute as to the underlying claim made it unclear whether the district court had jurisdiction to hear the petition, and since district courts have the jurisdiction to determine whether they have jurisdiction, the district court properly ordered an evidentiary hearing to resolve the factual dispute.

A factual dispute exists. Juror 28 told Mr. Tisius's counsel on two separate occasions that he could not read. He told the state once that he could read. This is the root of the problem—without gathering more evidence and resolving this factual issue, an accurate determination about the characterization of Mr. Tisius's petition cannot be made. Without that accurate determination, the district court could not determine whether it had jurisdiction to consider the petition. But a district court has jurisdiction to determine jurisdiction, which is why here it ordered further factual development—to determine whether the facts of the case demonstrated the petition was not second or successive and thus that the district court had jurisdiction. *Kansas City S. Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir. 1980) (*quoting Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938); *see also Smith v. Armontrout*, 604 F. Supp. 840, 843 (W.D. Mo. 1984) ("It is well-settled that federal courts always have jurisdiction to determine jurisdiction.")

The Eighth Circuit claimed that it conducted an "independent review" of Mr. Tisius's case, and that based on that independent review, it found Mr. Tisius's petition to be second or successive. App. p. 2a. But it explains nothing further. The court does not explain what it considered in its independent review, nor does it

discuss why exactly the facts of the state's interference and concealment of Juror 28's illiteracy make it second or successive.

This is why the district court ordered factual development—to consider whether Mr. Tisius's petition is second or successive. Courts have jurisdiction to determine whether they have jurisdiction to hear a claim. That is exactly what the district court did here. The district court had proper jurisdiction to issue its order staying Mr. Tisius's execution.

II. The state's argument and the Eighth Circuit's order ignore the facts establishing Mr. Tisius's team exercised due diligence in discovering and investigating this claim.

The state points out that Mr. Tisius did not interview jurors immediately after his trial. BIO, p. 10. But the state fails to explain why counsel did not do so, because the facts of the case establish due diligence in light of the circumstances.

The state and the Eighth Circuit ignored that Mr. Tisius and his counsel not only satisfied due diligence in their attempts to investigate potential juror issues, but that they also went beyond what was expected of them under applicable precedent. Contrary to the Eighth Circuit and the state, the presumption is people are honest and will act within the bounds of the law.

Whether Mr. Tisius and his counsel exercised due diligence in investigating this claim must be considered in the context of the full facts, which, again, the Eighth Circuit failed to do. Oddly enough, in making a due diligence determination, the Eighth Circuit utterly failed to discuss a single fact. The Eighth Circuit finds

there was no due diligence without explaining *why* it believes there was no due diligence.

To reiterate: two actors in 2010 concealed Juror 28's illiteracy, the factual basis of the claim. The trial court expressly asked the venire panel, including Juror 28, "Is there anyone here who does not read, speak and understand English?" Sentencing Trial Tr. p. 92. Juror 28 did not respond verbally or raise his hand. *Id.* His concealment during voir dire, even while he was under oath, meant that Mr. Tisius and his counsel had no reason to know that Juror 28 could not read English.

The second actor was a state official. Before jury selection started, Juror 28, who then was Venireperson 28, told a courthouse employee that he could not read and that he thus could not complete his juror form. App p. 16a. The employee took Juror 28 into a private room, read him the form word for word, filled out his answers for him, then had Juror 28 sign it. *Id.* The employee told no one else of what had transpired and hid that there was a venireperson whose illiteracy required disqualification. This employee's concealment allowed Juror 28 to pass as a fully qualified juror and ultimately be selected to serve on Mr. Tisius's resentencing jury. Juror 28's and the courthouse employee's furtive actions kept Mr. Tisius and his counsel from discovering the factual basis of the claim, much less have the opportunity to investigate the facts underlying the claim.

The state absurdly argues that Mr. Tisius should have immediately interviewed the jurors and investigated their qualifications after the case concluded. BIO, p. 10. But Mr. Tisius's reliance on the jurors' answers while they were under

oath as well as on the assumption that the employees of the court were carrying out their duties properly and appropriately is what this Court entitles him to do. In *Banks v. Dretke*, 540 U.S. 668, 698 (2004), this Court held that habeas petitioners are entitled to "presume that public officials have properly discharged their official duties." (quoting *Bracy v. Gramley*, 520 U.S. 899, 909 (1997)). This Court has also recognized a "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Accordingly, a petitioner is not at fault for failing to bring a juror misconduct case earlier when "[t]he trial record contains no evidence which would have put a reasonable attorney on notice that [a juror's] nonresponse was a deliberate omission of material information." *Williams v. Taylor*, 529 U.S. 430, 442 (2000). And, as in *Coleman v. Thompson*, 501 U.S. 722 (1991), Mr. Tisius should be allowed to presume that the officials involved in his case acted properly and did not interfere with his trial or his rights.

Mr. Tisius's counsel were entitled to assume that courthouse employees would not assist an illiterate juror in concealing the fact that he was disqualified from jury service. They were also entitled to assume that jurors would not lie about their qualifications in response to a direct, explicit question from the judge, while the jurors were under oath. The state's suggestion that Mr. Tisius's counsel should have interviewed jurors about their qualifications earlier and somehow also found out about the county employee's misconduct is nonsensical.

The state suggests a rule that reverses the presumption. Jurors are presumed liars. Court personnel are presumed to act contrary to law. It is absurd to suggest that Mr. Tisius should have regarded every juror, official or courthouse employee with suspicion and sought information about all possible ways they might have conducted their duties improperly. Mr. Tisius is not at fault for failing to bring this claim earlier when the lack of this information was due to concealment by both the county employee and the juror himself.

Furthermore, even though there was no indication whatsoever that a potential juror disqualification existed, Mr. Tisius's appellate counsel *did* attempt to investigate the jurors—only to have her investigation interfered with, yet again, by state officials. When counsel contacted the Greene County Circuit Clerk's office, they clerk informed them that the juror forms had already been destroyed, less than a year after the trial's conclusion, while Mr. Tisius's appeals were still ongoing, and in violation of Missouri court rules.[1] Counsel had little to go forward on. App. p. 13a (Attachment, Jeannie Willibey Affidavit).

Appellate counsel's investigation into the jurors, even when they had absolutely no reason to believe that they were going to find anything amiss, is obviously due diligence. *See Jimerson v. Payne*, 957 F.3d 916, 927 (8th Cir. 2020)

[1] Mo. Sup. Ct. Op. R. 27.09(b) states: "Jury questionnaires maintained by the court in criminal cases shall not be accessible except to the court and the parties. Upon conclusion of the trial, the questionnaires shall be retained under seal by the court except as required to create the record on appeal or for post-conviction litigation. Information so collected is confidential and shall not be disclosed except on application to the trial court and a showing of good cause."

("Due diligence does not require a defendant to root out information that the State kept hidden."); *Anjulo-Lopez v. United States*, 541 F.3d 814, 818 (8th Cir. 2008) ("To be sure, section 2255 'does not require the maximum feasible diligence, only due, or reasonable diligence.'" (citing *Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000))).

The district court in its order staying Mr. Tisius's June 6 execution recognized the need to consider the due diligence of Mr. Tisius's previous counsel in determining whether Mr. Tisius's petition is second or successive. *See* App. 5a. Its approach was clearly proper, and well within the parameters of 8th Circuit precedent. *See, e.g., Dansby v. Payne*, 47 F.4th 647, 658 (8th Cir. 2022) ("'Due diligence requires that (1) the defendant be unaware of the fact at the time of trial; (2) the defendant could not have, in the exercise of due diligence, presented the fact at trial; and (3) upon discovering the fact, the defendant did not delay bringing the petition.'" (quoting *Henington v. State*, 556 S.W.3d 518, 523 (Ark. 2018))); *Jimerson*, 957 F.3d at 927. The district court did not find that the Mr. Tisius's petition was ***not*** a second or successive petition, nor that it had jurisdiction to hear and consider the claim. Rather, it simply ordered an evidentiary hearing so it could determine whether due diligence was sufficiently satisfied and to determine its own jurisdiction.

In its terse order finding Mr. Tisius's petition to the district court as second or successive, the Eighth Circuit did not properly account for the facts of Mr. Tisius's case, nor for due diligence in *this* specific context. App. p. 2a. The court

alludes to diligence just once, mentioning that based on its independent review, the court believes "the new claim could have been timely investigated by counsel and raised in earlier habeas proceedings but was not." *Id.* But the facts, as discussed above, clearly show that interference by state officials prevented Mr. Tisius's counsel from investigating and presenting the claim earlier. The Eighth Circuit fails to account for the fact that direct appeal counsel tried to get the form, but it had been "conveniently" destroyed contrary to Missouri law. Under the Eighth Circuit's own case law and this Court's case law, the fact that counsel did exercise due diligence in relying on the presumption of regularity of proceedings as well as in attempting to initiate an investigation is critical to determining the characterization of Mr. Tisius's habeas petition in the district court. *See, e.g., Williams v. Taylor*, 529 U.S. at 437, 443-44; *Holland v. Florida*, 560 U.S. 631, 653 (2010) ("The diligence required for equitable tolling purposes s 'reasonable diligence,' not 'maximum feasible diligence.'" (first quoting *Lonchar v. Thomas*, 517 U.S. 324, 326 (1996), then quoting *Starns v. Andrews*, 524 F.3d 612, 618 (5th Cir. 2008))); *Jimerson*, 957 F.3d at 927. To put it plainly, while the district court attempted to examine the full scope of the facts (including diligence) to decide the characterization of Mr. Tisius's petition and to determine whether it had jurisdiction to consider the claims included in the petition, the Eighth Circuit's denial without a full consideration of the facts of Mr. Tisius's due diligence was improper given the specific facts and circumstances of Mr. Tisius's case and under this Court's authority and the Eighth Circuit's own authority.

III. A claim that is not ripe at the time of the first petition for federal habeas relief is exempt from the requirements of § 2244(b).

The state concedes that where a claim is not ripe at the time of the first petition, "it is exempt . . . from the requirements of § 2244(b)." BIO, p. 15 (citing *Magwood* and *Panetti*). However, the state makes no argument explaining how Mr. Tisius's *Hicks v. Oklahoma*, 449 U.S. 343 (1980) claim was ripe at the time of the initial federal habeas proceedings. Mr. Tisius reiterates what was explained fully in his petition: Because *Hicks* violations of federal due process occur only when the state refuses to apply its own law, Mr. Tisius's claim only became ripe when the Missouri Supreme Court denied his petition and refused to enforce Mo. Rev. Stat. § 494.425 in May 2023.

As for whether Mr. Tisius could have presented his claims earlier despite the state's and juror's concealment of them, several courts have determined that *Brady*-type claims are not ripe until a petitioner comes aware of previously concealed evidence. Thus, they cannot be materially distinguished from the *Ford* claim addressed in *Panetti*. Three considerations informed *Panetti*'s holding: (1) the "implications for habeas practice" of treating a habeas petition as second or successive; (2) AEDPA's purposes; and (3) the abuse-of-the-writ doctrine. *See Panetti*, 551 U.S. at 942-48. As several courts have recognized, these three considerations compel the conclusion that Congress did not intend to subject previously unavailable *Brady*-type claims to the "second or successive" gatekeeping requirements. *See Scott v. United States*, 890 F.3d 1239, 1256–58 (11th Cir. 2018) (unanimous panel concluding that, if not for prior circuit precedent, petition

including previously unavailable *Brady* claim would not be second or successive); *In re Jackson*, 12 F.4th 604, 613 (6th Cir. 2021) (Moore, J., concurring) (same); *Long v. Hooks*, 972 F.3d 442, 486-88 (4th Cir. 2020) (en banc) (Wynn, J., concurring) (same); *Brown v. Muniz*, 889 F.3d 661, 668 n.5 (9th Cir. 2018) ("[S]hould exculpatory evidence be discovered by the State after the first habeas petition is filed, and is thereafter suppressed by the State over the course of post-conviction proceedings, [the second-or-successive rules would not apply because] .... the new claim would not have been ripe at the time of the initial filing."); *Crawford v. Minnesota*, 698 F.3d 1086, 1090 (8th Cir. 2012) (concluding that "at least nonmaterial *Brady* claims in second habeas petitions" are subject to the second-or-successive rules, but noting that the question of whether "all *Brady* claims in second habeas petitions are second or successive regardless of their materiality" was "not presented" in the case); *Douglas v. Workman*, 560 F.3d 1156, 1193 (10th Cir. 2009) (declining to apply the § 2244(b)(2) requirements where a prosecutor acted affirmatively to conceal the facts underlying the petitioner's *Brady* claim until after he filed his first habeas petition, since to do so "would be to allow the government to profit from its own egregious conduct," and "[c]ertainly that could not have been Congress's intent when it enacted AEDPA"). *Douglas v. Workman*, 560 F.3d 1156, 1193.

Here, the state and Juror 28 acted affirmatively to conceal Juror 28's inability to read and unfitness to serve on Mr. Tisius's petit jury. To refuse to allow Mr. Tisius to now present his claim would allow the state to profit from its own misconduct, which "[c]ertainly that could not have been Congress's intent when it

enacted AEDPA"). As noted above, courts in several circuits have recognized that, under *Panetti*, such claims are not subject to the "second or successive" requirements of 2244(b). This Court should grant certiorari to settle this important question of law.

IV. Mr. Tisius is entitled to a stay of execution.

If this Court is unable to resolve this claim by 6:00 PM, CST on June 6, Mr. Tisius has established a basis for a stay. He relies on his pending motion for stay, but to summarize, he has shown a reasonable likelihood of success, the balance of harms favors a stay, and he has not delayed presenting his claim. *See, e.g., Hill v. McDonough*, 547 U.S. 573, 584 (2006).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to resolve this important question.

Respectfully Submitted,

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