

****THIS IS A CAPITAL CASE-EXECUTION SET FOR JUNE 6, 2023****

22A-____

No. 22-7398 (connected case)

**IN THE
SUPREME COURT OF THE UNITED STATES**

MICHAEL TISIUS, Petitioner,

v.

DAVID VANDERGRIF, Warden,
Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

APPLICATION FOR STAY OF EXECUTION

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To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

The State of Missouri has scheduled the execution of Michael Tisius for **June 6, 2023, at 6:00 p.m., central time**. Mr. Tisius respectfully requests a stay of execution pending consideration and disposition of the petition for a writ of certiorari, filed on April 26, 2023.

PROCEDURAL BACKGROUND

Mr. Tisius respectfully requests that this Court stay his execution, pursuant to Supreme Court Rule 23. Before the completion of his initial federal habeas proceedings, Mr. Tisius secured district court orders in an effort to prepare and present his clemency petition. App. 4a-5a. Although the state was aware of the orders before the denial of certiorari by this Court on the initial habeas, the state took no action until after certiorari denial. Instead, on the date of the certiorari denial, the state moved for an execution date. Later, the state successfully stayed the orders (App. 6a), thereby creating the exigent circumstances that currently exist.

REASONS FOR GRANTING THE STAY

A stay of execution is warranted where there is a “presence of substantial grounds upon which relief might be granted.” *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). To decide whether a stay of execution is warranted, the federal courts consider the petitioner’s 1) likelihood of success on the merits, 2) the relative harm to the parties, and the 3) extent to which the prisoner has delayed his or her claims. *See Hill v. McDonough*, 547 US. 573, 584 (2006); *Nelson v.*

Campbell, 541 U.S. 637, 649-50 (2004). In certiorari proceedings, a petitioner must show a reasonable probability that four members of this Court would consider the underlying case worthy of the grant of certiorari, that there is a significant likelihood of reversal of the lower court’s decision, and a likelihood of irreparable harm absent a grant of certiorari. *See Barefoot*, 463 U.S. at 895.

Mr. Tisius meets the relevant standards warranting a stay of execution.

I. Likelihood Of Success On The Merits

The petition for writ of certiorari has a substantial likelihood of success. Mr. Tisius raised a jurisdictional claim that garnered four votes from the then members of this Court in *Shoop v. Twyford*, 142 S. Ct. 2037 (2022). Justice Gorsuch’s dissent in *Twyford* noted: “The District Court’s transportation ruling was an interlocutory order, not a final judgment. To address its merits, the Court would first have to extend the collateral order doctrine to a new class of cases.” *Id.* at 2051 (Gorsuch, J., dissenting); *see also id.* at 2047-50 (Breyer, J., dissenting). Former Justice Breyer’s dissent was joined by Justice Sotomayor and Justice Kagan.

As noted by Justice Gorsuch, the jurisdictional question was discussed in “a terse footnote.” *Id.* at 2050 (Gorsuch, J., dissenting). In the absence of a thorough discussion of what now seemingly appears to be a massive expansion of appellate jurisdiction under the *Cohen* doctrine, Mr. Tisius’s case frames the jurisdictional question for full discussion in a non-terse fashion. Mr. Tisius respectfully suggests four members, if not more, of this Court, if considering this question in a context

lacking the expediency of the state-created time crunch, would vote to consider this jurisdictional question.

It is an uncontroversial proposition that this Court may enter a stay of a reasonable amount of time to permit consideration of a writ of certiorari. Congress provides for the same in 28 U.S.C. § 2101(f). An alternative basis exists in the All Writs Act 28 U.S.C. § 1651(a), which provides “may issue all writs necessary or appropriate in aid of their respective jurisdictions.”

Recently, this Court intervened and entered a stay to consider a petition for writ of certiorari. *See Glossip v. Oklahoma*, No. 22A941, 2023 U.S. LEXIS 1887 (May 5, 2023) (entering stay to permit consideration of writs of certiorari). Mr. Tisius’s case is as compelling as *Glossip* — the votes exist in this Court on a question presented in Mr. Tisius’s writ of certiorari.

The dissent in *Twyford*, along with the grant of a stay in *Glossip*, satisfy the reasonable likelihood of success standard.

II. Harm To The Parties

Irreparable harm will occur to Mr. Tisius if the execution is not stayed until the petition for writ of certiorari is considered. If this Court does not stay Mr. Tisius’s execution, he will be executed without the opportunity to fully litigate his meritorious writ of certiorari. Moreover, he will be executed without a full presentation of his clemency case. He will be executed without medical investigation that the district found was reasonably necessary for his clemency case. The state has not challenged that finding. That is an “irremediable” harm

because an “execution is the most irremediable and unfathomable of penalties.” *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (recognizing that irreparable injury “is necessarily present in capital cases”).

Allowing the state to execute Mr. Tisius while his petition is pending risks “effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari.” *Garrison v. Hudson*, 468 U.S. 1301, 1302 (Burger, C.J., in chambers). Because “the normal course of appellate review might otherwise cause the case to become moot,’ . . . issuance of a stay is warranted.” *Id.* at 1302 (quoting *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)); *see also Chafin v. Chafin*, 568 U.S. 165, 178 (2013) (suggesting that the threat of mootness warrants “stays as a matter of course”). This Court should now take the eminently reasonable approach it recently adopted in *Glossip*, 2023 U.S. LEXIS 1887.

There is no tangible harm to the state. A simple delay to accurately determine the merits of this certiorari petition ensures constitutional compliance. The state cannot claim harm for having to follow the law. *See, e.g., In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (noting that “contrary to the State’s contention that its interest in executing Holladay outweighs his interest in further proceedings, we perceive no substantial harm that will flow to the State of Alabama or its citizens from postponing petitioner’s execution to determine whether that execution would violate the Eighth Amendment.”). After all, the

state itself argued below that the jurisdictional question at issue here was a significant one worthy of immediate appellate review.

Although the state has a recognized interest in the enforcement of criminal judgments, it “also has an interest in its punishments being carried out in accordance with the Constitution of the United States.” *Harris v. Vasquez*, 901 F.2d 724, 727 (9th Cir. 1990). Mr. Tisius also presents to this Court a question related to clemency, which has been referred to by this Court as “the fail-safe in our criminal justice system.” *Harbison v. Bell*, 556 U.S. 180, 192 (2009); *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

Seemingly, the Missouri Attorney General would want the Missouri Governor (whose clemency power is found in Mo. Const. Art. IV § 7) to make this critical decision free from constraints. However, the Missouri Attorney General interfered with the free-flow of clemency-related information to the Missouri Governor by obstructing the operation of the district court’s clemency orders. The interests of the state are in apparent conflict.

Accordingly, although a stay to ensure that the governor’s power to grant clemency is not impeded would not cause the state to suffer a tangible harm, at least one state government official would suffer such harm if a stay were not granted. The Missouri Governor, who is now currently considering Mr. Tisius’s clemency request and materials, has been deprived of the full scope of information that the district court has determined to be reasonably necessary to the clemency determination. *See App. 4a-5a*. If the state is allowed to execute Mr. Tisius before the

merits of this writ certiorari are decided, the Missouri Governor will be forced to make a clemency determination that is not fully informed. Thus, the state would undoubtedly suffer harm if Mr. Tisius's execution is carried out on June 6th. *See United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (explaining that a state's interest "in a criminal prosecution is not that it will win a case but that justice shall be done") (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

III. THERE HAS BEEN NO UNNECESSARY DELAY IN THE PRESENTATION OF THIS CLAIM.

Mr. Tisius moved for the clemency related orders before this Court denied his petition for writ of certiorari from the denial of habeas corpus relief. *See Tisius v. Blair*, 146 S.Ct. 177 (Oct. 3, 2002). The orders pertaining to clemency were issued on September 23, 2022, and September 29, 2022.

On October 3, 2022, at 10:28 a.m., the state sent an email to counsel for Mr. Tisius indicating that it was aware of the orders. R. Doc. 115-1. Later that same day, the state filed a motion in the Missouri Supreme Court requesting that Court to set an execution date for Mr. Tisius. R. Doc. 113-1.

On October 6, 2022, the state filed in the district court its motion to vacate and unseal the orders. (R. Doc. 112). The state neither moved for expedited briefing nor a stay of the orders pending a ruling on the motion. Even after the state received the CM/ECF notice reminding the state of Local Rule 7.0 (c)(2) of the U.S. District Court for the Western District of Missouri, indicating Mr. Tisius's response deadline was October 20, 2022, and the state's reply deadline was 14 days after Mr. Tisius filed his pleading, the state did nothing to accelerate the briefing schedule.

On October 17, 2022, 11 days after filing its motion and after normal business hours, the state filed a motion to stay the orders pending a ruling on its motion to vacate. R. Doc. 112. In that motion, the state informed the district court of its intention to change forums if the stay were not entered or the orders were not vacated by noon on October 20, 2022, less than 72 hours later. Mr. Tisius’s counsel responded to both the motion to vacate and the motion for stay on October 18, 2022. R. Docs. 113, 114.

The state never explained why it waited until the eleventh hour to request a stay. The state did not indicate that it came into possession of new information after the motion to vacate and unseal was filed that explained the lack of a request for stay in the initial motion. As it threatened it would do, the state switched forums on October 20, 2022, by filing notice of appeal from the orders entered in September.

Once it was in its chosen forum, the state acted with more alacrity, immediately moving for expedited consideration.

Court	Motion for Stay (how quickly filed)	Motion to Expedite (how quickly filed)
Eighth Circuit	One hour	One hour
District Court	11 days – filed after regular business hours on the 11 th day ¹	NEVER

¹ Mr. Tisius calculates the 11 days from the filing of the motion with the district court. This is a conservative estimate because the emails filed by the state reflect knowledge of the orders on October 3, but they were served on the warden many days before that.

At no point has Mr. Tisius “delayed unnecessarily in bringing the claim[s].” *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). But for the state’s interjection, the original testing would have been completed last October, seven months ago, and could have been fully considered in the ongoing clemency proceeding before Missouri’s Governor. Rather, any immediacy is the product of the state’s manipulation of the process.

Although the petition for certiorari was not due until May 8, 2023, Mr. Tisius filed his petition early, on April 26, 2023. Thus, there have been no unnecessary delays in bringing this issue to this Court in a timely manner.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner Michael Tisius respectfully requests that the Court stay his execution to allow full and fair litigation of his meritorious petition for writ of certiorari.

Respectfully Submitted,

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