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

22A-____

No. 22-7625 (connected case)

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL TISIUS, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the Missouri Supreme Court

APPLICATION FOR STAY OF EXECUTION

ELIZABETH UNGER CARLYLE*
Carlyle Parish LLC
6320 Brookside Plaza #516
Kansas City, Missouri 64113
(816) 525-6540
elizabeth@carlyleparishlaw.com

KEITH O'CONNOR
Keith O'Connor, LLC
PO Box 22728
Kansas City, MO 64113
Mo Bar No. 63134
Phone: 816-225-7771
Keith@keithoc.com

LAURENCE E. KOMP
Capital Habeas Unit, Chief
Federal Public Defender,
Western District of Missouri
1000 Walnut St., Ste. 600
Kansas City, MO 64106
(816) 471-8282
laurence_komp@fd.org

*Counsel of Record, Member of the Bar of the Supreme Court
COUNSEL FOR PETITIONER

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and the 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 May 23, 2023.

PROCEDURAL BACKGROUND

Mr. Tisius respectfully requests that this Court stay his execution, pursuant to Supreme Court Rule 23. After completing his state appeal and post-conviction proceedings and federal habeas corpus proceedings, Mr. Tisius filed a petition for writ of habeas corpus in the Missouri Supreme Court. App. p. 2a (Petition for Writ of Habeas Corpus). His petition presented the claims that the Eighth Amendment categorically bars individuals who committed their crime under the age of 21 from the death penalty, and that in addition to his age at the time of the offense (19), Mr. Tisius's circumstances, including his brain impairments and mental illness, make his death sentence and execution a violation of his Eighth Amendment rights. The Missouri Supreme Court denied the petition without full briefing or argument in an unexplained order. App p. 1a (Missouri Supreme Court Order Denying Petition).

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). The standard governing stays in federal court includes: (1) the

petitioner's likelihood of success on the merits; (2) the relative harm to the parties; and (3) the extent to which the prisoner has unnecessarily delayed his or her claims. *E.g., Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). All three factors weigh in favor of staying Mr. Tisius's execution.

I. Likelihood of Success on the Merits

Mr. Tisius's petition for writ of certiorari has a substantial likelihood of success.

During just the last 34 years, this Court has decided the issue of youth eligibility for the death penalty on two separate occasions. These decisions indicate this Court's willingness to adjust the age cutoff to correspond with shifts in society's understanding of juveniles' and late adolescents' relative moral culpability. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), this Court concluded that executing 16- and 17-year-old offenders was permissible under the Eighth Amendment. However, upon reconsideration of the issue 16 years later, this Court found *Stanford*'s cutoff age erroneous and raised the death penalty eligibility age to 18. *Roper v. Simmons*, 543 U.S. 551 (2005).

In *Roper*, this Court considered the significant gaps between juveniles and adults in regard to maturity, vulnerability, and character. *Id.* at 569-70. Specifically, the Court found that juveniles' lack of maturity, heightened vulnerability, and undeveloped character distinguish them from adults so that juveniles cannot be said to bear the same level of moral culpability as adults. *Id.* In setting the death penalty cutoff age at 18, this Court relied on "evolving standards

of decency" in that society generally treated 18-year-olds as adults. *Roper*, 543 U.S. at 563-65. This Court also relied heavily on scientific evidence available at the time regarding the juvenile brain to conclude that an 18-year-old brain was sufficiently developed and mature to render those 18 and older eligible for the death penalty. *Id.* at 569, 573-74.

Now, 18 years after *Roper*, current scientific evidence and consistently evolving standards of decency no longer support characterizing all offenders 18 or older to be as morally culpable as an adult. Advances in neuroscientific research conclude that the brains of late adolescents (those between 18 and 21 years old), are more akin to the 17-year-old brains the *Roper* court found to be constitutionally protected from the death penalty than to adult brains.

What is more, the state agrees with this position. The state below conceded that medical science concludes that the same youthful and immature characteristics that categorically exempt 16- and 17-year-olds from the death penalty are present in 18- to 20-year-olds. Missouri Supreme Court Resp. at 14. So, even the state admits that there is no scientific reason to make a legal distinction between the culpability and responsibility of a 17-year-old versus a 19- or 20-year-old.

Additionally, society's views of late adolescents' maturity have evolved to reflect this shift in understanding of brain maturation. As detailed in the petition, individuals under 21 are prohibited from numerous adult activities because society has determined such activities to be either harmful for the underdeveloped brains of late adolescents (i.e., consuming alcohol, tobacco, and marijuana) and/or because

late adolescents are too irresponsible due to their immaturity to engage in such activities (i.e., hold most elected positions, rent a rental car, and obtaining a credit card without a co-signer).

In short, the same bases the *Roper* court relied on to choose 18 as the eligibility age now call for a higher eligibility age of 21. The logic of *Roper* remains unchanged from 2005, but given recent advances in neuroscience and society's evolved view of the moral culpability of late adolescence, that logic now supports the categorical exemption of late adolescents from the death penalty. Thus, because this Court has already determined that scientific evidence and societal standards of decency largely dictate death penalty eligibility, Mr. Tisius is likely to succeed on the merits of his claim because he has demonstrated that current scientific evidence and societal standards of decency dictate an eligibility age of 21.

In addition to his age and immaturity, Mr. Tisius has demonstrated likelihood of success on the merits of his claim that his lifelong brain impairments and mental illness make his impending execution a violation of his Eighth Amendment rights. As detailed in the petition, Mr. Tisius has suffered from a myriad of lifelong impairments and disorders that have exacerbated the effects of his brain immaturity and rendered him particularly vulnerable and suggestible to grooming.

The cumulation of over 20 years' worth of evidence documenting Mr. Tisius's many neurocognitive deficits and mental illnesses make clear that he simply is not one of those offenders "whose extreme culpability makes them the most deserving of

execution." *Roper*, 543 U.S. at 568 (internal quotation omitted). Over the span of almost two decades, Dr. Stephen Peterson, an expert in adolescent and forensic psychiatry, examined Mr. Tisius three times: first, in 2003 when Mr. Tisius was 22 years old, again in 2012 when Mr. Tisius was 31 years old, and most recently in 2022 when Mr. Tisius was 41 years old. In 2003, when Dr. Peterson first met Mr. Tisius, Dr. Peterson believed that Mr. Tisius, at the time of the offense, "was suffering from untreated mental disease, was experiencing diminished mental capacity, and was substantially under the manipulated influence of Roy Vance." App. p. 43a. When Dr. Peterson saw Mr. Tisius again 9 years later in 2012, he noted that at that time, Mr. Tisius "still demonstrated immature thinking as his abstract reasoning was concrete rather than abstract, suggesting though he was in his early 30s his maturity of reasoning plateaued in mid adolescence." *Id.* at p. 44a.

In August 2022 when Dr. Peterson evaluated Mr. Tisius, he found, "Socially, Michael Tisius experienced delayed maturation of adolescent brain functioning as a consequence of untreated childhood physical abuse/neglect." *Id.* at p. 59a. But he also noted that during Mr. Tisius's decades-long incarceration,

> Michael Tisius has made a successful transition to nonviolent living within the Missouri DOC. Michael Tisius demonstrates no current psychiatric or psychological data to suggest he has underlying fulminate or unexpressed violent tendencies. All psychological evaluations from 2003 forward to 2022 demonstrate the opposite of any antisocial mindset. He has had no conduct violations for at least 10 years.
>
> Michael Tisius has made an excellent institutional adjustment. His psychiatric/psychological functioning is stable. Though Michael Tisius doesn't feel mature, he has matured, and continues to show promise for ongoing personal growth.

> This maturing process over time for Michael Tisius was evident during three evaluations by this writer, spanning 20 years of assessments (2003, 2012, 2022). In addition, during 2018, bracketed by this evaluator's assessments, independent psychologists Love and Watson as well as psychiatrist Woods came to the same conclusions.
>
> Michael Tisius has come to grips with the gravity of his offense and is living a peaceful life. He has learned self-control, has empathy for others, shows empathy for the men he killed, is no longer impulsive, and is seeking to make the best life he can in his current situation.

Id. at p. 63a.

Mr. Tisius has been incarcerated for almost his entire adult life—he has experienced almost most major life milestones inside prison walls. Dr. Peterson has had the opportunity to see and evaluate Mr. Tisius throughout this time. Dr. Peterson's longitudinal study, conducted on the same individual by the same evaluator, has allowed Dr. Peterson to see the growth in Mr. Tisius's behavior from young adulthood to middle age. He has examined Mr. Tisius at three critical points and has literally seen Mr. Tisius develop into a well-adjusted, mature adult.

This type of within-subject repeated design study lends unique, uncontroverted support for Mr. Tisius's claim, as Dr. Peterson can testify to his personal experience witnessing Mr. Tisius's 20-year development. Dr. Erin Bigler, a neuropsychologist described Dr. Peterson's study of Mr. Tisius as "one of the most powerful research methods when studying human behavior[.]" App. p. 356a. Such a study is certainly fascinating from an academic perspective, but in Mr. Tisius's case, it is more than that. This study has allowed Dr. Peterson, Mr. Tisius's legal team, and courts, to track Mr. Tisius's behavior and brain functioning as he has matured.

It shows precisely how and why the Michael Tisius of today is a far cry from the immature, frightened, and easily manipulated, 19-year-old he was at the time of the offense. It demonstrates how Mr. Tisius has become rehabilitated in the Missouri prison system. It also demonstrates that having lived a peaceful life for at least the last 10 years, his offense was a singular, tragic incident attributable to his youth and immaturity in 2003. Michael Tisius is no longer the child he was in 2003, and he is not an offender whose extreme culpability makes him the most deserving of execution. Thus, Mr. Tisius is likely to succeed on the merits of his claim that his youth at the time of the crime combined with his significant cognitive impairments make his death sentence and execution a violation of the Eighth Amendment.

Furthermore, it is an uncontroversial proposition that a stay of a reasonable amount of time may be entered to permit consideration of a writ of certiorari. Congress provided 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 that this Court "may issue all writs necessary or appropriate in aid of [its] respective jurisdiction." This Court recently intervened and entered a stay of execution to consider a writ of certiorari. *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 claim regarding his juvenile brain and the unconstitutionality of his looming execution is as compelling—and as troubling—as the serious misconduct and unreliable conviction this Court found grave enough to warrant a stay of execution in *Glossip*. Mr. Tisius satisfies the reasonable likelihood of success standard.

II. Harm to the Parties

If this execution is not stayed pending consideration of the writ of certiorari, Mr. Tisius will suffer the irreparable harm of being put to death for an offense committed when he was suffering the effects of his combined immaturity and neurocognitive impairments. Mr. Tisius will be executed without the opportunity to fully litigate his meritorious writ of certiorari, and more importantly, without the opportunity for this Court to consider the constitutionality of his death sentence. That is an "irremediable" harm because "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).

Allowing the government to execute Mr. Tisius while his petition is pending risks "effectively depriv[ing] this Court of jurisdiction not 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 "says 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 mere delay so this Court may accurately determine the merits of this writ of certiorari will ensure that Mr. Tisius's execution complies with the Eighth Amendment. The state cannot claim

harm for being required to abide by the U.S. Constitution. *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.").

Moreover, while the state has an interest in the enforcement of its criminal judgements and punishments, it "also has an interest in its punishments being carried out in accordance with the Constitution of the United States." *Harris v. Vazquez*, 901 F.2d 724, 727 (9th Cir. 1990). Adherence to the U.S. Constitution is one of the most fundamental duties of the state.

Accordingly, the state has a strong interest in ensuring that its criminal judgments comply with Mr. Tisius's rights under the Eighth Amendment. As discussed previously, this Court has considered the issue of youth eligibility for the death penalty under the Eighth Amendment twice in the last 34 years. *See Stanford v. Kentucky*, 492 U.S. 361 (1989); *Roper v. Simmons*, 543 U.S. 55 (2005). This Court's repeated consideration of the issue and willingness to adjust the death penalty eligibility age in light of evolving standards of decency indicates the gravity of the potential harm to not only death-sentenced individuals, but also to states as they carry out death sentences against prisoners who were late adolescents at the time of their offense—executions that are likely impermissible under the Eighth Amendment. *See, e.g., Pike v. Gross*, 936 F.3d 372, 385 (6th Cir. 2019) (Stranch, J.,

concurring) ("I believe that society's evolving standards of decency likely do not permit the execution of individuals who were under 21 at the time of their offense."). The state thus has a particularly strong interest in ensuring that it carries out its sentence against Mr. Tisius, one of its most vulnerable citizens, in accordance with the Eighth Amendment. In other words, not only would a delay for this Court to consider the writ of certiorari not impose tangible harm upon the state, but such a delay would serve the state's interest in ensuring constitutional compliance.

III. Mr. Tisius has not unnecessarily delayed presentation of this claim.

The facts underlying this claim could not have been presented in earlier litigation. The research and changing legal trends have been developing since Mr. Tisius's trial in 2010 and since the beginning of his habeas proceedings in 2017. Under Missouri law, a habeas claim may be presented when the underlying factual basis was unknown within the time limits for trial, appeal, or post-conviction proceedings. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. banc 2003). Mr. Tisius's claim in the Missouri Supreme Court was timely.

Mr. Tisius filed his petition for writ of habeas corpus in the Supreme Court of Missouri on January 13, 2023, the same day he filed his response to the state's motion to set an execution date. The Supreme Court of Missouri denied Mr. Tisius's habeas corpus petition on the same day it set his execution date, March 1, 2023.

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 writ of certiorari.

Respectfully Submitted,

ELIZABETH UNGER CARLYLE*
Carlyle Parish LLC
6320 Brookside Plaza, #516
Kansas City, MO 64113
Mo. Bar No. 41930
(816) 525-6540
elizabeth@carlyleparishlaw.com

LAURENCE E. KOMP
Capital Habeas Unit, Chief
Federal Public Defender
Western District of Missouri
1000 Walnut St., Ste. 600
Kansas City, MO 64106
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Keith O'Connor, LLC
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