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

22A-____

No. 22-7700 (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 U.S. Court of Appeals, Eighth Circuit

APPLICATION FOR STAY OF EXECUTION

ELIZABETH UNGER CARLYLE*
Carlyle Parish LLC
6320 Brookside Plaza #516
Kansas City, Missouri 64113
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 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, concurrently filed with this Court.

PROCEDURAL BACKGROUND

Mr. Tisius respectfully requests that this Court stay his execution, pursuant to Supreme Court Rule 23. Thirteen years ago the state surreptitiously assisted a juror to complete a jury form **only after** the juror informed the state official he could not read. In response to this disclosure regarding his inability and in violation of Missouri law, the state "took [him] into a private room," read the form "word for word" to [him], and then filled out the answers for him. App. p. 16a. The state never disclosed the secretive process and assistance provided the juror.

During jury selection, the court asked the venire panel (with no objection from the state), "Is there anyone here who does not read, speak and understand English?" No one responded. Sentencing Trial Transcript, p. 92. In this moment, the state failed to disclose they had assisted the juror when he told them he could not read.

One year later, the state then destroyed the jury forms which could have potentially disclosed the assistance. They did so in violation of Missouri court rules. Mo. Sup. Ct. Op. R. 4.21. A state official informed Mr. Tisius's direct appeal

counsel that the forms were destroyed while appeal proceedings were pending. App. p. 13a.

While investigating for clemency, on April 28, 2023, Mr. Tisius's legal team learned a juror could not read. The next day, on April 29, 2023, he signed a statement indicating he could not read or write. (App. p. 14a). The significance of the admission is that a Missouri statute disqualifies this juror for his inability to read. Mo. Rev. Stat. § 494.425. Within 3 days, on May 2, 2023, Mr. Tisius prepared and filed a state habeas petition related to this juror's admission with the Missouri Supreme Court. *Tisius v. Vandergriff*, Case No. SC100059 (Mo.). He also filed a motion for stay based on the juror disqualification in *State v. Tisius*, Case No. SC91209 (Mo.). On May 3, 2023, the Missouri Supreme Court ordered the state to respond six days later. **The state never did.**

On May 4, 2023, Mr. Tisius filed a properly executed affidavit where the juror reaffirmed his inability to read or write and reaffirmed his earlier signed statement. (App. p.15a). This may seem unusually wasteful, but because Missouri has an affidavit requirement, even after filing the Rule 91, Mr. Tisius returned to the juror and had him sign an affidavit.

The state secured a recantation affidavit contesting the juror's inability to read, **but not challenging (1) he informed state officials he could not read the jury forms and (2) he received assistance from those state officials after informing them he could not read.** In contrarian fashion, while the juror attests in the state's "affidavit" that he can read, he acknowledges that the state drafted and

read to him the "affidavit" before he signed it. App. p. 19a. He admits that "[i]t would have been difficult for [him] to write the ["]affidavit["] on [his] own." *Id.*

On May 23, 2023, the Missouri Supreme Court denied relief. (App. p.7a). On May 25, 2023, Mr. Tisius asserted in the district court a *Hicks* claim based on the Missouri Supreme Court's May 23, 2023 refusal to apply the clear jury disqualification statute to Mr. Tisius. R. Doc. 132. On that same day he filed a stay motion articulating the *Hill v. McDonough*, 547 U.S. 573 (2006), standards. R. Doc. 133.

Based on a date **they** provided the district court, the state filed its response on May 28, 2023. R. Doc. 134. On May 30, 2023, Mr. Tisius filed a reply. R. Doc. 135. On May 31, 2023, the district court entered a stay of execution. (App. p. 3a). The district court determined that "a brief stay of execution" was merited when "the record contains conflicting evidence which cannot be resolved without an evidentiary hearing." (App. p.5a). The district court laid out a non-exhaustive list of three factual disputes. *Id.*

The district court then noted that if the factual disputes are resolved in the state's favor Mr. Tisius could not satisfy 28 U.S.C. § 2244 and he would lose. *Id.* If resolved in Mr. Tisius's favor, he may demonstrate the inapplicability of § 2244 as a bar to review and *could* be entitled to relief. *Id.* Consequently, the district court took the non-controversial step of preserving his ability to determine the § 2244 question.

Applying *Hill* and *Nelson v. Campbell*, 541 U.S. 637 (2004), the court noted Mr. Tisius presented evidence "sufficient to satisfy each factor." (App. p. 5a). The

district court recognized and credited "an interest in finality and carrying out judgment." *Id.* However, the district court found it "outweighed by Petitioner's interest in not being 'dead without the opportunity to have this Court' make findings of fact and conclusions of law regarding Juror 28." *Id.*

The state appealed and after briefing but without oral argument the Eighth Circuit vacated the stay and dismissed Mr. Tisius's claim as a successor. (App. p.1a), 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). Mr. Tisius meets the relevant standards for this Court to grant 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 raises a substantial claim pursuant to *Hicks.* It is beyond dispute that when a state fails to abide by its own statutes in a manner governed by a constitutional right, that action violates the Fourteenth Amendment. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

Mr. Tisius's *Hicks* claim only became ripe upon the Missouri Supreme Court's refusal to apply Missouri law. Juror 28 could not read at the time of voir dire (and still cannot read) and thus did not meet Missouri's juror qualification requirements. Mo. Rev. Stat. § 494.425. The state never disclosed their assistance provided Juror 28, assistance provided because he could not read. Juror 28 did not disclose his inability to read until well after the conclusion of Mr. Tisius's federal habeas proceedings. He failed to answer the voir dire question mirroring the state juror disqualification statute. When he did finally disclose his inability to read, Mr. Tisius promptly presented his due process claim to the state court using the required state procedure for the presentation of claims arising after the conclusion of direct appeal and post-conviction proceedings. *See State ex rel. Winfield v. Roper*, 292 S.W.3d 909, 910 (Mo. banc 2009).

In Missouri, criminal defendants are "entitled to a full panel of qualified jurors." *State v. Wacaser*, 794 S.W.2d 190, 193 (Mo. 1990). To ensure defendants receive a qualified panel, the Missouri legislature enacted Mo. Rev. Stat. § 494.425, which mandates no persons unable to read English may serve on juries. *Id.*; *see also Juror Basics*, Missouri Courts, https://tinyurl.com/3ze2hfr4 (last visited June 4, 2023. Further, in Missouri, "[f] ailure to strike an unfit juror is structural error. . . ." *Dorsey v. State*, 448 S.W.3d 276, 299 (Mo. banc 2014); *see also State v. Strong*, 263 S.W.3d 636, 647 (Mo. banc 2008) (prejudice presumed); *State v. Mayes*, 63 S.W.3d 615, 625 (Mo. banc 2001) (intentional nondisclosure merits new trial without a showing of prejudice); *Gray v. Mississippi*, 481 U.S.

648, 668 (1987). As these cases show, a death sentence imposed by an unqualified juror is a structural defect.

Instead, the Missouri Supreme Court summarily denied the claim without explanation. Prior to that ruling, there was no *Hicks* claim to present. *See Clemons v. Mississippi*, 494 U.S. 738, 746-47 (1990 (first citing *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion), then citing *Hicks v. Oklahoma*, 447 U.S. 343 (1980)); *see also Thompson v. Missouri Bd. Of Parole*, 929 F.2d 396, 401 n.10 (8th Cir. 1991). Missouri has a clear rule. Through assistance and concealment, the state has obscured the violation of that clear rule. Upon discovery and prompt notification to the court of this structural defect, relief has been denied.

It is an uncontroversial proposition a stay of a reasonable amount of time may be entered 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."

Similarly, the district court only entered a stay of a limited duration to determine the 2244 question in the context of a factual dispute. A factual dispute not resolved – a factual dispute that related to the due diligence requirement of 2244. The state has never disclosed the identity of the clerk who completed Juror 28's qualification form, nor the identity of the clerk who then destroyed the forms, and, in spite of a direct question in voir dire, Juror 28 did not disclose his inability to read until after the conclusion of his federal habeas proceedings. These facts, if

true, establish that Mr. Tisius did not have a fair opportunity to present the claim in his first federal habeas petition. *See*, *e.g.*, *Jimerson v. Payne*, 957 F.3d 916, 927 (8th Cir. 2020) ("[D]ue diligence does not require a defendant to root out information that the State kept hidden."); *Julian v. Hanna*, 732 F.3d 842, 849 (7th Cir. 2013) (Posner, J.) (finding petitioner's "*Brady* claim was ripe" no earlier than when "[t]he exculpatory evidence had been revealed"); *cf. McDonough v. Smith*, 139 S. Ct. 2149, 2159 (2019) (holding time to bring 42 U.S.C. § 1983 malicious-prosecution claim based on fabricated evidence accrues not from earliest date plaintiff becomes aware of fabricated evidence, but from later date of favorable termination of proceedings against him).

This Court has repeatedly held habeas petitioners are entitled to "'presume that public officials have properly discharged their official duties[,]'" *Banks v. Dretke*, 540 U.S. 668, 698 (2004) (quoting *Bracy v. Gramley*, 520 U.S. 899, 909 (1997)), and would not, for example, assist a juror in concealing the fact that he was disqualified from jury service. This Court further recognizes a "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

The concealment of the assistance was further masked by the state when it destroyed all of the juror questionnaire forms one year following the resentencing trial, during Mr. Tisius's direct appeal's pendency, and in contravention of Missouri records retention laws. Simply put, this information was hidden by Juror

28 and the state, and any paper trail to assist Mr. Tisius's counsel for discovering such a violation was destroyed by the state.

The Eighth Circuit vacated and remanded with orders to dismiss, because it deemed the petition "second or successive," but it did so without proper consideration to the ripeness principles at play. When a habeas petition presents a claim that did not become ripe for review until after the conclusion of the petitioner's federal habeas proceedings, this Court has determined that the habeas petition in question is not a second or successive petition within the meaning of § 2244(b). *Magwood v. Patterson*, 561 U.S. 320 (2010); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1999).

The term "second or successive" in § 2244(b) is "a term of art" that is "not self-defining." *Panetti*, 551 U.S. at 943-44. Instead, the term "takes its full meaning" from Supreme Court case law, including pre-AEDPA cases. *Id.* at 944. Because the *Hicks* allegations in the supplemental petition just recently became ripe for review, the supplemental petition is not a second or successive petition within the meaning of § 2244(b), and the lower court opinion conflicts with relevant decisions of this Court. *Nooner v. Norris*, 499 F.3d 831, 834-35 (8th Cir. 2007) (Nooner's supplemental habeas application raising a claim that the state was violating his right of access to the courts was filed when his claim first ripened, and was not subject to the statutory bar set out in § 2244(b)); *Crouch v. Norris*, 251 F.3d 720, 723-25 (8th Cir. 2010) (Crouch's second habeas petition raising a claim stemming from the state's refusal to grant him parole was not a "second or successive" petition

under § 2244(b) because the alleged violation occurred after the denial of his first petition); *Morgan v. Javois*, 744 F.3d 525, 527 (8th Cir. 2013) (petition challenging continued confinement after finding of not guilty by reason of insanity was not subject to § 2244(h) because it did not become ripe until the state court ruled on the continued confinement).

Mr. Tisius satisfies 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. 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 government 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 take the eminently reasonable approach it took recently in *Glossip v. Oklahoma*, No. 22A941, May 5. 2023.

There is no tangible harm to the state. A simple delay to accurately determine the merits of this writ of certiorari 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.").

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). The state has unclean hands – having failed to disclose their subterfuge 13 years ago. The state should not have an interest in preventing consideration of the critical questions of fact identified by the district court:

- whether Juror 28 could read at the time he was selected as a juror in 2010;

- whether a Courthouse employee improperly assisted Juror 28 in filling out his questionnaire; and,

- whether a Courthouse employee improperly failed to disclose that assistance.

Doc. 136.

The interests of the state are in determining why state officials assisted a juror disqualified from service to get on the jury. The interests of the state are in determining why the evidence of the assistance was destroyed in an untimely fashion under Missouri law.

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

Mr. Tisius has known of this claim for only approximately a month, and he initiated state court processes in three days and federal court processes within two days of the commission of the *Hicks* violation.

He brought a state court action in three days from discovery. He acted with all diligence.

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 failure to disclose for thirteen years, the facts underlying the *Hicks* could have been fully considered in the regular appellate processes. Rather, any immediacy is the product of the state's manipulation of the process and the surreptitious assistance provided a juror.

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 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

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
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COUNSEL FOR PETITIONER

*Counsel of Record, Member of the Bar of the Supreme Court