THIS IS A CAPITAL CASE

EXECUTION SET FOR August 1, 2023 (CURRENTLY STAYED)

No. 23A63

No. 23-5147 (connected case)

IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY JOHNSON, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the Missouri Supreme Court

REPLY IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION

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A STAY OF EXECUTION IS WARRANTED

The State suppressed important impeachment evidence from Mr. Johnson that would have cast doubt on the credibility of the State's psychologists, on whose evaluations and testimony Mr. Johnson's death-eligible conviction and death sentence rest. That suppression occurred before, during, and after trial; on direct appeal; during post-conviction proceedings; on appeal from the post-conviction denial before the Missouri Supreme Court; and throughout federal habeas proceedings, including Mr. Johnson's 2022 petition for certiorari before this Court.

Respondent now relies on a cramped misreading of Missouri law, misinterpretations of this Court's longstanding precedent, unfounded accusations of delay, and misleading claims about the balance of harms, to urge this Court to permit Mr. Johnson to be executed before his claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) is litigated before this Court. Respondent's arguments are meritless and a stay of execution is warranted because Mr. Johnson presents "substantial grounds upon which relief might be granted," *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), and because the factors governing stays of execution weigh in his favor. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004).

I. Mr. Johnson has demonstrated a likelihood of success on the merits.

Respondent attempts to distract from the substance of Mr. Johnson's *Brady* claim by arguing that the Missouri Supreme Court's denial of his state habeas petition rested on state law grounds and the impeachment evidence was not subject

to *Brady*. Sugg. in Opp. to Stay, p. 7. Neither argument has merit. Nor is Mr. Johnson asking this Court to extend *Brady*, as Respondent suggests. *Id.*

Mr. Johnson's claim is that the State withheld from him critical and material impeachment evidence that was available at trial, and that it continued to suppress that evidence throughout every stage of the litigation in his capital case. It did so even when the local prosecutor's involvement in the case ended and the Attorney General began representing the State before the Missouri Supreme Court and in federal court. It did so even though the Attorney General knew of the impeachment evidence and was actively using Becker's 1999 DWI in other, simultaneous proceedings, to revoke his license to practice psychology in the State of Missouri. And even while the Attorney General was engaged in that effort, he was simultaneously urging the Missouri Supreme Court and the federal courts to continue to rely on Becker's evaluations and reports to uphold Mr. Johnson's conviction and death sentence.

Contrary to Respondent's claim, the Missouri Supreme Court's checkbox denial of his *Brady* claim did not rest on state-law grounds. Sugg. in Opp. to Stay, p. 7. As more fully explained in Mr. Johnson's reply in support of the petition for certiorari, Pet. Rep, pp. 4-5, this Court has held that it "can generally presume that summary denials were on the merits." *Harrington v. Richter*, 562 U.S. 86, 99 (2002). In the absence of a "plain statement" from the state court indicating clearly that its decision was based on adequate and independent state court grounds, the Missouri Supreme Court's checkbox denial of Mr. Johnson's *Brady* claim cannot be presumed

to have been based on state law grounds. *Harris v. Reed*, 489 U.S. 255, 262-63 (1989). And under this Court's precedent in *Harrington*, it was presumptively a merits ruling. *Harrington*, 562 U.S. at 99.

Respondent's opposition to Mr. Johnson's petition for writ of certiorari further relies on a cramped misreading of Missouri law to incorrectly suggest Becker's 1999 pre-trial DWI was not subject to *Brady*. Contrary to Respondent's claims, whether Becker's 1999 was a "conviction" or a "suspended imposition of sentence," it was valid impeachment evidence that was required to be disclosed under Missouri law and *Brady*. *State v. Moore*, 411 S.W.3d 848, 854 (Mo. App. 2013) ("the State was . . . constitutionally obligated, pursuant to *Brady*, to search, find and disclose" the witness's SIS); *see also State v. Lynch*, 679 S.W.2d 858, 861 (Mo. banc 1984) ("Thus, a suspended imposition of sentence now carries with it the stain of certain undesirable attributes of a conviction, such as use for . . . impeachment . . . .") (abrogated on other grounds); *State v. Brooks*, 694 S.W.2d 851, 852 (Mo. App. E.D. 1985) ("We therefore hold that a witness can be impeached by his prior guilty plea, even though he had completed probation under a suspended imposition of sentence"); *State v. Urban*, 798 S.W.2d 507, 514 (Mo. App. W.D. 1990) (impeachment of a witness with an SIS is permissible) (overruled on other grounds); R.S.Mo. § 491.050 ("any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case.").

Nor is Respondent correct to argue that the State's gamesmanship in its eleventh-hour decision that only English would testify, when both English and Becker were noticed as witnesses, absolved it of its duty under *Brady* to disclose Becker's 1999 DWI. The prosecution was obligated, under *Brady*, to disclose impeachment evidence of its endorsed witnesses. Moreover, English's testimony relied on evaluations and reports **Becker** had conducted and authored. To permit one witness to testify about the work product of another, in order to insulate from possible impeachment the witness who actually prepared the reports and conducted the evaluations, cannot comport with due process or this Court's precedent under *Brady*. And the prosecution's suppression of the impeachment and reliance on English's testimony about Becker's work allowed the State to give the jury the impression it had **two separate** expert witnesses supporting its position instead of just one, when that was not, in fact, the case.

And while it is true that events that occurred after trial necessarily could not have been disclosed at trial pursuant to *Brady*, that is not Mr. Johnson's argument. It was the decades-long continued suppression of Becker's pre-trial DWI, by the local prosecutor and the Attorney General, that violated *Brady*—a violation made all the more egregious by the local prosecutor's reliance on that DWI to convict Becker of felony DWI as a persistent offender and the Attorney General's reliance on it to revoke Becker's psychologist license, all the while arguing Mr. Johnson's conviction and death sentence, based on Becker's reports and conclusions, should be upheld.

Because Mr. Johnson has presented this Court with a ripe avenue to clarify a state's continuing *Brady* obligations and responsibility for fair dealing at all stages of a criminal case, and because the Missouri Supreme Court's reluctance to impute *Brady* to Attorneys General conflicts with the standards recently adopted by the California Supreme Court, at least four members of this Court are likely to vote to grant certiorari.

For all these reasons and those in Mr. Johnson's petition for writ of certiorari and reply and in his application for a stay of execution, he has shown a likelihood of success on the merits and has satisfied that factor of *Hill* such that his application for a stay of execution should be granted.

II. Mr. Johnson has not delayed and the State's argument is unfounded.

Respondent repeatedly complains of delay in this case in an attempt to obscure the fact that it was the State that suppressed the impeachment evidence—Becker's 1999 DWI—for 24 years. And even 24 years later, the Attorney General has still taken no corrective action before the Missouri Supreme Court or any other court to correct the misperception—and injustice—he created by continually relying on the evaluations and reports of an expert whose license he was actively trying to revoke. The State had 24 years to come clean about the suppressed impeachment evidence, and it never did.

Rather, it appears the State made the decision to play hide and seek with the impeachment evidence, contrary to this Court's clear rule set forth in *Banks v. Dretke*, assuming that if it were ever uncovered, it would be too late for Mr.

Johnson to do anything about it. 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). Without a stay of execution to permit this *Brady* claim to be addressed, the State's calculation will be correct. Mr. Johnson will be dead without the opportunity to have this Court consider his *Brady* claim regarding impeachment evidence of a critical State expert whose evaluations and reports were key to the jury's decision to convict Mr. Johnson of a death-eligible offense.

Respondent's claim that Mr. Johnson has delayed in filing his petition for writ of certiorari or his application for a stay to gain some tactical advantage is wholly without merit and makes little sense. Mr. Johnson has expeditiously filed his *Brady* claim at every stage: he filed his state habeas petition in March, shortly after his February discovery of the *Brady* evidence the State has continually suppressed. And after the Missouri Supreme Court denied his claim without any reasoning, Mr. Johnson filed his petition for writ of certiorari in the time permitted by this Court's rules, and his application for a stay within days of the petition. Courts have rules, and Mr. Johnson cannot be penalized for filing his petition and his stay application in this Court in accordance with the Court's own rules. Sp. Ct. R. 13.1. Respondent's argument that Mr. Johnson should be punished for following this Court's rules and, as a result, executed without having his meritorious *Brady* claim fully and fairly adjudicated, is unavailing.

Mr. Johnson is well aware that unreasonable delay is held against a petitioner seeking a stay of execution and he would have no tactical advantage to gain by delaying. Had the State turned over the material impeachment evidence at any point in the last 24 years, Mr. Johnson would have no need for a stay of execution. At every stage of litigation and with every opportunity to disclose that evidence, the State declined to do so. This Court is urged not to reward the State for their decades-long suppression of impeachment evidence when Mr. Johnson raised his *Brady* claim expeditiously after discovering the State's malfeasance and complied with this Court's own rules for filing his petition for writ of certiorari and application for a stay of execution.

III. The balance of harms weighs in favor of granting the stay of execution.

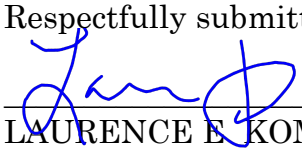
Respondent contends Mr. Johnson will not be injured without a stay, Sugg. in Opp. to Stay, p. 8-9, but of course he will, in fact, be irreparably harmed if he is executed before his meritorious constitutional claim is fully litigated. While the State has an interest in carrying out criminal judgments, it does not have a legitimate interest in doing so at the expense of following constitutional requirements or this Court's longstanding precedent. Had the State not suppressed the impeachment evidence for 24 years, there would be no need for a stay of execution to adjudicate Mr. Johnson's *Brady* claim. It is the State that created this situation by failing to comply with *Brady* and continuing to suppress the impeachment evidence at every stage of Mr. Johnson's case.

Respondent intimates that the victims in this case will suffer irreparable harm if Mr. Johnson's execution is stayed. Sugg. in Opp. pp. 9-10. In requesting a stay of execution, Petitioner in no way discounts the pain experienced by the family of the victim or their desire for closure in whatever form that may take for each of them. But it is inaccurate to suggest that the family of the victim in this case uniformly supports Mr. Johnson's execution. *See* Katie Moore, *Killer of 6-year-old Girl to be Executed. Victim's Father Wants his Life Spared*, KANSAS CITY STAR (July 24, 2023), https://www.kansascity.com/news/state/missouri/article277306138.html. Further, the public interest is not served when prosecutors—whether local trial prosecutors or Attorneys General—are permitted to suppress impeachment evidence for decades and face no consequences, while the death-sentenced petitioner has no recourse if he discovers such malfeasance after his opportunity to challenge it has run its course. This is especially so in this case, where the conclusions and reports of Becker, testified to by English, formed the basis for Mr. Johnson's conviction of a death-eligible offense and his ultimate death sentence. A stay is therefore warranted to permit this Court's consideration of Mr. Johnson's petition for writ of certiorari.

CONCLUSION

For the foregoing reasons and those in Mr. Johnson's petition for writ of certiorari and application for stay, Mr. Johnson respectfully asks this Court to grant the application for a stay of execution.

Respectfully submitted,



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