

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY JOHNSON,)	This Is a Capital Case
)	Execution Scheduled for
Petitioner,)	August 1, 2023,
)	at 6:00 p.m. CDT
v.)	
)	No. _____
DAVID VANDERGRIFF,)	
Superintendent,)	
Potosi Correctional Center)	
Respondent.)	

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

**APPLICATION FOR STAY OF EXECUTION PENDING
DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI**

Petitioner, Johnny Johnson, respectfully requests that Justice Kavanaugh, in his capacity as Circuit Justice for the Eighth Circuit, pursuant to 28 U.S.C. §2101(f), stay his execution pending this Court’s disposition of petitioner’s petition for a writ of certiorari filed contemporaneously with this motion. In support of this application, petitioner states the following grounds.

1. Petitioner is a Missouri death row inmate who is challenging his sentence of death in a certiorari petition that seeks review of the Missouri Supreme Court’s judgment denying his petition for a writ of habeas corpus. The procedural history of the case is set forth in the underlying petition for a writ of certiorari. The Missouri Supreme Court set petitioner’s execution for August 1, 2023, at 6:00 p.m. CDT.

2. As is more fully set forth in the accompanying certiorari petition, petitioner believes that the issues presented here are substantial and would warrant this Court's discretionary review. At the very least, a stay of execution should be granted pending the resolution of this petition.

3. The test for granting a stay of execution in a capital case is governed by the familiar standard set forth by this Court in *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). In the present context of a pending petition for a writ of certiorari, petitioner is entitled to a stay of execution if there is a reasonable probability that four members of the Court would consider the underlying issues sufficiently meritorious to grant discretionary review. *Id.* The questions raised in Mr. Johnson's petition for a writ of certiorari are substantial and meritorious. It also goes without saying that petitioner would suffer irreparable harm if his life is forfeited before this Court can review the claims in the underlying petition in a reasoned and thorough manner.

4. The questions raised in this petition involve Eighth and Fourteenth Amendment violations arising from the Missouri Supreme Court's failure to afford petitioner a meaningful review of his claim that he is not mentally competent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007).

5. The questions presented in the petition regarding what process is due to mentally ill condemned prisoners who raise *Panetti* claims has not been definitively

resolved and has created conflicts between lower federal and state courts. The issues in this case present substantial constitutional questions that will undoubtedly arise in future cases and are, therefore, worthy of discretionary review.

**SUGGESTIONS IN SUPPORT OF
MOTION FOR A STAY OF EXECUTION**

The Missouri Supreme Court denied petitioner a full and fair hearing where a trier of fact could hear and consider all of petitioner's evidence and any rebuttal from the state in order to determine whether he is too mentally ill to be executed under *Panetti*. The manner in which the Missouri Supreme Court denied petitioner's habeas corpus petition on a paper record, without giving petitioner an evidentiary hearing before a Special Master pursuant to Mo. S. Ct. Rule 68.03, also raises other substantial constitutional issues that this Court should address.

Where any litigant requests a stay of a judgment, a reviewing court must engage in a balancing of interests. This analysis necessarily involves the fundamental conflict between the harm to the party seeking a stay versus the prevailing party's interest in the finality of the judgment. In death penalty cases, because the stakes are much higher, any uncertainties should be resolved in the condemned man's favor.

In *Commodity Futures Trading Comm. v. British Am. Comm.*, 434 U.S. 1318 (1977) (Marshall, J., in chambers), Justice Marshall upheld a lower court stay by stressing the “potentially fatal consequences” to the businesses involved. *Id.* at 1321. The destruction of a human life should be undertaken with even more reluctance than the possible bankruptcy of a corporation.

In considering this petition and petitioner’s request for a stay, this Court should take into account an overriding concern in addition to the obvious fact that Johnny Johnson will be irreparably harmed if he forfeits his life. This Court should also consider the irreparable harm to the public’s confidence in the integrity of the criminal justice system if it permits a profoundly insane man to be executed without due process where there is compelling evidence he does not rationally understand why he is facing execution. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (The “traditional” standard for a stay also requires a reviewing court to determine “where the public interests lie.”) Any countervailing arguments from respondent regarding undue delay and the finality of judgments pale in comparison.

A. PETITIONER AND HIS POST-CONVICTION COUNSEL HAVE NOT BEEN DILATORY IN LITIGATING HIS PANETTI CLAIM.

Respondent argued in the court below against granting a stay of execution and giving petitioner a hearing that petitioner has been dilatory in not litigating his *Panetti* claim earlier. Nothing could be further from the truth.

Any argument from respondent about delay or other possible procedural hurdles to this Court's orderly review of this case are trumped by petitioner's substantial claim that he is too mentally ill to be executed. All of the other relevant factors of irreparable harm and the public's interest weigh heavily in favor of a stay of execution.

B. ANY INTEREST IN FINALITY MUST YIELD TO THE INTERESTS OF JUSTICE AND FUNDAMENTAL FAIRNESS.

In all of its prior pleadings, respondent repeatedly cites "interests of finality." As there is no such recognized principle under Missouri or federal habeas corpus law precluding a court from hearing a *Panetti* claim when a prisoner is facing a "serious" execution date, this argument should be emphatically rejected for a number of reasons.

First and foremost, there is no such thing as a finality bar under Missouri law or, for that matter, under federal habeas corpus law. *See State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217 (Mo. banc 2001), *Rideau v. Whitley*, 237 F.3d 472, 477-479 (5th Cir. 2000) (rejecting government argument that prisoner unreasonably delayed bringing equal protection challenge to a murder conviction that occurred more than thirty years earlier). Since *Panetti* claims are not ripe until an execution date is set, respondent's arguments regarding delay and finality ring hollow.

Respondent is correct in noting that there is a general **federal** judicial policy favoring the finality of state court judgments. As this Court is fully aware, the

interests of finality are trumped or superseded by the interests of justice and fundamental fairness. As this Court has pointed out: “Conventional notions of finality of litigation have no place where life or liberty is at stake and the infringement of constitutional rights is alleged...” *Sanders v. United States*, 373 U.S. 1, 8 (1963).

Respondent’s finality arguments represent the epitome of the legal system’s emphasis upon form over substance. Far too often in the post-conviction process, concern for efficiency in procedure has overshadowed concern for basic fairness and has transformed our fidelity to process into an undue obsession with formalities and technicalities. This obsession with procedure has far too often obscured or eclipsed the more important role in our system of dedication to do justice. It was, after all, in order to “establish justice” that our Constitution was written. (*U.S. Const. pmb.*).

It is certainly not a radical notion to propose that Mr. Johnson, in the interests of justice, be given a full and fair hearing in a court of law to conclusively prove he is not mentally competent to be executed. This is all he asks.

CONCLUSION

For all the foregoing reasons, as well as those reasons advanced in the underlying petition, this Court should grant a stay of execution.

Respectfully submitted,

/s/ Kent E. Gipson
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