IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY JOHNSON,	)	
	)	**<u>CAPITAL CASE</u>**
Petitioner,	)	**Execution Set for**
	)	**August 1, 2023**
v.	)	**at 6:00 p.m. CDT**
	)	
DAVID VANDERGRIFF,	)	**Case Numbers:**
Superintendent,	)	**23-5243**
Potosi Correctional Center	)	**23A93**
	)	
Respondent.	)	
	)	

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

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PETITIONER'S REPLY IN SUPPORT OF HIS APPLICATION FOR STAY OF EXECUTION AND PETITION FOR A WRIT OF CERTIORARI

In the last decade, five other condemned men from Missouri have come before this Court seeking review of their *Panetti* claims after a majority of the members of the Missouri Supreme Court denied their state habeas petitions without a hearing. *See State ex rel. Clayton v. Griffith*, 457 S.W.3d 735 (Mo. banc 2015), *cert. den.* 575 U.S. 908 (2015); *State ex rel. Middleton v. Russell*, 435 S.W.3d 83 (Mo. banc 2014), *cert den.* 573 U.S. 974 (2014); *State ex rel. Barton v. Stange*[1], 597 S.W.3d 661 (Mo. banc 2020), *cert. den.* 140 S. Ct. 2800 (2020); *State ex rel. Strong v. Griffith*, 462 S.W.3d 732 (Mo. banc 2015), *cert. den.* 576 U.S. 1019 (2015); and *State ex rel. Cole v.*

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[1] The *Barton* case was the only one of these cases where relief was denied without dissent.

Griffith, 460 S.W.3d 349 (Mo. banc 2015), *cert. den.* 575 U.S. 958 (2015). In each of these cases, as well as in this case, the Missouri Supreme Court allowed the executions to proceed by issuing findings of fact and by making credibility determinations based upon a paper record.

It is safe to say that the facts presented here, that Johnny Johnson is incompetent to be executed, are more compelling than the facts presented by any of the other five aforementioned Missouri death row inmates whose cases came before this Court on the eve of their executions. The facts of this case also present the most egregious example of Missouri's adoption of an unfair process in adjudicating *Panetti* claims that cannot be reconciled with rudimentary principles of procedural due process. Here, the Missouri Supreme Court, as in earlier cases, hastily disposed of the case on a paper record by relying on rebuttal evidence submitted by the state. However, subsequently disclosed prison records indicated this rebuttal evidence was inaccurate at best and probably false. This Court can no longer turn a blind eye to the Missouri Supreme Court's pattern and practice of reviewing *Panetti* claims in such a cursory manner. Now is the time for control.

In the aftermath of this Court's 2007 decision in *Panetti*, legal scholars and advocates for the mentally ill were hopeful that this Court's decision would ensure that the floridly insane would not face execution. The *Panetti* decision, however, has been a 'paper tiger" that has had a very minimal effect in providing due process to mentally ill death row prisoners. *See* Perlin, Michael L. and Roitberg Harmon, Talia and Geiger, Maren, <u>'The Timeless Explosion of Fantasy's Dream': How State Courts</u>

have ignored the Supreme Court's decision in *Panetti v. Quarterman* (January 6, 2023). NYLS Legal Studies Research Paper No. 4319397; pp. 6-9, available at SSRN: https://ssrn.com/abstract=4319397 or http://dx.doi.org/10.2139/ssrn.4319397.

As Professor Perlin's recent article points out, in the nearly seventeen years since this Court granted review in *Panetti*, less than a handful of condemned men and women have successfully litigated *Panetti* claims before the state courts. Id. at 8-9. This article also notes that among the sixteen cases where *Panetti* claims were rejected by the state courts, over 30% of these cases were decided by the Missouri Supreme Court. Id. at 19-20; 53-60. The facts of this case once again demonstrate unless this Court grants discretionary review to examine and rectify this unconstitutional behavior, the Missouri Supreme Court will continue to sanction the execution of profoundly insane prisoners without affording these unfortunate souls even "a modicum of due process." *See Middleton*, *supra*, 435 S.W.3d at 87 (Draper, J., dissenting).

I.

THE FACTS OF THIS CASE PROVIDE THE COURT WITH A PRISTINE VEHICLE TO PERMIT THIS COURT TO PUT SOME TEETH BACK INTO THE *PANETTI* DECISION AND PREVENT FUTURE UNLAWFUL EXECUTIONS OF THE INSANE.

The facts and procedural posture of this petition gives the Court a perfect vessel to effect needed substantive change in this area of mental health law by reaffirming, clarifying, and commanding the state courts to employ constitutionally sound procedures to allow condemned men and women who are seriously mentally ill a full and fair hearing to prove their Eighth Amendment claims. As respondent has

practically conceded, there are no valid procedural barriers to this Court's review of all of the substantive questions raised in the petition. In addition, unlike the contemporaneous petition pending before the Court seeking review of the Eighth Circuit's decision, the Court is not constrained by the standard of review provisions of 28 U.S.C. § 2254(d) or any other procedural or retroactivity bar[2], and is free to review all of the questions presented *de novo*. *See Madison v. Alabama*, 139 S. Ct. 718, 725-726 (2019).

The facts of this case, which provides this Court with a long overdue opportunity to revive and reinvigorate the promise of *Panetti*, are analogous to the situation the Court confronted seventeen years after this Court's 1986 landmark decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). In the decades after *Batson* was decided, it had become apparent to legal scholars and criminal defense lawyers that the *Batson* decision, that was crafted to eliminate racially discriminatory jury selection practices in criminal cases, was illusory. Both prosecutors and reviewing courts discovered and crafted disingenuous and legally dubious tactics to avoid following *Batson's* mandate. *See Christopher Smith*, Law and Symbolism, 1997 Det. C.L. Mich. St. U. L. Rev. 935, 946.

Ironically, it also took this Court seventeen years after *Batson* was decided to revitalize the purpose of *Batson* by issuing its two opinions in *Miller-El v. Cockrell*,

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[2] Respondent's opposition does half-heartedly assert a retroactivity bar to this Court's review (Opp. at 23). However, this argument is foreclosed by *Madison v. Alabama*, 139 S. Ct. 718 (2019), where the Court reviewed a *Panetti* claim arising from denial of a state post-conviction motion. *Id.* at 725-726. Respondent raises other meritless procedural hurdles that are more fully addressed below.

537 U.S. 322 (2003), and its follow-up decision in *Miller-El v. Dretke*, 545 U.S. 231 (2005). In the decade before the opinion in *Miller-El-I* issued, *Batson* reversals in lower courts were as rare as pearls in the desert. This unfortunate reality finally led this Court to exercise its discretion to resurrect *Batson*. Nearly seventeen years after this Court agreed to review Scott Panetti's death sentence, this case presents compelling facts of petitioner's insanity that are arguably stronger than Mr. Panetti's claim of incompetence. *Johnson v. Vandergriff*, 8th Cir. No.: 23-2664, slip op. at p. 8 (Kelly, J., dissenting)(July 29, 2023). Petitioner's case also demonstrates that he was arguably afforded fewer rights to a fair hearing than the courts of Texas provided to Mr. Panetti, which gives the Court an opportunity to determine what process is due to this subset of condemned prisoners under the Fourteenth Amendment.

Taking this necessary step to revive this Court's prior decisions in *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Panetti* is also necessary at this time in history in light of the fact that this Court's authority and legitimacy has come under attack on several fronts. For instance, it appears that the State of Alabama is ignoring and openly flaunting this Court's recent decision in *Allen v. Milligan*, 143 S. Ct. 1487 (2023) that ordered Alabama to create a second majority black congressional district in order to comply with the 1965 Voting Rights Act.

The state courts' egregious failures to follow the constitutional demands of *Ford* and *Panetti*, notwithstanding the fact this failure of the system has long been under the media's radar, is no less important. No civilized society should tolerate racial discrimination or arbitrarily sanction the execution of the insane. It's time for

this Court to intercede to prevent the unjust execution of Johnny Johnson and prevent other insane prisoners from forfeiting their lives in the future.

II.

RESPONDENT'S DISCUSSION OF THE MERITS OF PETITIONER'S *PANETTI* CLAIM ENHANCES, RATHER THAN DIMINISHES, PETITIONER'S ARGUMENTS THAT DUE PROCESS, IN LIGHT OF THE FACTS OF THIS CASE, REQUIRES A FULL AND FAIR HEARING BEFORE A TRIER OF FACT.

A substantial portion of respondent's opposition to the petition and the stay application attempts to denigrate and diminish the compelling facts presented through the unrebutted expert testimony of Dr. Agharkar that petitioner's severe mental illness renders him incompetent to be executed under the *Ford* and *Panetti* tests. In contrast to the *Panetti* litigation that took place before the Missouri Supreme Court in five previous cases, the Attorney General here did not even bother to obtain a statement or affidavit from a qualified state psychologist or psychiatrist to rebut Dr. Agharkar's report. *See Cole*, s*upra.*, 460 S.W.3d at 360-361. The state was banking on its view that the Missouri Supreme Court, based upon its similar treatment of the five previous *Panetti* petitioners, would find that an affidavit from an unqualified prison counselor who does periodic brief wellness checks of petitioner, and an incomplete set of prison records, would provide enough cover for the court to deny the petition and a stay of execution. This calculation succeeded.

However, the post-judgment disclosures of new mental health records on July12 and July 20, 2023, that were presented in petitioner's motion to recall the mandate, provided compelling evidence that the Supreme Court relied on inaccurate

and false evidence to deny relief without affording petitioner any further hearings or process.

In its opposition to the present petition, respondent downplays the importance of these undisclosed records and also relies on other purportedly new records that in their view, supports their position that petitioner is not sufficiently insane to be afforded a stay under *Panetti*. Ironically, respondent's alternative interpretation of the substance and strength of these records significantly bolsters petitioner's argument that under *Panetti* "a fair hearing" would require that these disputes of fact be resolved by a Special Master who can observe the demeanor of Dr. Agharkar, Counselor Skaggs, and any other fact witnesses who testify after full discovery is completed.

III.

ALL OF RESPONDENT'S OTHER ARGUMENTS THAT ATTEMPT TO ERECT PROCEDURAL BARRIERS TO THIS COURT'S DE NOVO REVIEW ARE MERITLES.

Respondent's opposition also advances a few other procedural roadblocks to this Court's discretionary review. None of these arguments have any merit. First, despite the fact that this case comes before the Court on direct review from a state court decision, respondent argues that this Court's review of the questions presented should somehow be circumscribed or "informed" by the AEDPA. (Opp. at 14-16). This argument is also meritless in light of *Madison v. Alabama*, *supra.*, where this Court agreed to review Mr. Madison's *Panetti* claim after previously denying him relief under the standard of review provisions of the AEDPA. 139 S. Ct. at 725-726.

Respondent also argues that principles of federalism and dual sovereignty should somehow circumscribe this Court's review of petitioner's *Panetti* claim. (Opp. at 22-23). Once again, this argument is foreclosed by this Court's decision in *Madison*. This line of argument appears to suggest that there is some sort of rule that this Court should rarely, if ever, grant certiorari from the denial of a state post-conviction motion. This contention is false. In addition to *Madison*, it is not unusual for this Court to grant certiorari from the denial of state post-conviction relief if a substantial constitutional question is involved. *See e.g. Miller v. Alabama*, 567 U.S. 460 (2012); *Sears v. Upton*, 561 U.S. 945 (2010).

In *Wearry v. Cain*, 577 U.S. 385, 395-396 (2016), this Court held it was appropriate to exercise jurisdiction to review of a ruling from a state post-conviction court in a capital case when "circumstances so warrant." In light of the compelling evidence that petitioner is incompetent to be executed and has been denied due process by the Missouri Supreme Court's failure to grant him a hearing, this is truly an extraordinary case. This Court's intervention is necessary to prevent the execution of a man who is profoundly insane and to more clearly define the scope of constitutional protections that must be afforded to state prisoners who have raised compelling claims under *Panetti*.

IV.

RESPONDENT'S EXCESSIVE DELAY ARGUMENTS ARE MERITLESS

As anticipated in petitioner's application for a stay of execution, respondent has once again argued that petitioner and his counsel have excessively delayed the

litigation of his *Panetti* claim. An excessive delay argument is advanced by respondent in every single death penalty case that comes before this Court in this procedural posture regardless of the facts of the case or the length or reasons for any delay in the commencement of the stay of execution litigation.

In any event, *Panetti* claims are treated differently than other technically successive or abusive claims that are raised in a second in time habeas petitions that come before this Court with an execution date looming in the near future. As the record reflects, petitioner and his counsel were extraordinarily diligent in developing this claim by obtaining a mental health evaluation of petitioner two months before an execution warrant issued. Thereafter, this litigation commenced and was pursued with as much diligence as humanly possible given the voluminous record and complexity of the issues involved. Respondent's excessive delay arguments are "red herrings" to divert this Court's attention from the overwhelming evidence, that was not rebutted by the state in any meaningful or compelling way, that Mr. Johnson is not mentally competent to be executed later today.

Finally, one newly minted argument regarding excessive delay advanced by respondent's opposition does deserve further mention. Respondent contends that petitioner excessively delayed filing the present petition until July 31, 2023, because the Missouri Supreme Court's decision issued almost two months earlier on June 8, 2023. This argument, however, ignores the fact that petitioner's state remedies were not fully exhausted until the Missouri Supreme Court denied petitioner's motion to

recall the mandate at 3:01 p.m. on Saturday, July 29, 2023. *See Chambers v. Bowersox*, 157 F.3d 560, 565-566 (8th Cir. 1998).

This petition was filed the following Monday. As in *Chambers*, a motion to recall the mandate, based upon the facts and prevailing Missouri law, was necessary to exhaust petitioner's state remedies because newly discovered evidence emerged that undermined the correctness of a prior post-conviction decision. *See Bridgewater v. State*, 458 S.W.3d 430, 440 (Mo. App. W.D. 2015).

CONCLUSION

Based on the foregoing reply, the underlying petition, and application for a stay of execution, petitioner respectfully requests that this Court stay his execution and, after careful consideration, grant the petition for a writ of certiorari to address whether the Missouri Supreme Court, by sanctioning petitioner's execution without a fair hearing, violated petitioner's Eighth and Fourteenth Amendment rights.

Respectfully submitted,

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