THIS IS A CAPITAL CASE – EXECUTION SET FOR August 1, 2023

No. 23A-_____

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

APPLICATION FOR STAY OF EXECUTION

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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 Johnny Johnson for **August 1, 2023, at 6:00 P.M., Central Time**. Mr. Johnson respectfully requests a stay of execution pending consideration and disposition of the petition for a writ of certiorari, filed on July 18, 2023.

PROCEDURAL BACKGROUND

Mr. Johnson 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 proceedings, Mr. Johnson filed a petition for writ of habeas corpus in the Missouri Supreme Court. App. 2a-46a [Petition for Writ of Habeas Corpus]. His petition presented the claim that the local prosecutor's office and the Attorney General withheld material impeachment evidence at trial, direct appeal, post-conviction, and habeas proceedings, in violation of this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963) and the due process clause of the Fourteenth Amendment. The Missouri Supreme Court denied the petition without argument in an unexplained order. Appendix at p.1a [Missouri Supreme Court Order Denying Petition].

REASONS FOR GRANTING THE STAY

A stay of execution is warranted when there is a "presence of substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). To determine whether a stay of execution is warranted, federal courts

consider: (1) the petitioner's likelihood of success on the merits; (2) the relative harm to the parties if the stay is not issued; and (3) the extent to which the petitioner has delayed his or her claims. *See 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. Johnson's execution.

I. Likelihood of Success on the Merits

Mr. Johnson's petition for writ of certiorari has a substantial likelihood of success on the merits.

This Court has long held that "suppression by the prosecution of evidence favorable to an accused…violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87. "Impeachment evidence . . . falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985). The Court also has steadfastly counseled that heightened burdens of integrity and transparency are inherent in the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *see also Banks v. Dretke*, 540 U.S. 668, 696 (2004); *Kyles v. Whitley*, 514 U.S. 419, 440 (1995). In Mr. Johnson's case, his conviction and death sentence are impaired by a major failure by the State—first by the local prosecutor's office, and then by the Attorney General—to disclose material impeachment evidence to Mr. Johnson at every stage of litigation.

Mr. Johnson's eligibility for a death sentence depended on the question of whether he coolly deliberated when he committed the offense. *See* Tr. 1901 ("The

key in this case…is distinguishing the elements between murder first degree and murder second degree[.]"); *See also State v. Johnson*, 207 S.W.3d 24, 34 (Mo. banc 2006) (Missouri's highest court noting that the disputed issue at trial was whether Mr. Johnson deliberated as required for first-degree murder and mentioning the State's expert testimony on that issue). At trial, he presented the expert testimony of a psychologist who evaluated him on four occasions and concluded that, due to his documented schizophrenia, he was experiencing command hallucinations at the time of the crime and was unable to coolly deliberate. To rebut that testimony, the prosecution presented testimony of Byron English, who testified about evaluations and reports that were primarily conducted by Stephen Becker. Both were, at the time, State-employed psychologists. English testified, based on Becker's evaluations and reports, that Mr. Johnson did coolly deliberate at the time of the crime and his psychosis was caused by his prior drug use rather than his schizophrenia (although English did not dispute that Mr. Johnson had schizophrenia). Tr. 1825, 1838-41, 1843-45, 1863, 1883.

Becker's evaluations and English's testimony were the only evidence presented by the State to rebut Mr. Johnson's diminished capacity defense. The jury, swayed by Becker and English, rejected Mr. Johnson's defense and convicted him of first-degree murder rather than second-degree murder, making him eligible for a death sentence. On direct appeal, in state post-conviction proceedings, and in federal habeas proceedings, the State continued to rely on Becker's evaluations and

English's testimony about them to uphold Mr. Johnson's conviction and death sentence.

What Mr. Johnson did not know—and, as a result, what neither the Missouri Supreme Court nor the federal habeas court knew[1]—was that Becker had been convicted of DWI in 1999, prior to Mr. Johnson's trial. Resp. Ex. A.[2] Despite defense counsel's multiple requests for discovery, including criminal conviction information regarding the State's anticipated witnesses—Becker was noticed as a witness and it was only when the State called English to testify instead of Becker that defense counsel learned Becker was not going to testify, raising the strong inference that choice was due to his criminal history—the prosecution never disclosed Becker's conviction. Ex. 1, p. 2; Ex. 2, pp. 1-2; Ex. 3, pp. 1-3; Ex. 4, p. 2; Ex. 5, p. 2.

By the time of Mr. Johnson's state post-conviction proceedings, Becker had been convicted of DWI at least three additional times, and he was charged—by the same prosecutor's office that was prosecuting Mr. Johnson—with felony DWI as a persistent offender. Ex. 15, p. 14. He pleaded guilty to that offense on April 1, 2010, before Judge Mark Seigel, the same judge who presided over Mr. Johnson's trial and who was, at the time of Becker's plea and sentence, simultaneously presiding over Mr. Johnson's post-conviction proceedings. *Id.* at 3. Judge Seigel

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[1] The state post-conviction trial court did know or should have known of Becker's criminal history by the time of the post-conviction hearing in Mr. Johnson's case, as explained below, but did not disclose the information to Mr. Johnson's counsel or direct the prosecution to do so.

[2] All cites are to the record filed with the Missouri Supreme Court in *State ex rel. Johnson v. Vandergriff*, Case No. SC100023 (Mo.).

sentenced Becker to four years in prison, concurrent to another four-year prison sentence for felony DWI as a persistent offender in another county. *Id.*; Ex. 16, p. 1.

Despite Judge Seigel's knowledge of and involvement in Becker's criminal case, however, Judge Seigel continued to rely on Becker's evaluations and reports, along with English's testimony about them, in denying Mr. Johnson post-conviction relief. Ex. 12, p. 20. What is more, neither Judge Seigel nor the prosecutor revealed to Mr. Johnson anything about Becker's criminal convictions, including the 1999 DWI that occurred prior to Mr. Johnson's trial and that had not been disclosed to him before trial—even though, like trial counsel, post-conviction counsel requested prior convictions and impeachment information regarding government witnesses, including Becker and English. *See* Ex. 1, Ex. 2, Ex. 3, Ex. 9.

Continuing this pattern of non-disclosure, the Attorney General, who prosecuted Mr. Johnson's case on appeal from the post-conviction denial and in federal habeas proceedings, also failed to disclose Becker's criminal conviction and history to Mr. Johnson. At the very same time the Attorney General was relying on Becker and English to maintain Mr. Johnson's conviction and sentence on appeal from the post-conviction denial, the same office was representing the Missouri State Committee of Psychologists, which was seeking to revoke Becker's license to practice psychology due to his many DWI convictions, which they argued were crimes involving "moral turpitude." Ex. 22, p. 25. The Attorney General's office filed its complaint on behalf of the Committee of Psychologists in Becker's license revocation case in March 2012 and filed its brief to the Missouri Supreme Court in

Mr. Johnson's case in July 2012—only a few short months later. Ex. 22, pp. 23-27; 2012-07-16 Respondent's Brief, *Johnny Johnson v. State of Missouri*, Case No. SC91787. Becker's license to practice psychology was revoked on May 3, 2013, while Mr. Johnson's federal habeas petition—opposed by the Attorney General's office—was pending. *State Comm. of Psychologists v. Becker*, Case No. 12-0407 PS (May 3, 2013), p. 3.

Later, while Mr. Johnson's habeas petition was still pending in federal court, English was also forced to relinquish his license. Ex. 19. In his case, the Committee of Psychologists received complaints from English's employer that he had been sexually harassing a coworker and was misusing state resources to conduct unsanctioned and unofficial examinations of colleagues who wanted gastric bypass surgery. *Id.* at 2-5. Although the misconduct for which he lost his license took place after Mr. Johnson's trial, his Committee of Psychologists file indicates he had been accused of similar sexual harassment twenty years earlier, before Mr. Johnson's trial. Ex. 23, p. 54. Despite English's loss of his license to practice psychology, the Attorney General continued to rely on his testimony in advocating the affirmance of Mr. Johnson's conviction and death sentence.

As more fully explained in Mr. Johnson's petition for writ of certiorari, the reliability of Becker and English was central to whether Mr. Johnson was guilty of first-degree murder and thus eligible for the death penalty, or guilty of second-degree murder. While there was no dispute at trial that Mr. Johnson had committed the killing, the sole issue before the jury was whether Mr. Johnson had

coolly deliberated before the act or whether the defense of diminished capacity applied, based on his mental illness-induced command hallucinations. Becker and English thus presented the most important evidence upon which Mr. Johnson's first-degree murder conviction and death sentence rests. Defense counsel's ability to impeach them with Becker's DWI and the reason English was being called to testify instead of Becker was paramount to the jury's ability to fully judge the credibility of the witnesses and the evidence of cool deliberation, the most important issue in the case. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (new trial required when "evidence affecting credibility" is not disclosed when "the reliability of a given witness may well be determinative of guilt or innocence.") (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (internal quotation marks omitted).

The importance of the Becker/English evidence at trial was clear throughout the case. In voir dire, the prosecutor asked prospective jurors whether they would be able to consider mental health-related evidence and emphasized that the jury was to determine the credibility of all the witnesses, including the psychologists and "mental health people" who would be called to testify. Tr. 562-63, 603-04, 674, 678, 683, 737, 756. In his closing argument, the prosecutor told the jury, "**The key in this case**, of course, and what you've heard an awful lot about, is distinguishing the elements between murder first degree and murder second degree." Tr. 1910 (emphasis added). In his rebuttal argument, the prosecutor again summed up the case by explaining, "What the issue is, is he able to coolly reflect." Tr. 1946. He also emphasized the importance of considering the credibility of the witnesses,

including expert witnesses, asking whether the jury believed the defense expert, accusing her of being anti-death penalty and stating, "if you knock out cool reflection, you knock out deliberation, you knock out death." Tr. 1947-48.

Two jurors who spoke about their experience of the trial after the fact acknowledged the importance of that evidence. One, who spoke to defense counsel after trial, expressed that although he believed Mr. Johnson was mentally ill, he was swayed by the State's experts' conclusions regarding Mr. Johnson's mental state and the cause of his actions. Ex. 4, p. 3. Another, who spoke to a documentarian about the case in 2016, explained that the case was "unique, I think, in the fact that [Mr. Johnson] admitted his guilt. He admitted he did it. So that really wasn't on the table. It was just the cool deliberation of premeditation to determine the first-degree charge." Ex. 8, p. 3. He further explained that the defense expert's conclusion about Mr. Johnson's auditory hallucinations "was offset by the prosecution's expert witnesses." *Id.* at 6.

Becker's history of impaired driving would have been salient in the jury's appraisal of his credibility and the value of his professional opinion. That both experts lost their professional licenses due to misconduct and malfeasance also would have been notable in any reviewing Court's consideration of the value of Becker and English's conclusions compared to the conclusions of other experts. Such appraisals were required by Mr. Johnson's post-conviction claims and were in fact performed by Judge Seigel in denying post-conviction relief—without acknowledging Becker's criminal history. Impeachment material that called into

question Becker's or English's credibility would have worked in Mr. Johnson's favor, reducing the jury's reliance on their conclusions about Mr. Johnson's mental health at the time of the offense in comparison to the conclusions of the defense expert.

This Court has described the State's duty to disclose *Brady* material as "ongoing," *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), and has long made clear that heightened burdens of integrity and transparency are inherent in the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). For that reason, "[a] rule…declaring a 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (quoting *Bracy v. Gramley,* 520 U.S. 899, 909 (1997)). These principles should apply equally to Attorneys General as they do to local prosecutors, at all stages of a criminal case. State prosecutors, including Attorneys General— whether at the trial level, on appeal, or during postconviction proceedings— must be steadfast in their pursuit of truth and justice, and not only their desire to "win" by any means necessary. *See Strickler*, 527 U.S. at 281 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

In Mr. Johnson's case, the local prosecutor initially withheld the important impeachment evidence of Becker's pre-trial DWI at trial and during state post-conviction proceedings, and the Attorney General continued that pattern of non-disclosure throughout the subsequent stages of litigation, relying on Becker's evaluations and reports while simultaneously seeking to revoke his license to

practice psychology in the State of Missouri. That non-disclosure was a clear violation of *Brady*, and the Attorney General's continued reliance on expert opinions from Becker and English in order to maintain Mr. Johnson's death sentence, while simultaneously pursuing revocation of both men's professional licenses, violated the high ethical standard to which this Court holds prosecutors. 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 such clarification is necessary in light of the Missouri Supreme Court's reluctance to impute *Brady* obligations to Attorneys General, which conflicts with the recently adopted standards set forth by the California Supreme Court, at least four members of this Court are likely to vote to grant certiorari. Mr. Johnson is therefore likely to succeed on the merits of his claim before this Court.

II. Harm to the Parties

Irreparable harm will occur if Mr. Johnson's execution is not stayed until the petition for writ of certiorari is considered. If this Court does not stay Mr. Johnson's execution, he will be executed without the opportunity to fully litigate his meritorious constitutional claim: that his right to due process under the Fourteenth Amendment was violated by the State's continued non-disclosure of important *Brady* evidence at every stage of litigation in his case. 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. Johnson 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").

There is no tangible harm to the State. A delay to accurately determine the merits of Mr. Johnson's certiorari petition ensures compliance with the Constitution and with this Court's longstanding precedents. The State is never harmed by following constitutional requirements, including the requirement to disclose material exculpatory evidence in accordance with the due process clause of the Fourteenth Amendment and this Court's longstanding *Brady* rule. The State cannot claim harm for having to follow the law, even after decades of failing to follow it by continually suppressing the *Brady* material in this case.

While 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). To the extent the State can claim any harm in this

case, it has only itself to blame: it created the current circumstances by withholding important impeachment evidence from Mr. Johnson at every stage of litigation. The State must not now be rewarded for its fundamentally unfair dealings in Mr. Johnson's case, especially in light of the importance of Becker and English to the question of Mr. Johnson's eligibility for the death penalty and his death sentence.

III. Mr. Johnson has not unnecessarily delayed in presenting this claim.

Mr. Johnson could not have raised this claim at any earlier point because the State suppressed the *Brady* information at issue throughout the course of his case. Mr. Johnson's counsel discovered that Becker and English had been stripped of their licenses to practice psychology in Missouri during the course of responding to the State's motion to set his execution date. In Mr. Johnson's February 23, 2023 motion for leave to file a sur-reply to the State's request to set his execution date, Mr. Johnson alerted the Missouri Supreme Court that he had just discovered the existence of the *Brady* evidence. App. 47a-50a [Case No. SC86689 Motion for Leave to File Sur-Reply]. In his March 1, 2023 sur-reply, Mr. Johnson further explained that his counsel were working diligently to investigate the circumstances surrounding the undisclosed information regarding Becker and English, and that he would file a state habeas petition asserting his *Brady* claim within 30 days. App. 51a-59a [Case No. SC86689 Sur-Reply]. Mr. Johnson did just that, filing his state habeas petition on March 31, 2023.

Less than 48 hours after Mr. Johnson filed his reply brief, on April 19, 2023, the Missouri Supreme Court summarily denied Mr. Johnson's *Brady* claim without

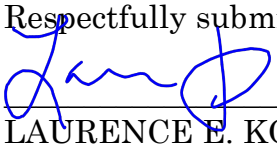
a written opinion and set his execution date for August 1, 2023. Mr. Johnson timely filed his petition for writ of certiorari with this Court in compliance with this Court's rules.

There would be no need for such expediency had the State not insisted, and the Missouri Supreme Court not complied with that insistence, on setting Mr. Johnson's execution date before his *Brady* claim was fully and fairly litigated. Mr. Johnson has acted as expeditiously as possible in bringing his *Brady* claim before this Court after his counsel discovered that significant impeachment evidence was withheld by the State at every stage of his case. Thus, there have been no unnecessary delays in bringing this issue to this Court in a timely manner, and a stay of execution is warranted to permit this Court to fully and fairly consider Mr. Johnson's petition for writ of certiorari.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner Johnny A. Johnson respectfully requests that the Court stay his execution to allow full and fair litigation of his meritorious petition for writ of certiorari.

Respectfully submitted,



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