IN THE SUPREME COURT OF THE UNITED STATES

BRIAN DORSEY	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. _____**
	)	
DAVID VANDERGRIFF,	)	**THIS IS A CAPITAL CASE**
Warden, Potosi	)	
Correctional Center,	)	***Pending Execution Date:***
	)	**April 9, 2024 @ 6:00 PM CDT**
Respondent.	)	

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

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

Brian Dorsey respectfully requests a stay of execution while his petition for certiorari is pending pursuant to Supreme Court Rule 23 and 28 U.S.C. §2101(f).

OVERVIEW

Brian Dorsey is currently incarcerated on Missouri's death row. He is challenging his sentence of death in a certiorari petition that seeks review of the Missouri Supreme Court's judgment denying his state habeas petition. Mr. Dorsey's execution is set for April 9, 2024, at 6:00 p.m. CDT.

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

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, a stay of execution is warranted 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. Dorsey's petition for a writ of certiorari are substantial and meritorious. It also goes without saying that Mr. Dorsey 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.

The question raised in the certiorari petition involves an Eighth Amendment violation arising from the Missouri Supreme Court's failure to recognize that a condemned person cannot be executed when the penological goals of retribution and deterrence are not furthered. *See Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

REASONS TO STAY THE EXECUTION

In deciding the present application, the Court must apply four factors: 1) whether Mr. Dorsey "has made a strong showing that he is likely to succeed on the merits"; 2) whether he "will be irreparably injured absent a stay"; 3) whether a "stay will substantially injure" the State; and 4) "where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). As set forth below, all four factors are satisfied.

A. Mr. Dorsey is likely to succeed on the merits.

Mr. Dorsey has made a strong showing that he is likely to succeed on the merits, *i.e.*, that there is "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" and there is "a significant possibility of reversal of the lower court's decision." *Barefoot*, 463 U.S. at 895. Mr. Dorsey's certiorari petition raises an "important question of federal law that has not, but should be, settled by this Court." Sup.Ct.R. 10(c). As set forth in his certiorari petition, the underlying claim here is that Mr. Dorsey is that rare person who has demonstrated that he is fully rehabilitated and the penological goals of the death penalty would not be met by executing him.

This Court has firmly held that there are categorical exceptions to execution because the goals of capital punishment would not be met. *See Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Kennedy v. Louisiana*, 554 U.S. 407 (2008). Furthermore, members of this Court have expressed that the goals of capital punishment are entirely frustrated by a death-sentenced person having spent years on death row. Those justices have noted that 17 years on death row meets this threshold. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., memorandum respecting denial of certiorari) ("neither [penological] ground retains any force for prisoners who have spent some 17 years under a sentence of death."); *Glossip v. Gross*, 576 U.S. 863, 929-35 (2015) (Breyer, J., joined by Sotomayor, J., dissenting) (making the same point and noting the average time spent on death row in 2015 was about 17 years); *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., memorandum respecting denial of certiorari) ("the additional deterrent effect from an actual

execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal"); *see also Knight v. Florida*, 120 S.Ct. 459, 462 (1999) (Breyer, J., dissenting from denial of cert.)); *Bucklew v. Precythe*, 139 S.Ct. 1112, 1144-45 (2019) (Breyer, J., joined by Ginsburg, J., Sotomayor, J., Kagan, J., dissenting). Mr. Dorsey has been incarcerated over 17 years on these charges.

This Court's evolving-standards-of-decency caselaw is clear. *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Furman*, 408 U.S. at 382; *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Kennedy v. Louisiana*, 554 U.S. 407 (2008). This Court has also clearly held that a death sentence should not be carried out when the penological goals of capital punishment are not furthered. Accordingly, because the Missouri Supreme Court refused to follow this clear line of cases as it was required to do, this Court should grant certiorari and find that this long-standing line of cases also applies to the fully rehabilitated offender. Consequently, a stay is warranted.

B. The balance of harms weighs in Mr. Dorsey's favor.

The second and third factors – whether the applicant will be irreparably injured absent a stay and whether issuance of the stay will substantially injure the other parties interested in the proceeding – also weigh in Mr. Dorsey's favor. As for the harm to Mr. Dorsey, he will be executed in the absence of a stay, which obviously constitutes an irreparable injury. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) (observing that this factor "is necessarily present in capital cases"); *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, J., in chambers) (granting a stay of execution and noting the "obviously irreversible nature of the death penalty"). This Court has granted stays to prevent far less severe consequences. *See*, *e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010) (issuing a stay to stop a court from broadcasting

a trial, as it would have chilled testimony); *Commodity Futures Trading Comm. v. British Am. Comm.*, 434 U.S. 1318 (1977) (Marshall, J., in chambers) (upholding a lower court stay by stressing the "potentially fatal consequences" to the businesses involved). A stay to prevent a potentially unconstitutional execution is a fortiori warranted.

In addition, the denial of a stay would cause irreparable harm by "effectively depriv[ing] this Court of jurisdiction to consider the" petition. *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers); *accord Mikutaitis v. United States*, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers) (granting a stay because the absence of one "may have the practical consequence of rendering the proceeding moot").

The pain of the victims' families – while very real and very visceral – is present in every capital case and is not dispositive of the test to whether enter a stay. This is especially true where members of that same family are also related to Mr. Dorsey and will be irrevocably injured by his execution. *See, e.g.,* Mitch Smith and Ernesto Londoño, *He's on Death Row for murders. Prison workers say he should be spared*, N.Y. Times (4/3/2024), *available at* www.nytimes.com/2024/04/03/us/missouri-death-penalty-brian-dorsey.html ("Some members of Mr. Dorsey's family, including some who were also related to Ms. Bonnie, supported the clemency request").[1]

The interests of Mr. Dorsey, the State of Missouri, and the general public are (or should be) aligned in favor of granting a stay. The State of Missouri has no interest in carrying out an

[1] As confirmed by still other media articles, more people than just family members have expressed pain and discomfort at the prospect of Mr. Dorsey's execution, including more than 70 current and former correctional officers and prison wardens, Republican state lawmakers, five jurors from his trial, and religious leaders. *See, e.g.,* Edward Helmore, *More Than 150 People Call On Missouri Governor to Forgive Brian Dorsey's Death Penalty*, The Guardian (4/23/2024), *available at* www.theguardian.com/us-news/2024/apr/03/missouri-governor-brian-dorsey-death-penalty.

unlawful or unconstitutional execution, and there is a strong public interest in ensuring that a person exempt from the death penalty not be executed. *See G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent violation of a party's constitutional rights"). Though the public interest favors implementation of criminal judgments, the public interest lies "in having a just judgment," *Arizona v. Washington*, 434 U.S. 497, 512 (1978), not simply in having an execution. A stay is warranted to allow this Court to decide Mr. Dorsey's petition to be heard without the artificial pressure of a pending death warrant. *Mikutaitis v. United States*, 478 U.S. 1306, 1309 (Stevens, J., in chambers) (emphasizing that the government would not "be significantly prejudiced by an additional short delay").

When it comes to any questions of delay, this claim did not become ripe until an execution warrant was issued. As fully laid out in the petition for writ of certiorari, whether Mr. Dorsey is someone who has demonstrated his rehabilitation and redemption was not ripe until such time that a warrant had been issued. Bringing the claim prior to that would have led to an easy rejection of the claim because he might in the future demonstrate that he had not been rehabilitated. Only when a warrant was issued and he was segregated from other inmates could an analysis of his rehabilitation be undertaken. In this sense, it is similar to evaluating whether a death-sentenced person is incompetent to understand or appreciate the punishment, which is not ripe until the issuance of a warrant. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643 (1998) (during initial habeas proceedings, the district court properly dismissed the *Ford* competency claim as unripe because an execution date had not been set; the claim became "unquestionably ripe" when the execution date was set).

Furthermore, 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, 477-79 (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). Notably, the Missouri Supreme Court, though presented with an argument that the claim was untimely, considered it on its merits. 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).

C. The public has an interest in the claim being heard.

The public has a powerful interest in this claim being heard. The public's interest in finality now is outweighed by the public interest in not putting to death someone who is exempt from being executed. For the reasons set out more fully in the petition, none of the purported purposes of capital punishment are fulfilled by Mr. Dorsey's execution in these unique circumstances. An execution can be barred by the Constitution in extraordinary circumstances when it "ceases realistically to further the[ ] purposes" of capital punishment. *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (opinion concurring in judgment). In Mr. Dorsey's unique circumstance, the penological purposes of deterrence and retribution are not met by his execution. *See Kennedy*, 554 U.S. at 420 (discussing purposes of capital punishment). Accordingly, "[a] penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman*, 408 U.S. at 312. The public has an interest in not seeing a person executed in this narrow situation.

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/ Kirk J. Henderson
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