****THIS IS A CAPITAL CASE****
EXECUTION SET FOR AUGUST 1, 2023 (6:00 CDT)

No. 23A90 (CONNECTED CASE 23-5244)

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 Eighth Circuit Court of Appeals

Reply In Support Of Emergency Application For Stay Of Execution To The Honorable Brett M. Kavanaugh, Associate Justice Of The Supreme Court Of The United States And The Circuit Justice For The Eighth Circuit

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Reply in Support[1]

Unquestionably, this case arises out of an unspeakable tragedy. Mr. Johnson has never minimized the heartbreak that occurred. Respondent's exploitation of these terrible circumstances should receive no approbation.

I. The en banc court failed to find the panel abused its discretion.

To vacate a stay of execution, a court must find there was an abuse of discretion. Judges Kelly and Erickson did not abuse their discretion in granting the stay. The en banc court issued no opinion on the matter, and the concurrence did not mention how the en banc court reached such a conclusion.

The en banc court's failure to apply the abuse of discretion standard demonstrates that it could not be met. In sum, the en banc court disagreed with the panel. That is not enough. Reasonable disagreement, while a valid legal basis for granting a COA, is not a legal basis for rehearing en banc or vacating a stay.

Respondent defends this failure on the basis that the en banc court could avoid the standard through the en banc process. But a stay was issued, and to warrant vacatur, the panel's decision to grant the stay must have been an abuse of discretion. *Kemp v. Smith*, 463 U.S. 1344, 1345 (1983) (Powell, J., in chambers). Chief Justice William Rehnquist determined that any doubt should be resolved in favor of a continuation of a previously entered stay. *Lenhard v. Wolff*, 443 U.S.

[1] Petitioner has chosen to respond to some of Respondent's arguments. The failure to respond to a specific argument does not equate to an agreement with Respondent's argument.

1306, 1313 (1979). Respondent's suggestions that an en banc court could purposely avoid an applicable abuse of discretion standard is specious.

II. Mr. Johnson is entitled to a stay under Lonchar and Barefoot.

A motion for a stay filed with a first habeas petition containing a non-frivolous claim of constitutional error that cannot properly be determined before the scheduled execution date is governed by *Lonchar v. Thomas,* 517 U.S. 314 (1996) and *Barefoot v. Estelle,* 463 U.S. 880 (1983). Thus, a stay of execution is warranted when there are "substantial grounds upon which relief might be granted." *Barefoot*, 463 U.S. at 895. Respondent failed to respond to this argument.

This Court "need not, and should not, … fail to give non-frivolous claims of constitutional error the careful attention that they deserve." *Id.* at 888-89. A claim is non-frivolous if it is not "palpably incredible" or "patently frivolous or false." *Blackledge v. Allison*, 431 U.S. 63, 67 (1977).

The dissent by a state court judge, the grant of a COA by a federal circuit court panel, and three federal circuit judges dissenting from the outlier take-away of an appeal demonstrates that Mr. Johnson's *Ford* claim is not "palpably incredible" or "patently frivolous or false." To hold otherwise would require this Court to do two things it would be loath to do.

First, the Court would have to retreat from the freshly inked Opinion of Chief Judge Roberts, when referring to three dissenting judges, confirming that a dissent is presumed reasonable, and dissenters are reasonable jurists. *Biden v. Nebraska*, 143 S. Ct 2355, 2375 (2023) ("Reasonable minds may disagree with our analysis—in fact, at least three do."). This presumption extends not only to the dissenting judge

of the Missouri Supreme Court, but to the panel and the three dissenters from the Eighth Circuit's en banc ruling to revoke Mr. Johnson's COA and vacate the stay of execution.

Second, this Court would have to conclude that three distinguished Eighth Circuit Jurists are unreasonable. That Chief Judge Smith, Circuit Judge Kelly, and Circuit Judge Erickson are unreasoned, out-of-control jurists. Contrary to Respondent's belief, they are not. Further, all 10 Eighth Circuit Judges agree the Missouri Supreme Court made a finding not supported by the record regarding an absence of demon delusions. That no demon delusions were refenced in the record simply is not true – and all Eighth Circuit Judges agree. Apx. p. 134a (Gruender, J., concurring) ("Johnson's past medical records show that he had expressed delusions like the ones mentioned in the report[.]"); *Id.* at 141a (Kelly, J., dissenting). The **entire** Eighth Circuit finding the Missouri Supreme Court's factual determination was not true demonstrates that the state court's findings were an unreasonable determination of fact. **Ten** reasonable federal appellate jurists clearly disagree with the district court's ruling to the contrary. All 10 judges are not unreasonable.

Even the evidence on which Respondent now relies demonstrates the prison counselor was wrong. Respondent noted "Johnson also reported that 'the [auditory and visual hallucinations] and sense of demons or others messing with him stopped in the same tiem [sic] frame.' " Resp. App. A33. Of course, for something to "stop," it had to have started or existed. Respondent's concession that the prison counselor was wrong about the lack of demon delusions and the Missouri Supreme Court's

finding the no such references existed – five did (and now seven do) –demonstrates the *Ford* claim is not "palpably incredible" or "patently frivolous or false."

III. Mr. Johnson is entitled to a stay of execution even under a successor standard.

As noted above, Mr. Johnson's habeas petition is a first-in-time petition and therefore issuance of a stay of execution is governed by *Barefoot* and *Lonchar.* The principles in *Hill v. McDonough*, 547 U.S. 573 (2006), were designed to empower courts to use equitable principles to root out "suits they saw as speculative or filed too late in the day," "repetitive or piecemeal" litigation, and "abusive litigation tactics" in § 1983 claims, and subsequently were extended to successive habeas petitions. 547 U.S. at 582, 584. First habeas petitions are, by their nature, not repetitive, nor can they be abusive of the writ. "[O]ur research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed claim on grounds of abuse of the writ." *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007).

Respondent misapprehends how *Hill* is applied, mischaracterizing the factors to be considered as, essentially, mandatory elements needing to be met. *Hill* is a balancing test for courts to weigh each of the factors necessary for considering a stay. *Nken v. Holder,* 556 U.S. 418, 434 (2009) (explaining that the court's judgment should be "guided by . . . consideration of the four factors"). This Court's precedent has set forth a hierarchy of these factors, prioritizing petitioner's likelihood of success on the merits and the potential for irreparable harm to the petitioner. *Id; see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1146 (2019) (Sotomayor, J.,

dissenting) ("the equities in a death penalty case will almost always favor the prisoner so long as he or she can show a reasonable probability of success on the merits."). Further, the final two factors merge when the opposing party is the government. *Nken,* 556 U.S. at 435.

In any event, applying *Hill*, the balancing of the factors favors entering a stay of execution. While he need not prove them all, he can; all these factors weigh in favor of staying Mr. Johnson's execution pending his prompt and meritorious appeal below. At minimum, the balance of the factors establishes the need for a stay.

A. Mr. Johnson is likely to succeed on the merits of his claims.

i. Ford claim.

Mr. Johnson is so severely mentally ill and delusional that it would be unconstitutional to execute him. He genuinely and fixedly believes that his death will bring about the end of the world; Satan told Mr. Johnson that himself. Decades of Mr. Johnson's medical records show he has long suffered from delusions, hallucinations, and other schizophrenia spectrum disorder symptoms, and that those symptoms persist today. The only qualified expert to evaluate Mr. Johnson, neuropsychiatrist Dr. Bhushan Agharkar, confirmed (as recently as July 23, 2023) that Mr. Johnson's persistent, fixed delusions about the true reasons for his execution render him incompetent to be executed. Apx. 56a-57a (7/23/23 Supplemental Report based on a 7/15/23 follow-up exam). Reasonable jurists could—and **did**—conclude (Apx. 141a (Kelly, J., dissenting) ("At minimum, reasonable jurists could, and in fact do, debate the issue")), under *Panetti*, this is

sufficient to make a threshold showing of incompetence—so long as correct factual determinations are reasonably and properly considered in light of clearly established federal law.

As noted above and previously, the Missouri Supreme Court relied on two specific bases to credit the prison counselor over a board-certified neuropsychiatrist – that no records supported the end-of-the-world demon delusion and that the medicines were working. Both were factually incorrect as demonstrated by the records filed with the state court.

Respondent proves the same via the records he filed with the Court today. *See* Respondent's App. A33 (noting demon delusions existed but are better now); App. A42 (noting upping the medications for a third time this month "for psychosis"). Again, Respondent's records convincingly undermine the prison counselor and the state court's reliance on her: she said no demon delusions – wrong; she said medications working – wrong.

That Respondent dropped more records and relied on them highlights the unreasonable and haphazard treatment of the *Ford* assessment by the state court.[2] As Judge Erickson noted: "the Constitution requires more than a fiat declaration that one piece of paper is more credible than another." Apx. 43a. No hearing on Mr. Johnson's competency was ever held before a factfinder and no evidence was

[2] The records filed by Respondent also note that Mr. Johnson's "brain zaps" are improving. Respondent's App. A33. Of course, this is a delusion - there is no such thing as a "brain zap." However, a psychotic individual's description of an ongoing symptom of psychosis demonstrates *Panetti* is met rather than detracting from it.

developed. "No one has ever been asked to explain his or her opinions or observations" and no trier of fact has been able to consider the underlying reasons for the opinions. *Id.* Instead, the state court made credibility determinations only "by weighing competing pieces of paper." Judge Erickson acknowledged that the Constitution does not require a full competency trial, but "it does require something more than what happened here." *Id.*

While addressing a different constitutional claim, Justice Thomas's concurring opinion in *Jones v. Mississippi*, 593 U.S. ___, 141 S.Ct. 1307 (2021), made clear that once the issue of insanity to be executed is raised, there must be a "satisfactory finding to the contrary" before the death sentence can be executed. Consistent with Judge Erickson, Justice Thomas noted: "I doubt that a majority of this Court would tolerate the execution of an offender who alleges insanity or intellectual disability absent a satisfactory finding to the contrary." 593 U.S. at ___, 141 S.Ct. at 1326 (Thomas, J., concurring).[3] The Respondent concedes that the prison counselor never evaluated Mr. Johnson for competency, thus there is no finding to the contrary. The finding here is not satisfactory.

ii. Appeal Deprivation Claim

As noted previously, the en banc court improperly deprived Mr. Johnson of an appeal. Respondent best demonstrates the Eighth Circuit's derogation of § 2253

[3] "Sure enough, this Court has often demanded factual findings…*Madison v. Alabama*, 586 U. S. ___, ___, 139 S. Ct. 718, 203 L. Ed. 2d 103, 109 (2019) (vacating and remanding "for renewed consideration" of the record after a state court "found [a prisoner] mentally competent" and thus eligible for execution)." *Jones*, 593 U.S. at ___, 141 S.Ct. at 1326 (Thomas, J., concurring).

when Respondent admits "§ 2253 provides that either a circuit justice or judge may issue a certificate of appealability[,]" BIO at 17, and debatability satisfies that standard. BIO at 21. Mr. Johnson wholeheartedly agrees – the problem is the en banc court did not. The en banc court interceded with a panel's § 2253 determination because it disagreed with it. This is not the law and offends the text of an unambiguous statute.

B. Mr. Johnson will be irreparably harmed absent a stay.

The State again argues no irreparable harm will occur if Mr. Johnson's execution occurs. This is absurd – death has an irremediable effect – which, by definition, is irreparable. *See Oxford English Dictionary*, https://www.oed.com/search/dictionary/?scope=Entries&q=irremediable.

As noted, the State has no interest in executing someone who is *Ford* incompetent. *Panetti*, 551 U.S. at 930 ("An inmate may not be put to death unless he has a rational understanding of the reason for his execution.") In *Jones*, 593 U.S. ___, 141 S.Ct. 1307, this Court acknowledged that "the Court has recognized certain eligibility criteria, *such as sanity or a lack of intellectual disability*, that must be met before an offender can be sentenced to death." *Id.* at 1315 (citing *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Atkins v. Virginia*, 536 U.S. 304 (2002)). The State's interest—as well as the public's interest—is in complying with the law.

C. Mr. Johnson has never delayed in presenting this claim.

The State again complains to this Court about delay. As noted in his opening briefing, it is the State that caused delay. It was the State that requested additional time from the Missouri Supreme Court only to file late, the next day.

No court has ever found Mr. Johnson to have delayed proceedings in raising his *Ford* claim, despite Respondent's bleating to the contrary. Respondent's irrational rage does not rebut that six state court judges and eleven federal judges have written (or joined) opinions during these proceedings, and not a single one has accepted Respondent's invitation to endorse their unrealistic view. Perhaps it is because those 17 judges understand that *Ford* claims do not ripen *until* an execution date issues. Perhaps those 17 judges remember the history, which Respondent conveniently omits, that this is a litigation schedule Respondent choose – Mr. Johnson specifically requested the date not be set to permit the presentation of the *Ford* claim. Sugg. in Opp. to Mot. to Set Execution Date, p. 3-4, *State v. Johnson*, No. SC86689. And Respondent objected.

Respondent's state court objection *then* demonstrates the dissonance displayed *now*. Respondent noted in his objections: "Assuming that Johnson wishes to claim he is not competent to be executed . . .that claim would not be ripe until an execution date was set." Reply in Support of Mot. to Set Execution Date, p. 5, *State v. Johnson*, No. SC86689. Respondent then cited examples of other petitioners who raised competency claims in recent years and cited the amount of time in which they did so—four weeks (*Middleton v. Roper,* 455 F.3d 838 (8th Cir. 2006)), 30 days (*Cole v. Roper,* 623 F.3d 1183 (8th Cir. 2010)), and six weeks (*State ex rel. Strong v.*

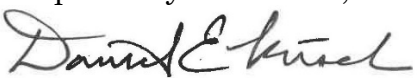
Griffith, 462 S.W.3d 472 (Mo. 2015)). *Id.* Respondent's historical perspective demonstrates Mr. Johnson filed his *Ford* claim faster than previously raised *Ford* claims after an execution date issued.

Critically, eleven federal court jurists have considered these same histrionic arguments and rejected them. Not a single federal court judge has taken the fake-bait the State offered. Indeed, the Missouri Supreme Court treated the claims as timely and promptly filed. There is no delay.

Conclusion

For all the foregoing reasons, Mr. Johnson respectfully requests that the Court stay his execution to allow full and fair litigation of his meritorious petition for writ of certiorari. Alternatively, this Court should exercise its discretion and enter a stay to meaningfully consider this petition for writ of certiorari. *See Glossip v. Oklahoma*, 143 S.Ct. 2453 (2023).

Respectfully submitted,



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