THIS IS A CAPITAL CASE-EXECUTION SET FOR SEPTEMBER 24, 2024

Case No. 24A286
(CONNECTED CASE 24-5606)

IN THE
SUPREME COURT OF THE UNITED STATES

MARCELLUS WILLIAMS, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OF EXECUTION

LAURENCE E. KOMP*
FAITH J. TAN
Capital Habeas Unit
Federal Public Defender,
1000 Walnut St., Ste. 600
Kansas City, MO 64106
(816) 675-0923
laurence_komp@fd.org
faith_tan@fd.org

KENT E. GIPSON
Law Office of Kent Gipson, LLC
121 East Gregory Blvd.
Kansas City, MO 64114
816-363-4400
kent.gipson@kentgipsonlaw.com

*Counsel of Record, Member of the Bar of the Supreme Court
COUNSEL FOR PETITIONER

INTRODUCTION

The State brings out its well-worn argument that Mr. Williams has delayed and that a stay should be denied because his execution date looms close. This ignores the record (namely, the State's own dilatory actions); the fact that a federal judge has explained that in Mr. Williams' case, delay is not a reason to deny a stay of execution, App. 4a (Judge Kelly in her concurrence recognized, "But both parties have been involved in a complicated array of state and federal motions, petitions, and appeals. In a procedurally complex case such as this one, it would be difficult to conclude that delay is a reason to deny a stay here."); and the very purpose of a stay of execution—to prevent an execution from being carried out as scheduled to ensure that the execution is not wrongful. As the St. Louis County Prosecuting Attorney has shouted from the rooftops again and again, Mr. Williams' pending execution *is* wrongful. His death sentence is based on a conviction so erroneous, so riddled with constitutional errors, and so infected with racism that the very same office that once fought to convict Mr. Williams and bring about a death sentence now has *no* confidence in the judgment they won in 2001.

A stay of execution is warranted in Mr. Williams' case. This Court cannot and should not allow flagrant unconstitutionality to stand, and more importantly cannot and should not allow deeply dangerous racism to stand unchecked in the criminal justice system.

I. Convictions and sentences improperly obtained through racist means are meritorious issues, and this Court has recognized that as an extraordinary circumstances.

The State argues that Mr. Williams has not demonstrated any probability that the Court will grant certiorari. The State, of course, ignores the fact that this Court has granted certiorari on similar issues, and so there is in fact a probability that the Court will grant certiorari. The Court's consideration of *Buck v. Davis*, 581 U.S. 100 (2017), addressing racism that infused a capital trial in the context of Rule 60(b)(6), and *Foster v. Chatman*, 578 U.S. 488 (2016), finding that voir dire notes revealed after the conclusion of trial with race-based notations evinced a *Batson* violation, are examples of that.

In particular, the facts in *Buck* presented such "extraordinary circumstances" that this Court found Rule 60(b)(6) relief was warranted. Where Mr. Williams' case involves similarly extraordinary circumstances and, in fact, includes several more additional extraordinary circumstances than in *Buck*, it cannot be said that there is no probability of a grant of certiorari or success on the merits.

Moreover, while the State briefly addresses the procedural posture of Mr. Williams' claim, it completely omits any mention of the underlying facts—the trial prosecutor's admissions of race-based strikes and the mysteriously disappeared voir dire notes amidst the presence of all other notes from the trial prosecutor. As laid out in the Petition for Writ of Certiorari and the Emergency Application for Stay of Execution, the trial prosecutor expressly stated that the race of venirepersons was at least part of the reason for at least one of his peremptory strikes. In short, as the trial

prosecutor and the St. Louis County Prosecuting Attorney concede,[1] racism played a role in Mr. Williams' trial from even the beginning stages. The Court has found this problem to be a meritorious issue before, and there is a substantial probability the Court will again.

II. The scales are overwhelmingly tipped in favor of a stay.

The State's argument as to the "harm" the State and the family of the victim will supposedly suffer is nothing if not disingenuous.

Addressing first the State's argument that "Williams will not be irreparably harm absent the stay"—this argument is comically ludicrous to the point of being nonsensical. If Mr. Williams is executed, he will be "irreparably" dead. Facing the ultimate punishment, he has every right to raise claims that this Court has found to have merit.

Turning to the State's "harm" next, as Judge Kelly of the Eighth Circuit Court of Appeals acknowledged, "These circumstances do not portray a unified State interest." The St. Louis County Prosecuting Attorney, like every other county-level prosecutor, represents the interests of the State in criminal proceedings. The Prosecuting Attorney obviously does not view a stay as a harm, since he seeks to prevent Mr. Williams from being executed.

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[1] The State appears to agree too—in their Response to Mr. Williams' Rule 60(b)(6) motion in the district court, the State advocated that the trial prosecutor's August 2024 testimony, which contained race-based statements, "contradicts" the trial transcript. App. 154a. Of course, where the trial prosecutor provided "race-neutral" reasons at trial, later testimony that "contradicted" those race-neutral reasons would accordingly be race-based.

Furthermore, even though the State via the Attorney General has an interest in enforcing "lawful criminal judgments without federal interference," BIO p. 22, this interest is not without limit. This is not the Wild West—the State may not do whatever it wants in the name of enforcing criminal judgments if it violates federal law. In Mr. Williams' case where there are clear *Batson* violations, among other constitutional violations, federal interference is warranted and necessary.

The State only briefly alludes to the interest of the victims. This is perhaps because they have consistently placed their own perceived "harm" above the interests of the victim and because the victim's family has been abundantly clear about their interest—that Mr. Williams not be executed. That the State continues to proclaim that they fight to execute Mr. Williams for the victim's family, who says *they do not want this*, is completely and utterly disrespectful.

The State also argues that the public interest weighs in favor of denying a stay. BIO p. 23. Judge Kelly took issue with this characterization, stating, "I am not convinced that proceeding forthwith properly accounts for the real threat of irreparable harm." App. 5a.

It is in the public's interest that an execution, which is carried out in the name of the people of Missouri, is conducted only after thorough and meaningful consideration in the courts as the laws of the state require. It is in the public's interest that an execution carried out in its name be lawful. It is not in the public's interest for a wrongful execution based in a wrongful conviction to be carried out. It is not in the public's interest to have potential jurors struck due to the color of their skin.

Additionally, the State argues that "the vast majority of a petitioner's meritless claims have already been rejected by this Court . . . and by every other court to consider before the current litigation." But *numerous* courts and governors, in addition to the Prosecuting Attorney's Office, have been troubled by Mr. Williams' case and death sentence (Judge Kelly's concurrence is the most recent expression of such concern). The State through the Attorney General has gone out of its way to thwart any and every attempt to remedy these constitutional issues. Once again, the Attorney General goes out of its way (after all, § 547.031 RSMo (2021), does not even designate the Attorney General as a party), to thwart a prosecutor who seeks to remedy *his own office's mistakes*. It is on the State that Mr. Williams has not before been able to obtain a remedy; it is on the State for championing discrimination.

III. Mr. Williams has diligently and timely brought this evidence before the Court.

This is not a belated stay application. It is a stay application based on the circuit court's denial of the Motion to Vacate that was issued 11 days ago.

The tight timetable for the Motion to Vacate proceedings is not the fault of Mr. Williams. Mr. Williams applied his case for review in the St. Louis County Prosecuting Attorney's Office virtually as soon as § 547.031 took effect in August 2021, **literally within days**. At that time, the Board of Inquiry established by then-Governor Greitens was still in existence and working on Mr. Williams' case. There was no execution date. There was no delay there.

Acknowledging they waited four months after filing a notice of intent to oppose the Motion to Vacate, the State insists that Williams and Prosecutor Bell let the case

"lie entirely dormant for a span of several months." BIO p. 25. This is a puzzling argument, because in civil cases (and in most cases), the normal course of litigation is for a motion to be filed, then the opposing party's response to that motion, then a reply to that motion, and then further proceedings commence. In other words, the rest of the case's progress is dependent on the opposing party's response to that motion. The § 547.031 months-long dormancy was because of the State's extensive and purposeful delay—nothing happened because everyone, having been noticed that an opposition motion was coming, expected that opposition motion to actually be filed before further proceedings commenced.

The State's description of the case management conference is wildly inaccurate. The State says that both sides were allowed to conduct civil discovery during the month of July—this is because the Attorney General alone requested discovery. The State then claims, "the State was unable to proceed to hearing in July, when written discovery responses were due to be returned as late as July 22, 2024, and requests for admissions were not due to be answered until August 16, 2024." BIO pp. 25-26. This is patently false. The circuit court proposed a July hearing date. Mr. Williams and Prosecutor Bell agreed. The Attorney General's office declined, saying an Assistant Attorney General had a conflict during that time. The circuit court then proposed a hearing on August 21, 2024. The Attorney General, Mr. Williams, and Prosecutor Bell agreed. At that point, the circuit court asked the Attorney General's office, Mr. Williams' counsel, and Prosecutor Bell's office to come to his chambers to create and sign a scheduling order that accorded with the hearing date. Thus, the

State's argument that they could not proceed to a July hearing because the scheduling order for discovery extended until August is a blatant and disingenuous mischaracterization.

Mr. Williams objects to the State's characterization of the August 21, 2024 consent judgment as an "unauthorized dilatory tactic[]." BIO p. 26. Civil cases are routinely settled. Section 547.031 proceedings are civil matters, *State ex rel. Bailey v. Fulton,* 659 S.W.3d 909, 914 (Mo. banc 2023), and the parties reasonably believed the statute allowed for the parties to agree to a settlement of the claims. The St. Louis County Prosecuting Attorney, who once brought these capital charges against Mr. Williams, later sought to agree to a plea in exchange for a life sentence rather than death. Moreover, it is worth noting again that the victim's family fully supported this resolution and the circuit court was prepared to accept it and end this matter. App. 13a, 22a-23a, 37a. The Attorney General prolonged this case by filing a writ of prohibition[2]—this case could be over and none of the ensuing litigation would have existed had the Attorney General not done so, utterly ignoring the wishes of the victim's family.

Even with the false narrative about the events of the August 21 proceedings and bemoaning about how they had little choice but to ignore the satisfaction of all other parties that would have been achieved by Mr. Williams' resentencing, the State cannot obfuscate the truth—the prosecuting authority that originally fought for and

[2] It is unclear why the State felt they were "forced" to seek a writ of prohibition, BIO p. 26, if they were the only interested party who was unhappy with the consent judgment.

secured Mr. Williams' conviction and death sentence believed so strongly they had made an unconstitutional mistake that they announced in open court their concession of constitutional error. They have continued to go to lengths since the August 21 consent agreement was prohibited to vacate that wrongful conviction and death sentence. Unsurprisingly, the Attorney General attempts to thwart this too, as he has done in every case involving wrongful convictions, including interfering with state court orders to release individuals who have been declared actually innocent.

The State then launches into an explanation of how, with less than two weeks before the scheduled execution, Prosecutor Bell filed a notice of appeal and Mr. Williams filed the underlying Rule 60(b)(6) motion. Putting aside that Prosecutor Bell and Mr. Williams could hardly have brought these actions any earlier because they were based on the circuit court's judgment, which issued only on September 12, 2024, it bears reminding that the hearing was held in August and the circuit court's judgment could thus only be issued in early September because of the State's dilatory tactics during the first half of the year.

In short, there has been no delay on Mr. Williams' part. At best for the State, Judge Kelly's concurrence demonstrates that there is no delay. To reiterate, "it would be difficult to conclude that delay is a reason is reason to deny a stay here." App. 4a.

CONCLUSION

If any case warrants a stay of execution, it is Mr. Williams' case. He is scheduled to die tomorrow evening for a crime there is doubt as to whether he committed. The truth of the evidence and the case was kept from the jury because of

constitutional errors by the St. Louis County Prosecuting Attorney's Office, which they have now recognized and conceded and on the basis of which they attempt to remedy this wrongful conviction and sentence.

Mr. Williams was convicted and sentenced to die based on racial animus. The trial prosecutor ensured racism was infused into the trial and into the case from the start. The State cannot truly now dispute that *Batson* violations occurred, considering the new testimony of the trial prosecutor, and the Prosecuting Attorney concedes the constitutional violation. The State seeks merely for this Court to give that racism the green light. The State's zeal for an execution appears to have no bounds.

Mr. Williams respectfully requests that this Court stay his execution to address the extraordinary circumstances surrounding his conviction and death sentence.

Respectfully Submitted,

LAURENCE E. KOMP, MO Bar #40446*
FAITH J. TAN, IL Bar #6342729
Federal Public Defender
Western District of Missouri
1000 Walnut Street, Suite 600
Kansas City, MO 64106
816-675-0923
laurence_komp@fd.org
faith_tan@fd.org

KENT E. GIPSON, MO Bar #34524
Law Office of Kent Gipson, LLC
121 E. Gregory Blvd.
Kansas City, MO 64114
816-363-4400 • Fax 816-363-4300
kent.gipson@kentgipsonlaw.com

COUNSEL FOR PETITIONER

*Counsel of Record, Member of the Bar of the Supreme Court