No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN DORSEY,

Petitioner,

v.

DAVID VANDERGRIFF,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Missouri

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

CAPITAL CASE

****EXECUTION DATE: APRIL 9, 2024****

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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.	**)**	

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

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

Petitioner Brian Dorsey, currently incarcerated on Missouri's death row, respectfully requests a stay of his execution, which is scheduled for April 9, 2020, at 6:00 PM CDT. Mr. Dorsey asks this Court to stay his execution to preserve the Court's jurisdiction to review his petition for certiorari to the Supreme Court of Missouri, which is simultaneously filed with this Application. Pursuant to Supreme Court Rules 23.1 and 23.2 and under the authority of 28 U.S.C. § 2101(f), the stay may lawfully be granted. In support of this application, petitioner states the following grounds.

STATEMENT OF THE CASE

Brian Dorsey was represented at his capital trial by attorneys who were paid a flat fee for their services, failed to investigate his mental state and possible defenses to the capital charges, and advised him to plead guilty to two counts of first-degree murder with no guarantee of a life sentence. Mr. Dorsey challenges his sentence of death in a certiorari petition that seeks review of the Missouri Supreme Court's judgment denying his state habeas petition filed under Missouri Supreme Court Rule 91.[1] The question raised in the certiorari petition involves an issue left open in *Cuyler v. Sullivan,* 446 U.S. 335 (1980), and *Mickens v. Taylor*, 535 U.S. 162 (2010), that has resulted in a deep and intractable split among state and federal courts: Whether, where appointed counsel in a capital case had a flat-fee contract and failed to investigate or challenge a capital murder charge to the client's detriment, counsel had an actual conflict of interest that adversely affected their performance such that *Cuyler v. Sullivan*'s presumption of prejudice applies.

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

REASONS TO STAY THE EXECUTION

A stay of execution is warranted where there is a "presence of substantial grounds upon which relief might be granted." *See Barefoot v. Estelle*, 463 U.S. 880,

[1] The case background is more fully set forth in the accompanying petition for a writ of certiorari.

895 (1983). To decide whether a stay is warranted, the Court considers the petitioner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner 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). "'[I]n a close case it may [also] be appropriate to balance the equities,' to assess the relative harms to the parties, 'as well as the interests of the public at large.'" *Indiana State Police Pension Trust*, 556 U.S. at 960 (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). Those standards are satisfied here.

A. Likely Success 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. C.R. 10(c). As set forth in his certiorari petition, the underlying claim here is that counsels' low flat-fee contract set up a fundamental conflict of interest between counsel and Mr. Dorsey that adversely affected counsel's performance and not only denied Mr. Dorsey's right to effective counsel, but also undermined the reliability of the adversarial process and the outcome in this capital case.

This Court has long recognized the Sixth Amendment right to effective assistance of counsel in order to "assure fairness in the adversary criminal process,"

ensure that the prosecution's case is tested meaningfully, and instill confidence in the reliability of the verdict. *United States v. Cronic*, 466 U.S. 648, 655–58 (1984) (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)). When the criminal process "loses its character as a confrontation between adversaries, that constitutional guarantee is violated," *id.* at 657, and the resulting verdict cannot stand. *See Bell v. Cone*, 535 U.S. 685, 695 (2002) (internal quotation marks omitted).

For most alleged Sixth Amendment errors, courts apply the two-pronged test for ineffective assistance of counsel this Court announced in *Strickland v. Washington*, 466 U.S. 466 U.S. 668 (1984). Where counsel labors under a conflict of interest, the Court has determined that a showing of prejudice under *Strickland*'s two-pronged test does not apply. *Strickland*, 466 U.S. at 692. Rather, when a conflict of interest exists, the Court has found that, because "it is difficult to measure the precise effect" of counsel's divided loyalties on his decision-making, and because "prejudice in these circumstances so likely," prejudice is presumed. *Id.*

More specifically, in *Cuyler v. Sullivan*, this Court held that when a defendant establishes that his lawyer had "an actual conflict of interest [that] adversely affected his lawyer's performance," courts should presume that the defendant was prejudiced. *Sullivan*, 446 U.S. 335, 349–50 (1980). Later, in *Mickens v. Taylor*, 535 U.S. 172 (2002), this Court clarified that "[a]n 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Mickens*, 535 U.S. at 172 n.5.

Even before *Mickens'* clarification, this Court found *Sullivan*'s presumption of prejudice may apply when counsel simultaneously represents co-defendants in a criminal trial, as occurred in *Sullivan*, 466 U.S. at 349–50; when counsel for criminal defendants is paid by their employer, whose interests diverge from those of the defendants, *Wood v. Georgia*, 450 U.S. 261, 268–74 (1981); and when two lawyers at the same law firm represent co-defendants in separate trials, *Burger v. Kemp*, 483 U.S. 776, 783–84 (1987). Although the Court has suggested that lower courts not "unblinkingly" apply *Sullivan* to all manners of attorney conflicts, *Mickens*, 535 U.S. at 174–75, the Court has yet to clarify when exactly *Sullivan* does apply, leaving open the question of *Sullivan*'s precise scope. *See id.* at 174–76.

As the deep split among the state and federal courts reveals, the unresolved question of *Sullivan*'s application to financial conflicts of interest arises in jurisdiction after jurisdiction, resulting in inconsistent treatment. Had Mr. Dorsey's case come before the neighboring Kansas Supreme Court, his conviction and death sentence would have been reversed years ago. *See State v. Cheatham*, 292 P.3d 318, 338–41 (Kan. 2013) (applying *Sullivan* where attorney paid $50,000 flat fee for a capital case because flat fee arrangement "pit[s] the client's interests against the lawyer's interest in doing no more than what is minimally necessary to qualify for the flat payment").

The conflict of interest involved in Mr. Dorsey's case unquestionably involves divided loyalties that negatively impacted counsels' decision-making and adversely affected their performance. Mr. Dorsey's attorneys were forced to choose—and indeed

did choose—between their own financial interests and what best served Mr. Dorsey. The divergence of interests is not unlike the Hobson's choices involved in *Sullivan*, *Wood*, and *Burger* where there were two distinct and competing interests and serving one necessarily adversely affected the other.

Sullivan must apply in these circumstances. The Supreme Court of Missouri failed to appreciate the pervasive nature of corrupting influences on every single decision that counsel in Mr. Dorsey's trial attorneys made, and crucially did not, make. In holding there was no actual conflict here, the state court fundamentally misunderstood the Sixth Amendment protections required of capital defense counsel. As a result, there is at least "a fair prospect" that this Court will conclude the Missouri Supreme Court erred in the opinion below. At this stage, Mr. Dorsey need not show that outcome is a certainty. *See Araneta v. United States*, 478 U.S. 1301, 1304 (1986) (Burger, C.J., in chambers) ("such matters cannot be predicted with certainty"); *Bd. of Educ. of City of L.A. v. Super. Ct. of Cal., Cty. of L.A.*, 448 U.S. 1343, 1347 (1980) (Rehnquist, J., in chambers) (comparing this exercise to "the reading of tea leaves"). Instead, the arguments in the petition need pass only the threshold of "plausibility." *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1310 (1989) (Marshall, J., in chambers); *accord, California v. Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers).

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"). The harm of being executed is inarguably "certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent [it]." *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (internal quotation marks omitted). 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").

Moreover, the State of Missouri will suffer little appreciable harm if a stay is granted. Mr. Dorsey has been on death row for this offense for 17 years. A brief stay of execution to allow the certiorari proceedings to reach their natural conclusion without the artificial pressure of a pending death warrant will do the State no harm. *See Mikutaitis*, 478 U.S. at 1309 (Stevens, J., in chambers) (emphasizing that the government would not "be significantly prejudiced by an additional short delay").

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

A stay is in the interest of the public because all citizens have an interest in ensuring the reliability of death sentences and that the Constitution is upheld. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979). The Sixth Amendment right to effective assistance of counsel is to "assure fairness in the adversary criminal process," to ensure that the prosecution's case is tested meaningfully, and to instill confidence in the reliability of the verdict. *United States v. Cronic*, 466 U.S. 648, 655–58 (1984) (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)).

When an attorney violates the foundational tenant that he zealously advocate for his client's interests and no one else's, any resulting "conviction" cannot "be regarded as fundamentally fair." *Mickens*, 535 U.S. at 167 n.1. It is in the public's interest that the Court take the opportunity to clarify the scope of the Sixth Amendment and implement a standard which does not apply a harsher standard to

those defendants who are not only facing the gravest punishment but are unable, because of indigence, to obtain unconflicted counsel.

The public has a strong interest in having the Court intervene to ensure that someone who is not among the most culpable, but rather was appointed conflicted counsel by underfunded state defense systems, is not put to death.

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,

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