IN THE SUPREME COURT OF THE UNITED STATES

LEONARD TAYLOR,	)	**This Is a Capital Case**
	)	**Execution Scheduled for**
Petitioner,	)	**February 7, 2023,**
	)	**at 6:00 p.m. CST**
v.	)	
	)	**No. _____**
DAVID VANDERGRIFF,	)	
Superintendent,	)	
Potosi Correctional Center	)	
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, Leonard Taylor, respectfully requests that the Justice Kavanaugh in his capacity as Circuit Justice for the Eighth Circuit, pursuant to 28 U.S.C. §2101(f), stay his execution pending this Court's disposition of petitioner's petition for a writ of certiorari filed contemporaneously with this motion. In support of this application, petitioner states the following grounds.

1. Petitioner is a Missouri death row inmate who is challenging his convictions and sentences of death in a certiorari petition that seeks review of the Missouri Supreme Court's judgment denying his petition for a writ of habeas corpus. The procedural history of the case is set forth in the underlying petition for a writ of certiorari. The Missouri Supreme Court set petitioner's execution for February 7, 2023, at 6:00 p.m. CST.

2. As is more fully set forth in the accompanying certiorari petition, petitioner believes that 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 this petition.

3. 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, petitioner is entitled to a stay of execution 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. Taylor's petition for a writ of certiorari are substantial and meritorious. It also goes without saying that petitioner 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.

4. The questions raised in this petition involve due process, Eighth Amendment violations arising primarily from the Missouri Supreme Court's failure to afford petitioner a meaningful review, under existing state law, of his death sentence in light of new expert testimony and other evidence that exonerates him. The underlying habeas petition also advanced a free-standing claim of innocence

under *In re Davis*, 557 U.S. 952 (2009) and *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003).

5. Whether claims of innocence of a similar nature are cognizable as constitutional violations has been fiercely debated. This precise issue has not been conclusively resolved by this Court and has created conflicts between inferior state and federal courts in the three decades since this Court's fractured decision issued in *Herrera v. Collins*, 506 U.S. 390 (1993). The issues in this case present substantial constitutional questions that will undoubtedly arise in future cases and are, therefore, worthy of discretionary review.

SUGGESTIONS IN SUPPORT OF MOTION FOR A STAY OF EXECUTION

As Justice O'Connor noted in *Herrera*, most fair minded persons, including judges, would agree that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Hererra v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring). There can be little dispute, based upon all of the available evidence that there is a substantial likelihood that Mr. Taylor is innocent of the four murders for which he has been condemned to die.

The Missouri Supreme Court denied petitioner a full and fair hearing where a trier of fact could hear and consider all of petitioner's evidence of innocence in order to determine whether he deserves a new trial or a commutation of sentence under state law. The manner in which the Missouri Supreme Court summarily denied petitioner's habeas corpus petition without explanation, and without giving petitioner an evidentiary hearing before a Special Master pursuant to Mo. S. Ct. Rule 68.03, also raises other substantial constitutional issues that this Court should address.

Where any litigant requests a stay of a judgment, a reviewing court must engage in a balancing of interests. This analysis necessarily involves the fundamental conflict between the harm to the party seeking a stay versus the prevailing party's interest in the finality of the judgment. In death penalty cases, because the stakes are much higher, any uncertainties should be resolved in the condemned man's favor.

In *Commodity Futures Trading Comm. v. British Am. Comm.*, 434 U.S. 1318 (1977) (Marshall, J., in chambers), Justice Marshall upheld a lower court stay by stressing the "potentially fatal consequences" to the businesses involved. *Id*. at 1321. The destruction of a human life should be undertaken with even more reluctance than the possible bankruptcy of a corporation.

In considering this petition and petitioner's requests for a stay and a remand for an evidentiary hearing before a Special Master to prove his innocence under the test announced in *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003), this Court should take into account an overriding concern in addition to the obvious fact that Leonard Taylor will be irreparably harmed if he forfeits his life later this month. This Court should also consider the irreparable harm to the public's confidence in the integrity of the criminal justice system if it permits a likely innocent man to be executed where there is compelling evidence exonerating him. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (The "traditional" standard for a stay also requires a reviewing court to determine "where the public interests lie.") Any countervailing arguments from respondent regarding undue delay and the finality of judgments pale in comparison.

A. PETITIONER AND HIS POST-CONVICTION COUNSEL HAVE NOT BEEN DILATORY IN LITIGATING PETITIONER'S CLAIM OF INNOCENCE.

Respondent argued in the court below against granting a stay of execution and giving petitioner a hearing and discovery on the McClain murder that petitioner has been dilatory in not litigating and obtaining this exculpatory DNA testing and evidence sooner and, that he had a tactical reason for doing so. Nothing could be further from the truth.

As set forth in Mr. Taylor's underlying petition for a writ of certiorari, Mr. Taylor filed an application before the CIRU of St. Louis County within a matter of days after newly enacted § 547.031 RSMo Supp. (2021). went into effect on August 28, 2021. This request for review by the CIRU was also filed more than nine months before this Court denied certiorari in petitioner's federal habeas corpus litigation. *See Taylor v. Blair*, 142 S. Ct. 2757 (2022).

St. Louis County Prosecutor Wesley Bell did not issue a preliminary decision on whether or not to invoke the provisions of § 547.031 until the evening of Monday, January 30, 2023, and his office did not provide the letter attached to the underlying stay of execution motion as Exhibit 2 until late in the afternoon of January 31, 2023. Thereafter, petitioner filed this motion in the Missouri Supreme Court that Mr. Bell joined to delay the execution to give both petitioner and the CIRU more time to investigate petitioner's claim of innocence. The Missouri Supreme Court denied this stay late in the afternoon of February 2, 2023. Petitioner filed his state habeas petition shortly thereafter. Had this stay motion been granted, it would have been unnecessary for Mr. Taylor to file a state habeas petition.

Respondent's excessive delay argument also ignores the fact that claims of innocence are not cognizable on direct appeal or in state post-conviction proceedings pursuant to Rule 29.15 or 24.035. *See Wilson v. State*, 813 S.W.2d 833 (Mo. banc

1991). Freestanding claims of actual innocence are also not cognizable in a majority of federal courts, including the Eighth Circuit. *See e.g. Burton v. Dormire*, 295 F.3d 839 (8th Cir. 2002).

Mr. Taylor's ability to fully investigate his claim of innocence has also been hampered by the fact that he is indigent, and that undersigned counsel were appointed to represent appellant during his federal habeas corpus litigation under the Criminal Justice Act. Under prevailing law, federally appointed counsel can seek approval from a federal district court for fees and expenses to pursue executive clemency and ancillary litigation before the state and federal courts. However, under prevailing local practice, such funding requests are not entertained until certiorari is denied in a condemned prisoner's initial habeas petition under 28 U.S.C. § 2254.

Although Mr. Taylor diligently sought federal funding for ancillary proceedings, the district court only recently approved a budget for this case. As a result, counsel for Mr. Taylor had to seek out pro bono expert assistance from Dr. Turner, James Trainum, and Dave Thompson, all of whom graciously agreed to conduct an initial review, free of charge, of the critical issues regarding the victims' time of death and whether Perry Taylor's statements to police were reliable.

Finally, any argument from respondent about delay or other possible procedural hurdles to this Court's orderly review of this case is trumped by

petitioner's substantial claim of innocence. *See Schlup v. Delo*, 513 U.S. 298, 324-326 (1995). And, all of the other relevant factors of irreparable harm and the public's interest weigh heavily in favor of a stay of execution.

B. ANY INTEREST IN FINALITY MUST YIELD TO THE INTERESTS OF JUSTICE AND FUNDAMENTAL FAIRNESS.

In all of its prior pleadings, respondent repeatedly cites "interests of finality." As there is no such recognized principle under Missouri or federal habeas corpus law precluding a court from hearing a claim of innocence, this argument should be emphatically rejected for a number of reasons.

First and foremost, 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) (finding no absolute bar to successive habeas corpus petitions); *Rideau v. Whitley*, 237 F.3d 472, 477-479 (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). More recent Rule 91 litigation both before the Missouri Supreme Court and other Missouri courts underscores this fact.

In 2011, the Missouri Supreme Court granted a new trial to Reginald Griffin in a state habeas action vacating a twenty-five year old murder conviction because of governmental misconduct. *State ex rel. Griffin v. Denney*, 347 S.W.3d 73 (Mo.

banc 2011). Mr. Griffin was subsequently released from prison after the Randolph County prosecutors elected not to retry him. The court reached this result, notwithstanding arguments made by the same attorney general's office that his claims for relief had previously been advanced and rejected in prior state and federal post-conviction appeals.

In 2011, the Missouri Court of Appeals upheld a grant of habeas relief to Missouri prisoner Dale Helmig, who was released from prison after serving nearly twenty years for the murder of his mother. *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo. App. W.D. 2011). As in *Griffin*, Mr. Helmig had also previously advanced several of the claims upon which he was subsequently freed in prior state and federal post-conviction appeals. Had the interests of finality been considered paramount in habeas corpus jurisprudence as respondent suggests, Mr. Griffin and Mr. Helmig would still be languishing in prison. As the Missouri Court of Appeals noted in its decision ordering a new trial for Mr. Helmig, Missouri courts have the inherent power to overturn "convictions that violate fundamental fairness." *Id*. at 258.

Respondent is correct in noting that there is a general **federal** judicial policy favoring the finality of state court judgments. 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).

Respondent's finality arguments represent the epitome of the legal system's emphasis upon form over substance. Far too often in the post-conviction process, concern for efficiency in procedure has overshadowed concern for basic fairness and has transformed our fidelity to process into an undue obsession with formalities and technicalities. This obsession for procedure has far too often obscured or eclipsed the more important role in our system of a dedication to do justice. It was, after all, in order to "establish justice" that our Constitution was written. (*U.S. Const. pmbl.*).

It is certainly not a radical notion to propose that Mr. Taylor, in the interests of justice, be given a full and fair hearing in a court of law to conclusively prove his innocence. This is all he asks.

CONCLUSION

Several legal commentators have advocated that the death penalty cannot be constitutionally imposed and certainly cannot be carried out unless the evidence forecloses all reasonable doubts of guilt. Any neutral observer in looking at the current record in this case cannot possibly conclude that petitioner is clearly guilty.

As a result, it would be a reasonable and logical extension of this Court's *Herrera* decision, to review this case and hold that no death sentence can be constitutionally carried out where there are substantial and reasonable doubts that the condemned man is guilty.

In conclusion, the interests of justice and the demonstrated fallibility of our justice system as evidenced by numerous DNA exonerations in the post-*Furman* era, strongly dictate that this Court intervene and ultimately decide whether a death sentence can be carried out where there is DNA or other credible scientific evidence that the condemned man is innocent. This case presents an ideal vehicle for this Court to address this important question.

For all the foregoing reasons, as well as those reasons advanced in the underlying petition, this Court should grant a stay of execution.

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that two true and correct copies of Petitioner's Application for Stay of Execution Pending Disposition of Petition for a Writ of Certiorari in the case of *Taylor v. Vandergriff* were forwarded pursuant to Supreme Court Rule 29.5(b), postage prepaid, this 6th day of February, 2023 to:

Michael Spillane
Assistant Attorney General
P O Box 899
Jefferson City, MO 65102

One copy in PDF format was electronically mailed to Laurie Wood and the Clerk of the Supreme Court and, one copy of Petitioner's Application for Stay of Execution Pending Disposition of Petition for a Writ of Certiorari was mailed, postage prepaid, to:

Scott Harris, Clerk
United States Supreme Court
One First Street N.E.
Washington, DC 20543

and

Laurie Wood
lwood@supremecourt.gov

pursuant to Supreme Court Rule 39.5, this 6th day of February, 2023.

_____

Kent E. Gipson, #34524
Counsel for Petitioner