No. 21A606
21-7542

IN THE SUPREME COURT OF THE UNITED STATES

CARMAN DECK,

Petitioner,

v.

PAUL BLAIR, Warden,

Respondent.

SUGGESTIONS IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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REASONS FOR DENYING THE APPLICATION FOR STAY

Deck fails to meet the requirements for a stay of execution because his pending petition for writ of certiorari does not have a significant possibility of being granted, this Court would not likely rule in his favor if it were granted, and he could have raised the claim for which he seeks review years earlier in a Missouri habeas petition, without the need for a stay to fully litigate the petition from the denial of that claim.

"[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). An applicant for stay of execution must satisfy all of this Court's equitable factors in granting a stay, which include "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari," "(2) a fair prospect that a majority of the Court will vote to reverse the judgment below," and "(3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). "In close cases," moreover, "the Court will balance the equities and weigh the relative harms to the applicant and the respondent." *Id.*

"Given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay

where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004); *see also, e.g., Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) (holding that the "last-minute nature of an application" may be grounds for denial of a stay). Indeed, "an inmate is not entitled to a stay of execution as a matter of course." *Hill*, 547 U.S. at 583–84. This is because "both the State and crime victims have an important interest in the timely enforcement of a sentence." *Id*. at 584. Belated motions for stay are not favored because they offend the State's and the victims' rights to final disposition of criminal judgments. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019).

Deck's petition for writ of certiorari in this Court (*Deck v. Blair,* No. 21-7542 (filed April 1, 2022)) does not have a significant possibility of success on the merits. The Court is not likely to grant certiorari to review his case, and if it did so, it would not be likely to rule in Deck's favor. *Hollingsworth*, 558 U.S. at 190. In fact, Deck presents this Court no real grounds for a stay related to this litigation, other than to simply argue that the existence of his certiorari petition warrants a stay. He does not demonstrate a reasonable probability that this Court will grant review, let alone a significant possibility that that this Court would grant relief. *Barefoot v. Estelle*, 463 U.S. 880 (1983).

I. The Court is not likely to grant certiorari because the Supreme Court of Missouri's judgment rests on an independent and adequate state procedural ground.

First, a grant of certiorari is highly unlikely because this Court does not have jurisdiction to consider the certiorari petition. The Supreme Court of Missouri's summary denial of Deck's habeas petition rests on an independent and adequate state procedural ground, which prevents state-court review of defaulted claims.

Deck defaulted his state habeas claim by failing to present it on direct appeal or in his Rule 29.15 proceeding in Missouri state court, which created an adequate and independent state-law basis for denial of the claim by the Supreme Court of Missouri. *Michigan v. Long*, 463 U.S. 1032 (1983). The United States Court of Appeals for the Eighth Circuit had already found the claim was defaulted and that Deck could not show cause and prejudice to excuse the default, long before Deck filed his habeas petition in the Supreme Court of Missouri on December 2, 2021. App'x 225a–256a; *Deck v. Jennings*, 978 F.3d 578, 581–84 (8th Cir. 2020).

The Supreme Court of Missouri summarily denied his habeas petition after Deck failed to raise his current claim in the ordinary course of review. App'x 1a. That demonstrates reliance on a firmly established and regularly enforced state law procedural bar. Under Missouri law, such procedurally defaulted claims are not reviewable in habeas corpus. *State ex rel. Koster v.*

McElwain, 340 S.W.3d 221, 243 (Mo. App. W.D. 2011). This rule is firmly established and regularly enforced. *See State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215 (Mo. 2001) (adopting the federal cause-and-prejudice framework for analysis of procedurally defaulted claims in Missouri habeas corpus over twenty years ago). The Supreme Court of Missouri therefore summarily denied Deck's habeas petition based on this independent and adequate state law ground. App'x 1a.

It was not, contrary to Deck's assertion, a decision on the merits. Certiorari Pet. 1, 10. In Missouri, a summary denial is presumed to be a denial for procedural reasons in cases such as this where the claim was not raised in the ordinary course of state review but was presented for the first time in a habeas corpus action. *Byrd v. Delo*, 942 F.2d 1226, 1231 (8th Cir. 1991). In *Ylst v. Nunnemaker*, 501 U.S. 797, 802 (1991), this Court wrote that the presumption that a state-court denial of a federal claim indicates federal review is to be applied *only* after it has been determined that the decision fairly appears to rest primarily on federal law or is interwoven with federal law. The Eighth Circuit, citing *Ylst* and this Court's decision in *Coleman v. Thompson*, 501 U.S. 722 (1991), explained that because it cannot be said that a summary denial fairly appears to rest primarily on federal law, or to be interwoven with the federal law, the presumption that federal law is the basis of a state court's summary decision is inapplicable. *Byrd,* 942 F.2d at 1231. With respect to

Supreme Court of Missouri's summary denials of habeas corpus petitions under Missouri Supreme Court Rule 91, "after *Coleman*, there is simply no reason to construe an unexplained Rule 91 denial as opening up the merits of a previously defaulted federal issue." *Id*. at 1232. The Eighth Circuit has consistently followed *Byrd*'s rule that an unexplained denial rests on the Missouri procedural rule that Missouri Supreme Court Rule 91 cannot be used to raise claims that could have been raised on direct appeal or in a timely motion for post-conviction relief, but were not. *Preston v. Delo,* 100 F.3d 596, 600 (1996). As the procedural requirements regarding Rule 91 state habeas petitions are firmly established and regularly followed, a violation of them is adequate to foreclose review. *See Lee v. Kemna*, 534 U.S. 362, 376 (2002).

This Court does not have jurisdiction to review a decision based on an independent and adequate state-law ground. *Michigan v. Long*, 463 U.S. at 1041–42. In *Harrington v. Richter*, 562 U.S. 86, 99 (2011), this Court held that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits *in the absence of any indication or state-law procedural principles to the contrary*." (Emphasis added). Here, there are state-law procedural principles to the contrary. There is no jurisdiction to review the certiorari petition here.

II. The Court is not likely to grant certiorari, and would not likely rule in Deck's favor if it did, because his claim of undue pre-sentencing delay is factbound and meritless.

Furthermore, even if this Court could review his petition, the Court would be unlikely to grant certiorari and unlikely to grant relief to Deck, because his underlying claim is both factbound and meritless. Deck claims that inordinate delays before his third sentencing rendered mitigation evidence unavailable and prevented him from presenting an effective case in mitigation. But Deck's trial attorneys had available to them all of the evidence presented at the first sentencing, and then some. In fact, Deck was able to provide testimony from one more witness at his last sentencing than he could at his first sentencing, and he was able to retain two more expert witnesses at his last sentencing than he did at his first sentencing. App'x 25a–26a, 113a. Trial counsel even testified at Deck's post-conviction hearing that he "absolutely believed that *everything* that [he] wanted to bring out came out at trial." Doc. 35, Ex. UU, p. 53 (emphasis added).

Deck alleges only that the evidence that he was fully allowed to present, and have considered, was not in the form Deck now says he *prefers*, repeating over and over that the evidence was not "compelling" in the form it was presented. Certiorari Pet. i, 4, 12, 18. Deck specifically refers to the lack of "*live* lay witnesses." Certiorari Pet. i, 3, 4, 7, 13, 17, 18 (emphasis added). To be clear, four family members and lay witnesses did testify at Deck's third and

final sentencing. Michael Deck, Deck's brother, and Mary Banks, Deck's aunt, provided testimony via video deposition. App'x 113a. Major Puckett, Deck's foster father, and Beverly Dulinsky, Deck's aunt, provided testimony by written deposition that was read aloud into the record. App'x 113a. Deck does not provide any precedent that indicates that live testimony is inherently superior to video-recorded testimony, reading from a transcript, or using an expert. And, in Deck's case, the use of videotaped and transcribed testimony eliminated inherent risks from calling family members to testify live, as discussed below.

In addition to those four lay witnesses, Deck also presented live testimony from two experts. Deck may now feel that expert testimony is somehow less "compelling" than lay witness testimony, but it was done here for a strategic reason related to Deck's family's behavior, and not due to the passage of time. The Supreme Court of Missouri found that presenting the testimony through experts was strategically superior to live lay testimony. App'x 119a. Many of the witnesses that Deck now complains did not testify live were family members who would have lesser credibility than an expert, and they would have only presented a piecemeal picture of his childhood. App'x 119a. In fact, Deck's trial counsel attested that live lay testimony was risky and could have been harmful to Deck's case. When asked if he believed live family witnesses would have been useful to Deck, trial counsel explained that

"with this family, I could very easily see Pete Deck, Kathy whatever her last name is now, Carman's mother, and these other people actually telling the jury, Carman's childhood wasn't really that bad in order to make themselves look better in their own twisted way." Resp. Ex. M at 144. Additionally, members of Deck's family were hard to obtain, not due to the passage of time, but because "this family was so fond of playing hide and seek." Resp. Ex. M at 126. Thus, their absence in court was due primarily to their lack of interest in helping Deck, not the passage of time.

Trial counsel explained that, given Deck's family's indifference, "[i]n this case it was absolutely a benefit to have an expert talk about certain things as opposed to a family member." Resp. Ex. M at 185. He stated that in Deck's case, if he relied on family-member testimony, he would have had to address "why aren't these people here?" *Id.* By contrast, an expert could explain the family members' absence as supporting his theory of abandonment by his family, which was central to the mitigation theory. Trial counsel explained:

> This is the defendant's mother, the defendant's father, sure you can explain Tonia Cummings isn't here, who is his sister, because she is incarcerated. Sure you can explain that. Letisha Deck, you can understand because, you know, she is mentally retarded. She is not able to verbalize, but you know, siblings, uncles, aunts, nobody is coming in. The jury's got to wonder. And an expert, actually both of our experts, explained why, with the facts of, well he has been neglected his whole life, this is another example of this guy being neglected. You know, his life is on the line and they are still not willing to cross the street and help him out.

Id. Trial counsel used the lack of the family's cooperation to support his trial strategy. He testified that the family's "absence in court reinforced the notion that [he was] presenting to the jury, that they were terrible people and terrible parents." *Id.*

III. Deck's delays before asserting this claim weigh heavily against a last-minute stay of execution.

Deck's long delays before presenting this claim also weigh heavily against a stay of execution. Deck could have brought the state habeas petition on which he seeks certiorari at any time after his last sentencing in 2008, but chose to wait thirteen years to file until December 2021. Instead of pursuing state habeas relief in a timely fashion, Deck instead chose to pursue federal habeas relief exclusively for many years. He has been litigating the same unsuccessful claim since it was originally denied by the Eighth Circuit a year and a half ago. *Deck*, 978 F.3d at 581–84.

After the denial of his federal habeas petition, Deck filed a petition for rehearing in the Eighth Circuit and that was denied. He filed a petition for certiorari in this Court, and that was denied. He filed a state habeas petition on the same grounds as his federal habeas litigation only in December 2021, when his execution was impending. No rule prevented Deck from raising this claim in state court before the final disposition of the claim in federal court. Deck is now litigating, in this Court, yet another petition for certiorari on the

same ground that this Court has already rejected after the federal habeas litigation. He is not likely to succeed.

The extreme delay in bringing his underlying claim in state court is itself a sufficient reason to deny a stay here. As noted above, there is a strong equitable presumption against granting a stay of execution where a litigant could have raised the claim in time to have it adjudicated without a stay of execution. *Hill*, 547 U.S. at 584. "Courts should police carefully against attempts to use such [last-minute] challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm…" *Bucklew*, 139 S. Ct. at 1134. There is no good reason that Deck could not have filed his habeas petition in the Supreme Court of Missouri years ago. He should not be rewarded for his dilatory strategy of piecemeal litigation.

CONCLUSION

This Court should deny the motion for stay of execution.

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