Nos. 22-7398, 22A1011

IN THE SUPREME COURT OF THE UNITED STATES

Michael Tisius,

Petitioner,

v.

David Vandergriff, Warden,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and Response Opposing Motion for Stay Execution

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Capital Case

Questions Presented

I. In determining whether it had jurisdiction, was the court of appeals required to follow this Court's holding in *Shoop v. Twyford,* 142 S. Ct. 2037 (2022), that orders directing the transportation of a state prisoner are immediately appealable under the collateral order doctrine?

II. After denying relief under 28 U.S.C. § 2254, does a federal district court retain jurisdiction under 18 U.S.C. § 3599 to compel the warden of a state prison to admit people into the prison or to transport state prisoners out of the prison?

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Statement of the Case

The Parties Below

David Vandergriff is the warden of Potosi Correctional Center, a prison in Potosi, Missouri, which houses Missouri inmates who are sentenced to death. Warden Vandergriff supervises the custody of Michael Tisius, who was sentenced to death in 2010 for the murders of Sheriff's Deputies Jason Acton and Leon Egley. Dist. Dkt. 46-19 at 1242.

Tisius's Crimes

Tisius awaits execution for the murder of Randolph County Sheriff's Deputies Jason Acton and Leon Egley. Tisius planned to break his former cellmate, Roy Vance, out of the Randolph County jail. Dist. Dkt. 46-2 at 795–97, 835, 881–82. Vance, Tisius, and Vance's girlfriend, Tracie Bulington, planned the jailbreak over the course of several weeks. Dist. Dkt. 46-1 at 597–98; Dist. Dkt. 46-2 at 761–62, 794–97, 835, 881–82. Tisius and Bulington obtained a gun, tested it, and cased the Randolph County jail to make sure that Deputy Acton was working because Tisius and Vance believed Deputy Acton would not have the "heart to play hero" and stop them. Dist. Dkt. 46-2 at 1021–22. Tisius and Bulington passed coded messages to Vance to communicate with him about the jailbreak. Dist. Dkt. 46-2 at 697–701, 755–60, 762, 887–88. While planning the jail break, Tisius repeatedly listened to a song with lyrics about "mo[re] murder" and a "shotgun." Dist. Dkt. 46-2 at 1026–27; Dist. Dkt.

46-19 at 790. Tisius told Bulington that he planned to go in to the jail "and just start shooting" and that he would "do what he had to do" and "go in with a blaze of glory." Dist. Dkt. 46-2 at 1031–32.

Just after midnight on June 22, 2000, Tisius and Bulington entered the Randolph County jail under the pretense of bringing cigarettes for Vance. Dist. Dkt. 46-2 at 797–99, 835, 842, 891. Deputies Acton and Egley were working in the jail that night. Dist. Dkt. 46-2 at 613–14. Tisius chatted amicably with Deputy Acton for about 10 minutes, thanking him for helping Tisius in the past when Tisius had been an inmate at the jail. Dist. Dkt. 46-2 at 835–36, 842–43, 882, 891–92. Both Deputies Acton and Egley were unarmed. Dist. Dkt. 46-2 at 666, 754. Bulington turned to leave because she had cold feet about the jailbreak, but Tisius raised his concealed gun and shot Deputy Acton in the head, killing him. Dist. Dkt. 46-1 at 579–80, 592; Dist. Dkt. 46-2 at 836, 838–39, 843, 854, 875–77, 882–83, 886, 891–892. Deputy Egley charged around the counter trying to stop Tisius, but Tisius shot Deputy Egley in the head. Dist. Dkt. 46-1 at 606; Dist. Dkt. 46-2 at 799, 836, 839, 843, 854, 883, 886, 892.

Tisius tried to unlock the cell doors in the jail, but could not find the right keys. Dist. Dkt. 46-2 at 800–01, 805, 836, 843, 854, 883, 892–93. Deputy Egley was still alive, and he crawled toward Bulington, trying to grab her leg. Dist. Dkt. 46-2 at 801, 836–37, 843, 854, 883–84, 887, 893. Then Tisius returned and shot Deputy Egley several more times in the forehead, cheek, and shoulder.

Dist. Dkt. 46-2 at 801, 836–37, 843, 854, 883–84, 887, 893. Tisius and Bulington fled the scene, disposed of the murder weapon, and crossed into Kansas in an attempt to evade police. Dist. Dkt. 46-2 at 837–38, 843, 864, 884–85, 893. Bulington's car broke down, so the two continued on foot and were arrested the afternoon after the murders. Dist. Dkt. 46-2 at 837, 885–86. Tisius agreed to speak with police and confessed to the murders in oral and written statements. App. 89a.

The jury convicted Tisius of two counts of first-degree murder in the killings of Deputies Acton and Egley. Dist. Dkt. 46-2 at 1298–99. The jury found aggravating factors for both murders and recommended that Tisius be sentenced to death for both counts. Dist. Dkt. 46-2 at 1298–99. Dist. Dkt. 46-19 at 1229–30. The sentencing court agreed and imposed two death sentences. Dist. Dkt. 46-19 at 1242.

Relevant Procedural History

After Tisius's convictions and sentences were upheld by Missouri's courts, Tisius petitioned for federal habeas corpus relief in the district court below. Dist. Dkt. 29, 38. Tisius's initial petition was filed on June 26, 2018. Dist. Dkt. 29. On October 30, 2020, the district court denied Tisius's petition without a certificate of appealability. The United States Court of Appeals for the Eighth Circuit likewise declined to grant Tisius a certificate of

appealability, *Tisius v. Blair,* 21-1682, and, on October 3, 2022, this Court denied Tisius's request for certiorari review. *Tisius v. Blair,* 21-8153.

The District Court's Sealed, Ex Parte Orders

On September 23, 2022, counsel for Tisius sent a facsimile transmission to Warden Vandergriff that contained a sealed, ex parte order that the district court had entered in Tisius's habeas case. Dist. Dkt. 109. On September 30, 2022, Tisius's attorneys sent the Warden another sealed, ex parte order by facsimile. Dist. Dkt. 110. Both orders displayed the caption for *Tisius v. Vandergriff,* 4:17-CV-00426-SRB, including listing Warden Vandergriff as the respondent. Dist. Dkt. 109, 110. Both orders were directed to Warden Vandergriff and purported to compel him to allow people into Potosi Correctional Center or to transport prisoners outside the prison. Dist. Kt. 109, 110.[1] The orders required the Warden to avoid publicly disclosing the "fact," "location," and "purpose" of relief entered in the orders. Dist. Dkt. 109 at 2; Dist. Dkt. 110 at 2. The Warden had no prior notice of the district court's sealed, ex parte orders, and the orders did not provide any supporting explanation or authority for granting Tisius the requested relief.

[1] In his petition, Tisius only raises claims related to one order, the district court's September 29, 2022 transportation order. A4; Dist. Dkt. 110. That is because, after Tisius petitioned for clemency in state court, the Governor of Missouri permitted Tisius to conduct additional investigation, including the relief Tisius sought in the other district court order, Dist. Dkt. 109.

Both of the district court's sealed, ex parte orders referenced corresponding sealed, ex parte motions. Dist. Dkt. 109 at 2; Dist. Dkt. 110 at 2. Those motions are apparently documents 107 and 108 in the district court below, though the Warden cannot access them and has never seen them.

Though Warden Vandergriff was represented by counsel at the time of the district court's orders, Tisius's attorneys did not notify the Warden's counsel before contacting the Warden directly about the orders. Warden Vandergriff sought legal advice about the orders, and through counsel, promptly challenged the district court orders. Dist. Dkt. 111. When it became apparent the district court might not vacate the orders before Warden Vandergriff was supposed to comply with them, the Warden sought a stay and asked the district court to rule in time to preserve the Warden's ability to seek appellate review. Dist. Dkt. 112. The district court did not stay or vacate its orders, so the Warden sought immediate appellate review from the court of appeals. Dist. Dkt. 116. The court of appeals stayed the district court's orders on October 21, 2022, and after briefing, vacated the district court's orders.

Reasons for Denying the Petition

I. The court of appeals had jurisdiction.

In vacating the district court's orders, the Eighth Circuit correctly determined that it had jurisdiction. This Court's precedent makes plain that State officials can immediately appeal district court orders requiring the transportation of a state prisoner. *Shoop,* 142 S. Ct. at 2043 n.1. But the Eighth Circuit did not even need to reach the collateral-order question because the district court's transportation orders were appealable post-judgment orders. Tisius's post-judgment requests for transportation were not interlocutory or collateral to some larger matter—they were the only issues in an otherwise final case, and the district court's orders as to those requests finally decided all pending issues. Either way, the orders were appealable, and the Eighth Circuit had jurisdiction to hear the appeal.

A. The district court's postjudgment orders were appealable because they resolved all remaining issues in the case.

Tisius phrases his first question presented as a challenge to the Eighth Circuit's appellate jurisdiction under the collateral order doctrine, but it is not clear *to what* he believes those orders were collateral. Pet. at 9. At the time of the orders, Tisius's petition for a writ of habeas corpus was long-denied, and there were no other issues pending before the district court. Dist. Dkt. 109; Dist. Dkt. 110. While Tisius asserts that the orders were "interlocutory in

nature," he fails to identify any final judgment that would have eventually resulted from those orders. Pet. at 10. That is because Tisius's argument is a bare hope that the orders cannot be reviewed at all so that he can use federal courts to trample Missouri's sovereignty without consequence. His hope is misplaced. *See* U.S. Const. amend. X; *Younger v. Harris*, 401 U.S. 37, 44–45 (1971).

Though the district court's sealed, ex parte orders came after its final judgment was entered in Tisius's habeas case, postjudgment orders can also be final and appealable. *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 668–71 (8th Cir. 2008); *Acheron Capital, Ltd. v. Mukamal,* 22 F.4th 979, 987 (11th Cir. 2022). Post-judgment orders, like the district court's orders below, are essentially "free-standing litigation," and the orders are appealable because they "finally dispose[ ] of the question[s] . . . raised by the post-judgment motion[s]." *Id.* Tisius's sealed, ex parte motions were apparently freestanding litigation, unrelated to the prior final judgment, and asked the district court to force the warden of a state prison to transport a prisoner outside the prison walls. The district court disposed of those issues by entering the relief Tisius requested. R. Docs. 109, 110. There was no additional litigation that needed to conclude before an appeal, so the orders were final and appealable.

B. This Court's recent, on-point decision in *Shoop* forecloses Tisius's first question presented.

To the extent the orders were not final themselves, they were appealable under the collateral order doctrine. *Shoop,* 142 S. Ct. at 2043 n.1 (citing *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144–45 (1993)). Tisius's first question implicitly asks this Court to ignore its recent jurisdictional holding in *Shoop*. Without mentioning the majority opinion in *Shoop,* Tisius argues that the Eighth Circuit "expanded its jurisdiction under the *Cohen* collateral order doctrine." Pet. at 1. But that is not true. *This* Court recently extended the *Cohen* doctrine when it held that district court orders requiring the transportation of a state prisoner are immediately appealable. *Shoop,* 142 S. Ct. at 2043 n.1. In determining whether it had appellate jurisdiction, the Eighth Circuit was required to follow this Court's holding in *Shoop*. U.S. Const. art. III, § 1; *Agostini v. Felton,* 521 U.S. 203, 207 (1997).

Tisius does not discuss *Shoop* except to cite the dissenting opinions in that case. Pet. at 8–9. But this Court's majority opinions bind lower courts. Tisius does not ask the Court to overrule or reexamine its recent decision in *Shoop,* and there is no basis to undertake such a reexamination. *Shoop's* jurisdictional holding controls, so the Eighth Circuit had appellate jurisdiction and Tisius's first question presented does not merit review.

C. This case presents no reason to reexamine *Shoop's* jurisdictional holding.

Even if the collateral order doctrine issue in this case was not controlled by this Court's decision from less than one year ago, there is no reason for the Court to reach a different result here. Though 28 U.S.C. § 1291 generally limits appeals to final district-court orders, this Court has given "finality" a "practical rather than a technical construction." *Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 171 (1974) (quoting *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546 (1949)). Since the collateral order doctrine was identified in *Cohen,* this Court has read § 1291 to accommodate "a 'small class' of rulings, not concluding the litigation, but conclusively resolving 'claims of right separable from, and collateral to, rights asserted in the action.'" *Will v. Hallock,* 546 U.S. 345, 349 (2006) (quoting *Behrens v. Pelletier,* 516 U.S. 299, 305 (1996)).

The collateral order doctrine extends to orders that (1) "are conclusive"; (2) "resolve important questions completely separate from the merits"; and (3) "would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Dig. Equip. Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 867 (1994). In *Shoop,* this Court found that orders requiring a State to "take a convicted felon outside the prison's walls" meet all three requirements. *Shoop,* 142 S. Ct. at 2043 n.1. After all, such orders "create[ ] public safety risks and burdens on the State that cannot be remedied

after final judgment." *Id.* That is especially true here, where Tisius was sentenced to death for killing two sheriff's deputies *during a jail break*. Dist. Dkt. 46-2 at 1031–32.

With the matter settled in *Shoop,* this Court and every appellate court to consider the question have found that transportation orders like the one at issue below are immediately appealable. *Id.* (citing *Pennsylvania Bureau of Correction v. United States Marshall Service*, 474 U.S. 34 (1985); *Twyford v. Shoop,* 11 F. 4th 518, 522 (6th Cir. 2021); *Jones v. Lilly*, 37 F.3d 964, 965–66 (3rd Cir. 1994); *Jackson v. Vasquez*, 1 F.3d 885, 887–88 (9th Cir. 1993); *Ballard v. Spradley*, 557 F.2d 476, 479 (5th Cir. 1977); *Barnes v. Black*, 544 F.3d 807, 810–11 (7th Cir. 2008)). This question is well-settled and does not warrant further review from this Court.

Tisius's arguments about § 1291 and § 1292 are unavailing. Pet. at 8–12. True, transportation orders are not specifically listed as appealable under those statutes. But that is because the collateral order doctrine is an "exception to," *Mohawk Indus. Inc. v. Carpenter,* 558 U.S. 100, 116 (2009), or a "practical construction" of the "final decision rule laid down by Congress in § 1291." *Will,* 546 U.S. at 349. As a result, Tisius's arguments about the language and requirements of § 1291 and § 1292 are "not material" in deciding what orders are appealable as collateral orders. *Cohen,* 337 U.S. at 545. Besides those immaterial arguments, Tisius simply asks this Court to substitute the

dissenting opinions in *Shoop* for the majority opinion because he believes it would benefit him here. Pet. at 8–9. That request does not warrant further review from this Court.

II. The district court lacked jurisdiction to enter its sealed, ex parte orders.

This Court should deny certiorari on Tisius's second and third questions because federal courts have unanimously held that 18 U.S.C. § 3599 does not provide district courts with authority to order the transportation of state prisoners.

There is no legal authority for the district court's sealed, ex parte, transportation order. At the time of the orders, the district court exhausted its authority under § 2254, and neither § 3599 nor any other federal statute allows the court to manage Missouri's prisons at Tisius's request. *Beatty v. Lumpkin,* 52 4th 632, 634–35 (5th Cir. 2022), *cert denied* 142 S. Ct. 415 (2022); *Bowles v. Desantis*, 934 F.3d 1230, 1243–44 (11th Cir. 2019); *Leavitt v. Arave*, 682 F.3d 1138, 1141 (9th Cir. 2012); *Baze v. Parker*, 632 F.3d 338, 342–43 (6th Cir. 2011).

A. The district court exhausted its habeas jurisdiction.

"Federal courts are courts of limited jurisdiction." *Home Depot U.S.A., Inc. v. Jackson,* 139 S. Ct. 1743, 1746 (2019) (citations and alterations omitted). The United States Constitution limits "the character of the controversies over

which federal judicial authority may extend," and lower federal courts are further constrained by statutory limits. *Id.* (citations and alterations omitted). Put simply, "the district courts may not exercise jurisdiction absent a statutory basis." *Id.* (citing *Exxon Mobil Corp. v. Allapattah Services, Inc.* 545 U.S. 546, 552 (2005)). This Court reviews the existence of subject-matter jurisdiction de novo. *Barse v. United States,* 957 F.3d 883, 885 (8th Cir. 2020).

The district court had jurisdiction to hear Tisius's 2017 habeas petition under § 2254, but even that review was "narrowly circumscribed." *Shinn v. Ramirez,* 142 S. Ct. 1718, 1730 (2022) (citations omitted). States possess the primary authority for defining and enforcing the criminal law and the primary responsibility for punishing and incapacitating dangerous criminals like Tisius. *Id.* at 1730–31 (citations omitted). Federal intervention imposes "significant costs on state criminal justice systems," so, to "respect our system of dual sovereignty," federal law imposes a number of statutory and equitable limits on habeas review. *Id.* (citations omitted).

For example, federal statute prohibited the district court from entering orders to assist Tisius in investigating his federal habeas claims except in extraordinary circumstances that meet the "stringent requirements" of § 2254(e)(2). *Id.* at 1735; *Shoop,* 142 S. Ct. at 2044–45. The statutory prohibitions of § 2254(e)(2) would have prevented the district court from entering the type of orders at issue here to further discovery in the habeas case.

Shoop, 142 S. Ct. at 2044–45. When the district court denied Tisius's petition for a writ of habeas corpus (and the court of appeals and this Court affirmed that denial), the district court's limited authority to compel discovery on Tisius's behalf did not expand—it *ended*. *Jenkins v. Kan. City Mo. Sch. Dist.,* 516 F.3d 1074, 1081 (8th Cir. 2008) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 378–79 (1994)). In the motion-to-vacate briefing in the district court below, Tisius conceded that the district court's orders were unrelated to its habeas jurisdiction. Dist. Dkt. 114 at 2, 5. Because Tisius's sealed, ex parte motions were "more than just a continuation or renewal of the dismissed [habeas] suit," the district court's orders "require[d] [their] own basis for jurisdiction." *Kokkonen,* 511 U.S. at 378. There is none.

B. 18 U.S.C. § 3599 does not provide jurisdiction for the district court's orders.

Tisius's reading of § 3599—and the district court's exercise of jurisdiction here—is "belied by the plain meaning of the statute" and unanimous federal appellate precedent. *Baze,* 632 F.3d at 343; *accord Bowles,* 934 F.3d at 1243; *Leavitt*, 682 F.3d at 1141.

Section § 3599 allows federal courts to appoint counsel for actions under § 2254 and to authorize appointed counsel to hire "investigative, expert, or other services [that] are reasonably necessary for the representation of the defendant." § 3599(a)(2), (f). But as with any litigant represented by counsel,

the permission to investigate and hire experts is "not the same as establishing a substantive right for that person to acquire that information over all possible obstacles." *Baze,* 632 F.3d at 343. Both the text and context of § 3599 show that its provisions are about funding and not judicial orders requiring party or third-party compliance. *Id.* at 342.

A "natural reading of § 3599 is that all it does is what it says it does." *Bowles,* 934 F.3d 1243. Subsection (a)(2) entitles Tisius to counsel in federal proceedings. *See id.* "The other subsections explain just what that appointment and the furnishing of those services entails, including funding." *Id.* But there is "nothing in § 3599 to indicate that Congress meant to empower [Tisius's] federally appointed and funded counsel to force themselves into state clemency proceedings." *Id.* While the district court may authorize Tisius's counsel to aid him in preparing for clemency proceedings "as may be available to [him]," § 3599(e), the court has no ability "to order third-party compliance with the attorneys' investigations." *Baze,* 632 F.3d at 342.

That plain-text interpretation is confirmed by viewing the section "in connection with the whole statute" and in the greater context of federal law and its relationship with State governments. *See id.* at 343 (citing *Brown v. Duchesne,* 60 U.S. 183, 194 (1856)). "After all, '[i]t is beyond dispute that [federal courts] do not hold a supervisory power over the courts of the several States.'" *Bowles,* 934 F.3d at 1242 (quoting *Dickerson v. United States,* 530 U.S.

428, 438 (2000)). Federal courts may not supervise state judicial and administrative bodies and they may not "require the observance of special procedures" except as a remedy for a proven constitutional violation. *Id.* (citing *Smith v. Phillips,* 455 U.S. 209, 221 (1982)).

That is especially true of state clemency proceedings, which provide "the historic remedy for preventing miscarriages of justice where the judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 412 (1993). Clemency is traditionally a discretionary remedy that is "granted as a matter of grace," *Bowles*, 934 F.3d at 1230 (citations omitted), and the Missouri Governor's clemency power follows that tradition. The power to grant pardon or commutation is "a mere matter of grace that the governor can exercise upon such conditions with such restrictions and limitations as he may think proper." *State ex rel. Lute v. Missouri Bd. of Prob. & Parole*, 218 S.W.3d 431, 435 (Mo. 2007). Federal courts have very little, if any, oversight of that executive discretion. *Bowles,* 934 F.3d at 1242; *see Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 289 (1998) (O'Connor, J. concurring) ("[J]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.")

Given the limited role of federal courts in discretionary state clemency, "it is questionable whether the kind of interference in the state clemency process that [Tisius] says § 3599 provides would even be constitutionally permissible." *Bowles,* 934 F.3d at 1243. This Court should reject Tisius's strained, constitutionally problematic reading of the district court's authority under § 3599. If Congress had authorized such an "expansive" and "drastic" federal intrusion into "areas traditionally reserved to the States," it would have done so "clearly and unequivocally." *Id.* at 1242, 1243. But there is "nothing in § 3599 to indicate" that Congress has given the district court jurisdiction to enter the intrusive relief in the sealed, ex parte orders below. *Id.* at 1243.

C. Tisius's plain text argument is meritless, and this Court has already declined to consider the same argument in *Beatty*.

In his third question presented, Tisius asks this Court to read "authorize" in § 3599 to mean that the district court can order *anyone*, *anywhere*, to do *whatever* Tisius's counsel believes is reasonably necessary for his expert to conduct a clemency investigation. Tisius's argument is neatly answered by the Sixth Circuit's observation that the permission to investigate and hire experts is "not the same as establishing a substantive right for that person to acquire that information over all possible obstacles." *Baze,* 632 F.3d at 343.

This Court declined to hear the same argument last term in *Beatty*. There, the Fifth Circuit found that the normal meaning of the phrases "'obtain counsel' or 'obtain expert assistance' is to *hire* the relevant kind of professional." *Beatty,* 52 F.4th at 636. While § 3599 allows the district court to authorize Tisius's counsel to hire an expert, it does not grant the district court fiat to direct third parties to assist Tisius's expert in gathering information. *Id.* Instead, "the provision empowers the district court to guard the federal purse by authorizing—for purposes of federal reimbursement—an attorney to obtain only those investigative services that the court approves." *Baze,* 632 F.3d at 343.

If this Court were to accept Tisius's reading of § 3599, the Court would reach an absurd result where indigent death row inmates have "enforceable rights not available to other death row inmates." *Baze,* 632 F.3d at 344. Presumably, under Tisius's reading of § 3599, the district court could order any expert that Tisius requested to assist him and order them to travel anywhere or devote any amount of time to the case as long as the court believed it was "reasonably necessary." After all, Tisius would say that he cannot "obtain expert assistance" if the expert declines to help him or devote sufficient time to the case. And, following Tisius's argument, the district court could enter these orders without allowing the expert notice of the proceedings or an opportunity to be heard.

Tisius's contorted reading cannot be squared with the text of § 3599. Congress enacted § 3599 to "level the playing field by providing indigent death row inmates with the same access to clemency attorneys available to paying inmates," but there is no evidence that Congress intended, as Tisius does, "to tip the balance in the other direction by providing indigent death row inmates" with special access to federal judicial power. *Baze,* 632 F.3d at 344.

D. The opinion below does not conflict with this Court's precedent or any federal appellate precedent.

The Court should also reject Tisius's misreading of this Court's precedent.

In *Ayestas v. Davis,* 138 S. Ct. 1080, 1091 (2018), this Court held that a district court's decision denying a funding request under § 3599 is an appealable exercise of judicial authority. But *Ayestas* does not say that § 3599 allows a district court to exercise judicial authority to supervise state clemency proceedings or to otherwise hold jurisdiction over parties who are not given notice or opportunity to be heard on the questions before it. No case does.

Tisius points to *McFarland v. Scott,* 512 U.S. 849, 856–58 (1994), but that case offers no help. In *McFarland,* this Court found that a federal habeas proceeding can be initiated by a request for the appointment of counsel, and that a district court can exercise its habeas jurisdiction in such a case even before the petition is filed. *McFarland,* 512 U.S. at 858. But the district court's

power to stay the proceedings arises from its habeas jurisdiction under 28 U.S.C. § 2251, and not its authority to appoint and fund counsel. *Id.* Likewise, this Court's recent decision in *Shoop* discussed a district court's authority to enter investigative transportation orders under its habeas authority and the All Writs Act. *Shoop,* 142 S. Ct. at 2041–42.

Tisius fails to appreciate the difference between final habeas cases and cases pending under 28 U.S.C. § 2254, like the one at issue in *McFarland.* Congress has given district courts jurisdiction to enter orders, including stay orders, in pending habeas cases. 28 U.S.C. § 2251. Tisius's case is not pending, and there is no provision that authorized the district court to enter stay orders in a case without pending habeas litigation. The *McFarland* Court rested its decision solely on its finding that the case below was a "habeas corpus proceeding [that was] pending under § 2251," and it did not entertain the idea that § 3599 (or its predecessor) was an independent source of jurisdiction. *McFarland,* 512 U.S. at 857–58. So, *McFarland* lends no support to Tisius's arguments here.

In *Harbison v. Bell,* 556 U.S. 180 (2009), this Court held that § 3599 "authorizes counsel appointed to represent a state petitioner in 28 U.S.C. § 2254 proceedings to represent him in state clemency proceedings" and that appeal of orders about the appointment of counsel are outside the certificate of appealability requirement in § 2253(c)(1)(A). *Harbison,* 556 U.S. at 183–84.

Those issues are not in dispute here. The Warden has not appealed any order authorizing Tisius's counsel to represent him or any order compensating them for doing so. And there is nothing in *Harbison* that suggests the district court had jurisdiction to issue the orders the Warden did appeal.

In *Christeson v. Roper,* 574 U.S. 373 (2015), this Court found that an inmate should have been entitled to substitution of his counsel appointed under § 3599 because his current counsel were operating under a conflict of interest. But *Christeson* has no bearing on any question before this Court.

Tisius's attempt to cite all the cases about § 3599 are not relevant to his questions presented does not erase the unanimous body of precedent that reject his arguments here. *Beatty,* 52 4th at 634–36; *Bowles*, 934 F.3d at 1243–44; *Leavitt*, 682 F.3d at 1141; *Baze*, 632 F.3d at 342–43.

Reasons for Denying a Stay

For many of the same reasons above, the Court should deny Tisius's motion to stay his execution. A stay of execution is an equitable remedy that is not available as a matter of right. *Hill v. McDonough,* 547 U.S. 573, 584 (Mo. 2006). Tisius's request for a stay must meet the standard required for all other stay applications, including a showing of significant possibility of success on the merits. *Id*. In considering Tisius's request, this Court must apply "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." *Id.* (citing *Nelson v. Campbell,* 541 U.S. 637, 650 (2004)). The "last-minute nature of an application" may be reason enough to deny a stay. *Id.* Tisius's request fails under the traditional stay factors.

Tisius cannot meet any of the traditional factors required for stay of execution. Tisius has little possibility of success because, as discussed above, Tisius's claims here do not warrant further review. Tisius, likewise, will not be injured without a stay. Tisius has had a full opportunity to pursue clemency under Missouri statute, including the opportunity to request additional investigation. Mo. Rev. Stat. § 217.800. Tisius did request investigation, and he received permission to conduct the testing that was at issue in one of the district court orders below. *See* Dist. Dkt. 109.

On the other hand, a stay would irreparably harm both the State and Tisius's victims. "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019) (quoting *Hill*, 547 U.S. at 584). Now that Tisius has exhausted his state and federal remedies, further litigation discovery orders in his long-final, federal habeas case "disturbs the State's significant interest in repose for concluded litigation[.]'" *Shinn,* 142 S. Ct. at 1731. The surviving victims of Tisius's crimes have waited long enough for justice, and every day longer that they must wait is a day they are denied the chance to finally make peace with their loss. *Id.* ("[O]nly with real finality can the victims of crime

move forward knowing the moral judgment will be carried out.") (quotations and citations omitted). For these same reasons, the public interest weighs against further delay.

Conclusion

This Court should deny the petition for writ of certiorari and the request for a stay of execution.

Respectfully submitted,

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