Nos. 22-7625, 22A1016

IN THE SUPREME COURT OF THE UNITED STATES

Michael Tisius,

Petitioner,

v.

David Vandergriff,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Missouri and Response Opposing Motion to Stay Execution

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Capital Case

Question Presented

1. Does the Constitution require the Missouri Supreme Court to expand this Court's holding in *Roper v. Simmons,* 543 U.S. 551 (2005), to murderers who are over the age of eighteen even though *Roper* found that the Constitution does not require such an expansion?

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Statement of the Case

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.[1] 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," that he would "do what he had to do" and "go in with a blaze of glory." Dist. Dkt. 46-2 at 1031–32.

[1] Federal courts, including this Court, have previously rejected Tisius's challenges to his convictions and sentences during Tisius's federal habeas proceedings. The Warden will cite to documents from the district court docket in *Tisius v. Griffith,* 4:17-CV-00426-SRB (W.D. Mo.).

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 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 day 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 deaths 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. Tisius's convictions and sentences were affirmed on direct appeal, App. 89a–98a, but overturned during state post-conviction proceedings because the motion court found the State had played the "wrong song" for the jury during sentencing, and Tisius had actually listened to a different "murder-inspiring" song before killing Deputies Acton and Egley. Dist. Dkt. 46-13 at 554–55.

At resentencing, a second jury unanimously found aggravating facts in both murders, and recommended that Tisius should be put to death on both counts. Dist. Dkt. 46-19 at 1229–30. The sentencing court agreed and imposed two death sentences. Dist. Dkt. 46-19 at 1242.

After Tisius's convictions and sentences were upheld by Missouri's courts, Tisius petitioned for federal habeas corpus relief in the district court. 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.

This Court's review of a state conviction is informed by AEDPA, which limits federal review to the evidence presented in state court and presumes that the facts found by state courts are correct. 28 U.S.C. § 2254(e); *Shinn v. Ramirez,* 142 S. Ct. 1718, 1732 (2022); *Cullen v. Pinholster,* 563 U.S. 170, 180 (2011). Tisius's statement of the case fails to recount the facts of his crime and culpability as they were found by the jury, so this Court should rely on Respondent's statement instead. *See* Rule 15.2. Further, Tisius's statement includes discussion of events never presented or proven in state court including allegations about his mental health. This Court should treat those statements as unproven allegations.

Reasons for Denying the Petition

I. This Court lacks jurisdiction because the Missouri Supreme Court's order below is supported by adequate and independent state-law grounds.

Tisius's certiorari question fails to properly invoke this Court's jurisdiction because the record gives no reason to believe that the Missouri Supreme Court finally decided a federal question below. Instead, it is much more likely that the state court denied Tisius's petition for adequate and independent state-law reasons.

This Court should deny Tisius's petition under the "well-established principle of federalism" that state-court decisions resting on state law principles are "immune from review in the federal courts." *Wainwright v. Sykes,* 433 U.S. 72, 81 (1977). This rule applies "whether the state law ground is substantive or procedural." *Coleman v. Thompson,* 501 U.S. 722, 729 (1991) (citing *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935)).

Citing *Harrington v. Richter,* 562 U.S. 86, 99 (2002), Tisius wrongly argues that the Missouri Supreme Court's summary denial must be viewed as a decision on the merits of his claims. Pet. at 1–5. The presumption discussed in *Harrington* only applies "*in the absence of any indication or state-law procedural principles to the contrary." Harrington,* 562 U.S. at 86 (emphasis added). Missouri's procedural rules prohibit late-coming post-conviction challenges that could have been raised earlier as well as "duplicative and

unending challenges to the finality of a judgment[.]" *State ex rel. Strong v. Griffith,* 462 S.W.3d 732, 733–34 (2015) (quotations omitted). The Eighth Circuit recognizes that Missouri's procedural rules often require summary denial of defaulted post-conviction claims, so a summary denial does not "fairly appear to rest primarily on federal law, or to be interwoven with federal law." *Byrd v. Delo,* 942 F.2d 1226, 1231 (8th Cir. 1991) (alteration and ellipsis omitted).

The same is true here. Tisius's petition below failed on both substantive and procedural grounds. Because adequate and independent state-law grounds support the Missouri Supreme Court's order below, this Court has "no power to review" the order and "resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman,* 501 U.S. at 729.

Missouri's procedural rules require litigants to raise claims "at each step of the judicial process in order to avoid default." *Arnold v. Dormire,* 675 F.3d 1082, 1087 (8th Cir. 2012) (quotations and citations omitted). Claims of constitutional error are waived if not made "at the first opportunity with citation to specific constitutional sections." *State v. Driskill,* 459 S.W.3d 412, 426 (Mo. 2015). Tisius's convictions were affirmed after state court review, and generated four published opinions. *State v. Tisius,* 92 S.W.3d 751 (Mo. 2002) (*Tisius I*); *Tisius v. State,* 183 S.W.3d 207 (Mo. 2006) (*Tisius II*); *State v. Tisius,*

362 S.W.3d 398 (Mo. 2012) (*Tisius III)*; and *Tisius v. State,* 519 S.W.3d 413 (Mo. 2017) (*Tisius IV).*

In Tisius's two direct appeals, one following his first trial and one following his resentencing, he did not raise a claim that his death sentences violated *Roper*. On post-conviction appeal following his resentencing, Tisius raised a claim in which Tisius argued that his age and mental health combined to invalidate his death sentence and that trial counsel was ineffective for failing to raise that issue at trial. *Tisius IV,* 519 S.W.3d at 430–31.[2] The Missouri Supreme Court rejected Tisius's arguments for expanding *Roper* to include mental-age claims. *Id.* In *Roper*, this Court "recognized the potential for a defendant's mental age to differ from his or her biological age but, nonetheless, implemented a bright-line rule as to the minority age for imposition of the death penalty." *Id.* (citing *Roper,* 543 U.S. at 574). Because the Missouri Supreme Court rejected Tisius's mental-age claim on post-conviction appeal, he was not allowed to repeat the same arguments in a petition for a writ of habeas corpus. *Strong,* 462 S.W.3d at 734.

The Missouri Supreme Court's decision in *Strong* is instructive on the procedural posture of Tisius's claims in state court. In *Strong*, a death row

[2] In that case, Tisius relied on evaluations conducted by Dr. Stephen Peterson in 2003 and 2013. *See* Res. PCR App. Br. at 126–131. Here, Tisius relies on those same evaluations, plus evaluations done in 2018 and 2022. Pet. at 3–9; App. at 41a–63a.

inmate tried to raise claims about his mental health, including a claim that had previously been rejected during post-conviction proceedings. *Id* at 735–36. The inmate presented additional evidence in support of his previously rejected claims, including new, more recent mental health evaluations. *Id.* at 737. The Missouri Supreme Court found it "need not consider" the inmate's new evidence because the inmate "fail[ed] to present a cognizable claim for habeas corpus relief" under Missouri's procedural rules. *Id.* at 738.

There are good reasons for Missouri's prohibitions against duplicative claims. For example, Tisius now argues that he "was suffering from seizures or seizure-like impairments at the time of the offense." Pet. at 25–26. Tisius's argument stems from an expert report generated just before he filed his state-court petition, and more than two decades after Tisius murdered Deputies Acton and Egley. Pet. at 25–26; App. at 293a. That report concludes, based on Tisius's belated description of his mental state at the time of the crimes, that his "behavior at the time of the offense is consistent with brain dysfunction due to epilepsy." App. at 301a.

Tisius's belated disclosure is highly suspect to say the least, and it is belied by other false accounts he has given in the past. Tisius has previously lied about his mental state to try to minimize his responsibility for his crimes. Doc. 46-2 at 851–52. When Tisius first spoke to police, he claimed that he did not remember committing the crimes. Doc. 46-2 at 851. Detective Mike Platte,

who interviewed Tisius, did not believe him and told Tisius "that was a lie and we both knew it." Doc. 46-2 at 851. Confronted with his lie, Tisius relented and described his role in the murders. Doc. 46-2 at 851–52. At his 2010 resentencing, Tisius presented evidence that he had an above average IQ, that "he did not have any brain damage," and "[t]hat his brain works well." Doc. 46-2 at 1114–15. Over the years, Tisius has paid for experts to give different testimony. App. at 41a–301a, 351a–361a. Thus, these new claims, which are contradicted by previous defenses asserted in state court, should be rejected. The Court should not credit Tisius's attempts to assert new and different evidence to shift his "duplicative and unending challenges" in yet another direction. *See Strong,* 462 S.W.3d at 734

Even if accepted, these belated allegations do not change that the Missouri Supreme Court already rejected Tisius's arguments for expanding *Roper*, *Tisius IV,* 519 S.W.3d at 430–31, so adequate and independent state-law grounds foreclose this Court's review here. *Coleman,* 501 U.S. at 729.

II. This Court's should deny certiorari to respect our system of dual sovereignty.

Even presuming the Missouri Supreme Court's order below can be read to pass on a federal question, this Court should not grant certiorari review of state post-conviction claims because federal habeas proceedings provide a more appropriate avenue to consider federal constitutional claims. *Lawrence v.*

Florida, 549 U.S. 327, 328 (2007), *Kyles v. Whitley,* 498 U.S. 931, 932 (1990) (Stevens, J., concurring in the denial of certiorari).

"To respect our system of dual sovereignty," this Court and Congress have "narrowly circumscribed" federal habeas review of state convictions. *Shinn,* 142 S. Ct. at 1730 (citations omitted). The States are primarily responsible for enforcing criminal law and for "adjudicating constitutional challenges to state convictions." *Id.* at 1730–31 (quotations and citations omitted). Federal intervention intrudes on state sovereignty, imposes significant costs on state criminal justice systems, and "inflict[s] a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* at 1731 (quotations and citations omitted).

To avoid the harms of unnecessary federal intrusion, "Congress and federal habeas courts have set out strict rules" requiring prisoners to present their claims in state court and requiring deference to state-court decisions on constitutional claims. *Id.* at 1731–32; 28 U.S.C. § 2254(d), (e). Tisius petitioned for federal habeas review, his claims were denied, and that denial was affirmed by the United States Court of Appeals for the Eighth Circuit and this Court. There is no basis for this Court to afford Tisius successive federal habeas review by granting certiorari here.

Tisius's federal habeas petition presented arguments for expanding *Roper* similar to the ones he presses now. Dist. Dkt. 38 at 140. Federal law specifically prohibits successive review of a state prisoner's federal habeas claims that were presented in a prior petition. 28 U.S.C. § 2244(b)(1). To the extent that Tisius's claim here is not the same as the argument he made on federal habeas, AEDPA also prohibits successive review of the new claim unless Tisius can show that the claim "relies on a new rule of constitutional law" that applies retroactively or that "the factual predicate of the claim could not have been discovered previously through the exercise of due diligence" and that the claim shows "by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Tisius] guilty of the underlying offense." § 2244(b). Tisius cannot make either showing.

To the extent Tisius's claim was not previously presented, AEDPA's one-year statute of limitations in § 2244(d) would render the claim untimely. Tisius has known the factual and legal bases for any *Roper* claim for more than a decade, since the time of his sentencing in 2010.

Even if Tisius's claims could properly be presented in a new federal habeas petition, they do not warrant relief. As discussed in point I, there are adequate and independent state law grounds that require denial of the claims. And if, as Tisius argues, the Missouri Supreme Court denied his claims on the merits and not on procedural grounds, then federal habeas relief would be

precluded under § 2254(d)(1). Tisius's claim require an expansion of, or departure from, this Court's precedent, and AEDPA prohibits granting federal relief on the basis that the state court failed to extend this Court's precedents. 28 U.S.C. § 2254(d)(1); *White v. Woodall*, 572 U.S. 415, 426 (2014) (state courts need not extend this Court's precedent in adjudicating constitutional claims).

Tisius's convictions and sentences have been exhaustively reviewed and affirmed in state and federal court. A grant of certiorari now would allow Tisius an end-run around the rules that Congress and federal courts have crafted to maintain our federalist system of government. To respect "Our Federalism," *Younger v. Harris,* 401 U.S. 37, 44 (1971), and "finality, comity, and the orderly administration of justice," this Court should enforce the limits on federal review of state convictions and deny Tisius's petition. *Shinn,* 142 S. Ct. at 1733 (quoting *Dretke v. Haley,* 541 U.S. 386, 388 (2004))

III. The Constitution does not require the Missouri Supreme Court to expand this Court's decision in *Roper*.

In his question presented, Tisius asks this Court to review the Missouri Supreme Court's decision not to expand this Court's decision in *Roper*. But one core flaw pervades Tisius's argument: nothing has changed since *Roper* that would justify expansion. As this Court noted in *Roper,* society has drawn the line between juveniles and adults at 18 years old even though that distinction has long been subject to "the objections always raised against categorical

rules." *Roper,* 543 U.S. at 574. The research available then suggested that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." Still, this Court established a bright-line rule based on the traditional age of majority. *Id.*

Tisius's arguments against that categorical rule are the same objections the *Roper* Court rejected. Like death row inmates in other federal cases, Tisius argues that "the factors *Roper* considered relevant . . . apply equally to persons under 21." *United States v. Tsarnaev,* 968 F.3d at 24, 96 (1st Cir. 2020), *reversed on other grounds by United States v. Tsarnaev*, 142 S. Ct. 1024 (2022). But he fails to show that research about brain maturation is "substantially different from the research available at the time of *Roper*." *See id.* at 97. This Court recently declined to hear a similar challenge from another Missouri offender, *Johnson v. Missouri*, 143 S. Ct. 477 (2022). Nothing has changed since last year (or since *Roper*) that would justify a different result.

There is good reason to doubt whether this Court should continue to apply its evolving-standards-of-decency jurisprudence in capital sentences. *Baze v. Rees,* 553 U.S. 35, 47 (2008); *Glossip v. Gross,* 576 U.S. 863, 869 (2015); *Bucklew v. Precythe,* 139 S. Ct. 1112, 1122–23 (2019). While *Furman v. Georgia,* 408 U.S. 238, 242 (1972) (Douglas, J, concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)), invalidated the death penalty on the idea that the "Eighth Amendment 'must draw its meaning from the evolving standards

of decency[,]'" this Court has since rejected *Furman's* reasoning, finding that "it is settled that capital punishment is constitutional." *Glossip,* 576 U.S. at 863.

In *Baze, Glossip,* and *Bucklew,* this Court has reaffirmed the legality of capital punishment without any discussion of the "evolving standards" test. Beyond that, at least one member of this Court has suggested that *Furman* was a "poorly reasoned" and "functionalist" decision that may be overruled in time. *Ramos v. Louisiana,* 140 S. Ct. 1390, 1433 (2020) (Alito, J., dissenting). Though this Court has not overruled *Furman* or the plurality decision in *Trop*, its decisions in *Baze, Glossip,* and *Bucklew* suggest that the Court will no longer rely on indicators of public opinion to overrule death sentences. For example, the *Bucklew* Court stressed that "the judiciary bears no license" to invalidate capital punishment because that debate is "reserved for the people and their representatives." 139 S. Ct. at 1122–23. At the very least, this Court's recent precedent emphasizes the wisdom of the Missouri Supreme Court's rule against "[e]xtending the Supreme Court's [Eighth Amendment] holdings beyond the four corners of its opinions." *Willbanks v. Department of Corrections,* 522 S.W.3d 238, 246 (Mo. 2017).

Assuming that this Court would consider Tisius's claim under the evolving-standards-of-decency test, the claim still fails to warrant review. To prove his claim, Tisius must first show "objective indicia of society's standards,

as expressed in legislative enactments and state practice" that establish a "national consensus against the sentencing practice at issue." *Graham v. Florida,* 560 U.S. 48, 61 (2010) (citing *Roper,* 543 U.S. at 572) (quotations omitted).

Tisius's citations to state practices fall flat because they ignore the most important indicator of state standards: "not a single state with an active death penalty scheme bans the executions of 18-to-20-year-olds." *Tsarnaev,* 968 F.3d at 97.[3] Tisius relies on several states that do not actively use the death penalty, but that does not prove any consensus about capital sentences for 18-to-20-year-olds. Pet. at 16–17. Tisius then points to age-based restrictions on things like tobacco, alcohol, and fireworks, but these vice restrictions do not show evolution of any thought as to capital punishment. Pet. at 23–24. Indeed, it is absurd to think that laws about drinking, smoking, and shooting fireworks show a societal consensus about when Tisius was "mature enough to understand that murdering another human being is profoundly wrong." *Roper,* 543 U.S. at 619 (Scalia, J., dissenting) (quotations omitted).

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[3] *See also* Brian Eschels, Data & the Death Penalty: Exploring the Question of National Consensus Against Executing Emerging Adults in Conversation with Andrew Michael's A Decent Proposal: Exempting Eighteen-to-Twenty-Year Olds From the Death Penalty, 40 N.Y.U. Rev. L. & Soc. Change Harbinger 157, 148 n.11 (2016); *available at*: https://socialchangenyu.com/wp-content/uploads/2016/06/eschels-compliment piece_clean-copy_6-14-16.pdf.

Tisius next tries to show that prosecutors or juries rarely impose the death sentence on young adults, but these efforts also fail. As one of Tisius's sources notes, "[f]rom January 2005 to December 2018, 546 people were executed in all jurisdictions in the United States; 106 (19%) were under twenty-one at the time of their crimes." John H. Blume et al., *Death by Numbers: Why Evolving Standards Compel Extending Ropers Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98 Tex. L. Rev. 921, 930-31 (2020). That rate generally reflects the number of 18-to-20-year-olds that commit murders. *See* Howard N. Snyder, *Arrest in the United States 1990-2010,* U.S. Dep't of Justice, Bureau of Justice Statistics, 17–18 (October 2012), http://www.bjs.gov/content/pub/pdf/aus9010.pdf. For example, 18-to-20 year olds made up 18.8% of the total arrests for murder and non-negligent homicides in 2010. *Id.*

But even if the data showed a substantial discrepancy, that would not help Tisius. If prosecutors and juries see young age as a mitigating factor when deciding whether to charge and impose the death penalty, that would not make Tisius's death sentence unconstitutional. After all, the two sentencing juries in Tisius's case were able to consider his young age and the evidence he presented about his mental health, yet both juries still decided to impose the death penalty. If anything, the juries' decisions show that, despite the mitigating

value of youth and mental health evidence, Tisius's crimes place him among "the worst of the worst." *Glossip,* 576 U.S. at 916–17 (Breyer, J., dissenting).

Tisius also points to psychological and neurological studies, but his evidence only shows that little has changed since *Roper*. Tisius has attached a declaration summarizing research that piles on to conclusions that have been widespread for decades *Cf.* App. at 172a–176a *with* Sarah Johnson, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45.3 J. Adolesc. Health, 216, 216 (2009) ("in the last decade, a growing body of longitudinal neuroimaging research has demonstrated that" some areas of the brain "may not be fully developed until halfway through the third decade of life.").

There is no legal disagreement among courts or states about the line this Court drew in *Roper*. "[N]ot a single state with an active death penalty scheme bans the execution of 18–20 year olds." 968 F.3d at 97. And federal courts have uniformly declined to expand *Roper* to apply to offenders at the age of majority, regardless of arguments about their "mental age." *Tsarnaev,* 968 F.3d at 96–97 (reversed on other grounds); *United States v. Dock,* 541 F. App'x. 242, 245 (4th Cir. 2013); *Doyle v. Stephens,* 535 F. App'x 391, 395 (5th Cir. 2013); *United States v. Marshall,* 736 F.3d 492, 500 (6th Cir. 2013); *Melton v. Fla. Dep't. of Corr.*, 778 F.3d 1234, 1235, 1237 (11th Cir. 2015). There is no conflict that would demand reexamining *Roper,* especially here, where Tisius has already

been denied habeas relief on the same claims. Tisius's arguments offer no basis for expanding *Roper*, and this Court should deny the petition.

Reasons to Deny Tisius's Request for a Stay

For many of the same reasons above, the Court should deny Tisius's motion to stay his execution.[4] 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 (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 on all four 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,

[4] On May 30, 2023, the district court entered a stay of execution in order to hold an evidentiary pleading on successive claims that Tisius filed long after the district court had entered its final judgment. Dist. Dkt. 136. The Warden has appealed and moved to vacate the stay because the district court did not have jurisdiction, because the district court did not have authority to order an evidentiary hearing, and because Tisius is not entitled to a stay under this Court's precedent. *Tisius v. Vandergriff,* 23-2314 (8th Cir.).

Tisius's claims here do not warrant further review. This Court has no jurisdiction because the decision below rests on state-law procedural grounds, this Court should decline certiorari in the interests of comity and federalism, and Tisius's claims fail on their merits under this Court's case law.

Tisius, likewise, will not be injured without a stay. Tisius murdered Deputies Acton and Egley in 2000, and has had ample time to seek review of his convictions in state and federal court. As this Court knows, "the long delays that now typically occur between the time an offender is sentenced to death and his execution are excessive." *Bucklew,* 139 S. Ct. at 1134. This Court's role is to ensure that Tisius's challenges to his sentence are decided "fairly and expeditiously," so he has no interest in further delay while the Court considers his petition. *Id.* Tisius has long delayed in bringing his claims, which amount to "little more than an attack on settled precedent." *See id.* Given the strong state and federal precedent that require the denial of his claims, Tisius has no more legitimate interest in delaying the lawful execution of his sentence.

A stay would also 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." *Id.* at 1133 (quoting *Hill*, 547 U.S. at 584). Now that Tisius has exhausted his state and federal remedies, further litigation of his long-delayed, meritless claim "disturbs the State's significant interest in repose for concluded litigation[.]" *Shinn,* 142 S. Ct. at 1731

(quotations omitted). 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 motion for a stay of execution.

Respectfully submitted,

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