Nos. 22-7700, 22A1046

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 United States Court of Appeals for the Eighth Circuit and Response Opposing Motion to Stay Execution

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ANDREW BAILEY
Missouri Attorney General

Andrew J. Crane
Counsel of Record
Assistant Attorney General
Missouri Bar No. 68017
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573) 751-0264
Andrew.Crane@ago.mo.gov

Attorneys for Respondent

Capital Case

Question Presented

1. Under 28 U.S.C. § 2244(b), can a state prisoner file an unauthorized second or successive habeas petition challenging a state-court judgment because he alleges he failed to discover his claim before filing his first petition?

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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. 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 into 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. 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.

AEDPA governs this Court's review of a state conviction, and it 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.

Reasons for Denying the Petition

I. The district court lacked jurisdiction to consider Tisius's successive petition.

Federal law prohibits the district court from considering successive petitions that are not first authorized by the court of appeals. 28 U.S.C. § 2244(b)(3)(A). *Gonzalez v. Crosby,* 545 U.S. 524, 530 (2005). Any filing, no matter how it is labeled, that raises substantive claims challenging the same judgment of conviction and sentence is successive within the meaning of § 2244. *Id.* at 530–31. Even pleadings attempting to raise claims previously omitted through neglect or claims based on alleged newly discovered evidence are successive. And all unauthorized successive petitions must be denied. *Id.*

This Court has held that "the phrase 'second or successive' must be interpreted with respect to the judgment challenged." *Magwood v. Patterson,* 561 U.S. 320, 332–33 (2010). In 2018, Tisius filed a habeas petition under

§ 2254 challenging the state-court judgment convicting him of first-degree murder and sentencing him to death. Tisius's petition below again raised claims of error challenging the same judgment. Tisius argued that one of the jurors at his sentencing trial was not qualified to serve under state law. Dist. Dkt. 132.[1] If Tisius's allegations are true, the errors he now alleges happened at the time of his resentencing trial in 2010, well before he filed his first federal habeas petition.

Tisius's new petition in the district court, raising claims of error that occurred before his first petition and against the same state court judgment, is plainly successive under § 2244(b) and this Court's precedents. *Gonzalez,* 545 U.S. at 530–31; *Magwood,* 561 U.S. at 332–33. While Tisius tries several ways to circumvent the law barring his successive petition, none warrant this Court's review.

A. Tisius's failure to discover his claim sooner does not entitle him to successive habeas review.

Tisius claims that he failed to discover the claim in time to file his first habeas petition because his counsel "had no reason to know that Juror 28 could not read" and because an unidentified court staff member assisted Juror 28 with completing a juror questionnaire but did not inform any of the parties at

[1] Tisius filed an earlier successive petition on May 4, 2023, which the district court denied on May 11, 2023. Dist. Dkt. 123, 130.

Tisius's sentencing trial. Pet. at 11–12, 21–22. But Tisius admits that he discovered the factual basis for his claim when he simply "interviewed Juror 28 at his home." Pet. at 4. Tisius also admits he made no effort to interview the jurors after his trial to investigate claims related to the jurors' answers in voir dire. Dist. Dkt. 132 at 15; App. at 8a–13a, 20a–25a.

The Eighth Circuit found that Tisius's "new claim could have been timely investigated by counsel and raised in earlier habeas proceedings but was not." *Tisius v. Vandergriff,* 23-2314 (8th Cir. June 2, 2023). Tisius cannot reargue that point here, because the Eighth Circuit's denial of authorization to file a successive petition "shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Tisius's arguments in this vein show that his petition is indeed successive. In deciding whether to authorize a successive petition, the court of appeals must evaluate whether the factual predicate of the claim could not have been discovered previously through the exercise of due diligence" and whether 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).

While Tisius spends much time arguing that he cannot be faulted for failing to earlier discover his claim, that argument is explicitly included in the successive-petition standard under § 2244(b), and it is not sufficient to warrant

successive review. "The writ of habeas corpus is an 'extraordinary remedy' that guards only against 'extreme malfunctions in the state criminal justice systems.'" *Shinn,* 142 S. Ct. at 1731. Because Tisius has previously completed federal habeas review of the judgment sentencing him to death, federal courts will not review subsequent petitions absent a showing that an "extreme malfunction" casts doubt on Tisius's guilt. § 2244(b)(2)(B)(ii).

Instead of trying to meet that standard, Tisius comes to this Court hoping to delay justice for the victims of his crimes based only on an alleged technical error of state law that not even he believes to have had any impact on the outcome of this sentencing trial. Tisius's petition here is exactly the reason for the rule set forth by § 2244(b). There is "no doubt Congress intended AEDPA to advance" the "principles of comity, finality, and federalism." *Williams v. Taylor,* 529 U.S. 420, 436 (2000). Nothing upends those purposes more than forcing States to defend round after round of federal habeas review. In the last month, Tisius has filed two federal habeas petitions and four petitions for writs of certiorari. AEDPA's rules are designed to separate "extreme malfunctions" warranting review from frivolous litigation brought solely for delay. *See Shinn v,* 142 S. Ct. at 1731. Tisius cannot meet the standards contained in those rules because his claims are the latter and not the former.

B. Tisius's claims alleging error at trial that happened thirteen years ago did not just become ripe.

Tisius's thirteen-year-old claim of state-law error has been ripe since the error allegedly occurred in 2010. Tisius claims that Juror 28 was not fit to serve under a state-law juror qualification statute. *See, e.g.,* Pet. at i. Tisius could have raised that claim during voir dire, in a motion for new trial, on direct appeal, or during state collateral-review proceedings. He did not. Whether and why Tisius failed to discover his claims earlier has nothing to do with when his claims became ripe.

Ripeness is a justiciability doctrine designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements when those disagreements are premised on contingent future events that may not occur as anticipated or indeed may not occur at all." *Reno v. Catholic Soc. Servs., Inc.,* 509 U.S. 43, 72 (1993) (internal quotation marks omitted). Tisius alleges errors during jury selection at his 2010 sentencing. If he had raised those claims in his first federal habeas petition, there would have been no doubt that the claims were ripe for review.

Tisius tries to further his ripeness arguments by misreading this Court's decision in *Magwood* and *Panetti v. Quarterman,* 551 U.S. 930 (2007). Those cases, unlike Tisius's, are about prisoners who raised claims of error that did not challenge the original sentence and judgment. In *Panetti,* this Court found

that petitions challenging a prisoners' competency to be executed are not successive under § 2244(b). The reason for that distinction is clear. "Mental competency to be executed is measured at the time of execution, not years before then. A claim that a death row inmate is not mentally competent means nothing unless the time for execution is drawing nigh." *Tompkins v. Secretary, Dept. of Corrections,* 557 F.3d 1257, 1260 (11th Cir. 2009); *Panetti,* 551 U.S. at 946–47. The same is not true of claims alleging error during jury selection or other claims "that can be and routinely are raised in initial habeas petitions." *Tompkins,* 557 F.3d at 1260.

Likewise, in *Magwood,* this Court found that a prisoner who had been resentenced was allowed to file a federal habeas petition challenging the new judgment of conviction and sentence. *Magwood,* 561 U.S. at 332–33. But both the majority and dissent in *Magwood* agreed that the prisoner's petition would be barred if he "were challenging an undisturbed state-court judgment for the second time." *Id.* at 343 (Breyer, J., concurring). Tisius seeks to do exactly that, and § 2244(b) bars his successive petition.

Tisius's argument here is similar to the one that the Eleventh Circuit rejected in *Tompkins* because Tisius tries to contort language from *Panetti* and *Magwood* to have this Court "hold that any claim based on new evidence is not 'ripe' for presentation until the evidence is discovered, even if that discovery comes years after the initial habeas petition." *Tompkins,* 557 F.3d at 1260.

That is not what *Panetti* and *Magwood* hold. Claims purportedly based on newly-discovered evidence are governed by § 2244(b)(2)(B), and Tisius's claim fails under that standard.

Tisius's citations to *Hicks v. Oklahoma,* 447 U.S. 343 (1980), are especially unavailing. Pet. at 9–13. Tisius argues that under *Hicks,* his claims of juror error did not become ripe until the Missouri Supreme Court denied his state habeas petition. *Id*. That argument has no support in law or logic.

If Tisius raises a claim challenging the Missouri Supreme Court's habeas denial *and not the judgment of conviction and sentence,* then his claim fails because federal habeas review only extends to claims that a prisoner's custody, "pursuant to the judgment of a state court" violates "the Constitution or the laws or treaties of the United States." 28 U.S.C. § 2254(a). Federal courts cannot review a habeas claim challenging the Missouri Supreme Court's state habeas review because "an infirmity in a state post-conviction proceeding does not raise a constitutional issue cognizable in a federal habeas petition." *King v. Kelley,* 797 F.3d 508, 512 (8th Cir. 2015) (alteration omitted) (quoting *Williams-Bey v. Trickey,* 894 F.2d 314, 317 (8th Cir. 1990)).

If Tisius seeks to raise claims challenging the state-court judgment convicting him and sentencing him to death, then his petition is successive and must be dismissed because the petition is not authorized under § 2244(b). *Gonzalez,* 545 U.S. at 535. Tisius has no case for authorization under § 2244(b)

because it would require him to show, "by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Tisius] guilty of the underlying offense." § 2244(b)(2)(B)(ii). As the Eighth Circuit has already found, Tisius's claims about Juror 28's reading level would not meet that standard.

Tisius also wrongly argues that he has not had a "fair opportunity" to present his claim. Pet. at 16. (citing *Panetti,* 551 U.S. at 947). This Court has recognized only two circumstances that exempt petitions from the requirements of § 2244(b): 1) "where the claim was not yet ripe at the time of the first petition," *Magwood,* 561 U.S. at 346 (Kennedy, J., dissenting) (citing *Panetti,* 551 U.S. at 947); and 2) "where the alleged violation occurred only after the denial of the first petition, such as the State's failure to grant the prisoner parole as required by state law." *Id.* (citations omitted). Beyond those, prisoners are limited to one federal habeas petition challenging a judgment of a state court except as authorized in § 2244(b).

Perhaps recognizing that he is not entitled to successive review under federal law, Tisius asks this Court to "look to the substance of the claim" and allow further review under some undefined equitable principle. Pet. at 16–17. While this Court has referenced the court-made abuse-of-the-writ doctrine in interpreting the successive petition requirement, there is no support for Tisius's request that this Court ignore the requirements of § 2244(b) to allow

consideration of his plainly successive petition. *See Gonzalez,* 545 U.S. at 530. At bottom, Tisius wants to challenge the same judgment that he previously challenged with a claim that he says he did not previously discover. That request falls directly within the scope of § 2244(b)(2)(B), and since Tisius cannot meet the standard there, he may not file a successive petition in federal court. This Court should deny the petition for a writ of certiorari.

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. 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.*

In addition, "A stay of execution pending disposition of a second or successive federal habeas petition should only be granted when there are substantial grounds upon which relief might be granted." *Bowersox v.*

Williams, 517 U.S. 345, 346 (1996) (quotations omitted). "Entry of a stay on a second or third habeas petition is a drastic measure, and [this Court] has held that it is particularly egregious to enter a stay absent substantial grounds for relief." *Id.* (quotations omitted). Tisius's petition fails to raise any substantial ground for relief, and his stay request fails on all four traditional stay factors.

Tisius has little possibility of success because, as discussed above, his petition is successive and the Eighth Circuit has already determined that there is "no statutory basis to authorize the filing of [Tisius's] second or successive petition" because Tisius could not meet the standard contained in § 2244(b). *Tisius v. Vandergriff,* 23-2314 (8th Cir. June 2, 2023). Further, Tisius's underlying claim of state law error presents no basis for federal review.[2]

Tisius will not be injured without a stay. Tisius murdered Deputies Acton and Egley in 2000, and he 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 v. Precythe,* 139 S. Ct. 1112, 1134 (2019). 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

[2] Respondent has addressed Tisius's juror-qualification claims in the response to Tisius's petition in 22-7699. That case remains pending before this Court, and Respondent asks the Court to note those arguments in deciding this case.

while the Court considers his petition. *Id.* Tisius's last-minute complaints about the technical requirements of state law cast no doubt on his guilt or the appropriateness of his sentence. Tisius has failed to present any federal-law issue for this Court's review, and he has no legitimate interest in delaying the lawful execution of his sentence.

A stay would also irreparably harm both the State and Tisius's victims. This Court has repeatedly recognized the States' important interests in enforcing lawful criminal judgments without federal interference. "The power to convict and punish criminals lies at the heart of the States' 'residuary and inviolable sovereignty.'" *Shinn,* 142 S. Ct. at 1730 (quoting The Federalist No. 39, p. 245 (J. Madison) (Clinton Rossiter ed. 1961)); *see also Gamble v. United States*, 139 S. Ct. 1960, 1968–69 (2019). "Thus, [t]he States possess primary authority for defining and enforcing the criminal law and for adjudicating constitutional challenges to state convictions." *Id.* (quotations and citations omitted). Federal intervention "disturbs the State's significant interest in repose for concluded litigation" and it "undermines the States' investment in their criminal trials." *Id.* (quotations and citations omitted). "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Id.* (quoting *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). "To unsettle these expectations is to inflict 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.* (quoting *Calderon*, 523 U.S. at 556).

Tisius has exhausted his opportunities for federal review and his convictions and sentences have been repeatedly upheld. There is no basis to delay justice. 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.* This Court should deny Tisius's stay application.

Conclusion

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

Respectfully submitted,

ANDREW BAILEY
Attorney General

/s/Andrew J. Crane
Andrew J. Crane
Assistant Attorney General
Counsel of Record
Missouri Bar No. 68017
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-0264
Andrew.Crane@ago.mo.gov

Attorneys for Respondent