

**In the Supreme Court of the United States**

---

**Brian Dorsey,**  
Petitioner,

v.

**David Vandergriff, Warden,**  
Respondent.

---

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

---

ANDREW BAILEY  
*Missouri Attorney General*

GREGORY GOODWIN  
*Chief Counsel, Public Protection Section*  
*Counsel of Record*  
P.O. Box 899  
Jefferson City, MO 65102  
Gregory.Goodwin@ago.mo.gov  
(573) 751-7017

*Attorneys for Respondent*

## Capital Case

### Questions Presented

Brian Dorsey raised his Sixth Amendment claim on federal habeas review almost a decade ago but did not seek certiorari. Then, when the Missouri Supreme Court scheduled his execution four months ago, he raised the same claim again through a habeas petition in state court. Pet. 13–14. As Dorsey admits, the Missouri Supreme Court rejected that claim based on Dorsey’s failure to follow *state* law. *Id.* Dorsey now asks this Court to resolve what he describes as an “open question” about the Sixth Amendment—by appealing from a denial of state habeas on state-law grounds.

The Questions Presented are,

- I. Does this Court have jurisdiction to review a claim when a state court decides the matter on an adequate and independent, state-law ground?
- II. Does the text or history of the Sixth Amendment ban flat-flee representation agreements in criminal cases?

## Table of Contents

Questions Presented .....	1
Table of Contents .....	2
Table of Authorities .....	3
Opinions Below .....	3
Jurisdiction.....	5
Statement .....	6
Reasons for Denying the Petition .....	14
I. This case is a poor vehicle for considering the questions presented.....	14
A. The decision below rests upon an independent and adequate state-law ground. ....	14
B. The Court should not reward Dorsey’s strategy of twice withholding the claim from this Court, and then presenting the claim in an eleventh-hour certiorari petition from the denial of a procedurally barred state habeas petition.....	15
II. This Court’s should deny certiorari to respect our system of dual sovereignty. ....	17
III. Dorsey’s alleged split in authority does not warrant the Court’s discretionary review. ....	19
IV. The Supreme Court of Missouri’s <i>ex gratia</i> ruling is correct. ....	20
Reasons to Deny Dorsey’s Request for a Stay .....	22
Conclusion .....	25

## Table of Authorities

### Cases

<i>Bucklew v. Precythe</i> , 587 U.S. 119 (2019) .....	23
<i>Calderon v. Thompson</i> , 523 U.S. 538 (1998) .....	24
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991) .....	14, 15, 16
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980) .....	19, 20
<i>Dorsey v. Steele</i> , 4:15-CV-8000-RK, 2019 WL 4740518 (W.D. Mo. Sept. 27, 2019) .....	5
<i>Dorsey v. State</i> , 448 S.W.3d 276 (Mo. 2014) .....	20, 21, 22
<i>Dorsey v. Vandergiff</i> , 30 F.4th 752 (8th Cir. 2022) .....	11, 15
<i>Dretke v. Haley</i> , 541 U.S. 386 (2004) .....	19
<i>Fox Film Corp. v. Muller</i> , 296 U.S. 207 (1935) .....	14
<i>Gamble v. United States</i> , 139 S. Ct. 1960 (2019) .....	24
<i>Hill v. McDonough</i> , 547 U.S. 573 (2006) .....	22
<i>Home Depot U.S.A., Inc. v. Jackson</i> , 139 S. Ct. 1743 (2019) .....	14
<i>Kyles v. Whitley</i> , 498 U.S. 931 (1990) .....	17

<i>Lawrence v. Florida</i> , 549 U.S. 327 (2006) .....	17
<i>Marshall v. Lonberger</i> , 459 U.S. 422 (1983) .....	22
<i>Mickens v. Taylor</i> , 535 U.S. 162 (2002) .....	21
<i>Nance v. Ward</i> , 597 U.S. 159 (2022) .....	17
<i>Nelson v. Campbell</i> , 541 U.S. 637 (2004) .....	22
<i>Philadelphia &amp; Reading Coal &amp; Iron Co. v. Gilbert</i> , 245 U.S. 162 (1917) .....	17
<i>Shinn v. Ramirez</i> , 596 U.S. 366 (2022) .....	18, 19, 23
<i>State ex rel. Dorsey v. Vandergriff</i> , 2024 WL 1194417 (Mo. Mar. 20, 2024) .....	5, 6, 12, 13
<i>State ex rel. Strong v. Griffith</i> , 462 S.W.3d 732 (Mo. 2015) .....	15
<i>State v. Dorsey</i> , 318 S.W.3d 648 (Mo. 2010) .....	11
<i>Wainwright v. Sykes</i> , 433 U.S. 72 (1977) .....	14
<i>Younger v. Harris</i> , 401 U.S. 37 (1971) .....	19

#### Statutes

28 U.S.C. § 1257(a) .....	5
28 U.S.C. § 2254(d), (e) .....	18

### **Opinions Below**

The opinion of the Missouri Supreme Court is not yet published, but is available on Westlaw as *State ex rel. Dorsey v. Vandergriff*, 2024 WL 1194417 (Mo. Mar. 20, 2024). The opinion is reproduced as Pet. App. A. Dorsey previously raised an identical claim on federal habeas review. The district court's opinion denying the claim is not published, but is available on Westlaw as *Dorsey v. Steele*, 4:15-CV-8000-RK, 2019 WL 4740518 (W.D. Mo. Sept. 27, 2019).

### **Jurisdiction**

The Missouri Supreme Court issued its judgment denying Dorsey's state habeas opinion on March 20, 2024. Pet. App. A. The petition for writ of certiorari was filed on April 1, 2024. Dorsey invokes the Court's jurisdiction under 28 U.S.C. § 1257(a). Because the decision below relies on an independent and adequate state-law ground—a violation of Missouri procedural law—this Court does not have jurisdiction to consider the claim, as explained more fully below.

## Statement<sup>1</sup>

1. In 2006, just two days before Christmas, S.B. (Dorsey's cousin) started the day by baking cookies and making a gingerbread house with her mother and her four-year old daughter, J.B. Dist. Dkt. 29-2 at 23.<sup>2</sup> That night, J.B. was to spend the night with her grandparents. *Id.* After they finished baking cookies and making the gingerbread house, J.B. left with S.B.'s mother. *Id.*

Sometime between 3:00 p.m. and 6:30 p.m., Dorsey asked S.B., his cousin, for money and help because Dorsey owed money to drug dealers. *Id.* at 33, 37. S.B.'s husband, B.B., agreed to help Dorsey confront some drug dealers who were at Dorsey's apartment without permission. *Id.* at 37. S.B., B.B., and their friend went to Dorsey's apartment to help Dorsey. *Id.* S.B. and B.B. stayed until the drug dealers left, and then they took Dorsey into their home to protect him. *Id.* at 33. Before leaving the apartment, S.B. told Dorsey to gather Dorsey's dirty clothes so that S.B. could wash them for him. *Id.* at 33–34. When J.B. learned that Dorsey intended to spend the night at the couple's home, J.B. wanted to come home so she could see Dorsey. Dist. Dkt. 29-2, at

---

<sup>1</sup> Supreme Court Rule 15 requires a respondent to “address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted.” Dorsey's petition contains such misstatements. For instance, Petitioner's Appendix F was never presented to the Supreme Court of Missouri during the state habeas proceedings. It is, therefore, outside the record of this Court.

<sup>2</sup> Respondent cites to the record of the district court that adjudicated Dorsey's federal habeas petition.

23. S.B.'s mother brought J.B. back home and then stayed for a while to visit. Dist. Dkt. 29-2, at 24. Other friends and family members joined in. Dist. Dkt. 29-2, at 23.

The women visited inside the house while the men, including Dorsey, went to the "shop" to drink beer and shoot pool. Dist. Dkt. 29-2, at 24, 29–30, 38. Before the men could shoot pool, they had to clean off the pool table. Dist. Dkt. 29-2, at 30, 38. B.B. removed a single-shot 20-gauge shotgun from the pool table. Dist. Dkt. 29-2, at 38. The shotgun was B.B.'s first gun, a gift from his father. Dist. Dkt. 29-2, at 88. The shotgun was unloaded. Dist. Dkt. 29-2, at 38. Eventually, all of the houseguests left, leaving S.B., B.B., J.B., and Dorsey in the house.

After everyone went to bed, Dorsey retrieved the shotgun and shot S.B. in the lower right jaw. Dist. Dkt. 29-2, at 67, 128. The force of the shotgun blast was so powerful that it separated S.B.'s brain from her spinal cord, doing "massive damage to [her] brain." Dist. Dkt. 29-2, at 67. It was a "devastating injury." Dist. Dkt. 29-2, at 68. Dorsey shot B.B. in the head with the shotgun as well. Dist. Dkt. 29-2, at 68, 128. B.B.'s gunshot wound had gunpowder in it, proving that the wound was a "close-contact wound" where the gun was "pressed very close" to B.B.'s body. Dist. Dkt. 29-2, at 68. Dorsey then raped S.B.. Dist. Dkt. 29-2, at 100.



After murdering S.B. and B.B. and raping S.B., Dorsey stole personal property, such as S.B.'s old cell phone, S.B. and B.B.'s jewelry, two firearms, and J.B.'s DVD copy of Bambi II. Dist. Dkt. 29-2, at 28, 32, 74, 76, 87. Dorsey used these items to try to repay his drug debt. Dist. Dkt. 29-2, at 39–41. Dorsey also stole S.B.'s car. Dist. Dkt. 29-2, at 22–23, 90. Dorsey could not take his own car because B.B., who was a mechanic, had been repairing Dorsey's car at B.B.'s expense, but the repairs were not finished. Dist. Dkt. 29-2, at 22–23, 90.

On Christmas Eve, S.B.'s mother received a phone call because S.B., B.B., and J.B. had not yet arrived for a family gathering. Dist. Dkt. 29-2, at 24. S.B.'s mother and father went to the couple's home to check on them. Dist. Dkt. 29-2, at 24. When they entered the house, they found J.B. sitting on the couch drinking chocolate milk and eating chips. Dist. Dkt. 29-2, at 24. J.B. jumped up and was glad to see her grandparents, and she said that she could not wake up S.B.. Dist. Dkt. 29-2, at 22, 24. After knocking on the bedroom door and calling for S.B. and B.B., S.B.'s father forced the door open and discovered the bodies. Dist. Dkt. 29-2, at 24–25.

When law enforcement entered the bedroom, they noticed the smell of bleach coming from S.B.'s body. Dist. Dkt. 29-2, at 56. S.B.'s mid-section and groin bore a "pour pattern," which was revealed under an alternative light source. Dist. Dkt. 29-2, at 57, 60. S.B.'s body was examined and a rape kit was performed. Dist. Dkt. 29-2, at 69. Swabs were collected for DNA testing. Dist.

Dkt. 29-2, at 97. Upon examination, those vaginal swabs screened positive for the presence of semen. Dist. Dkt. 29-2, at 98. The crime lab could not confirm that semen was present because of “chemical insults,” which included “soap, detergent, cleansers and so forth.” Dist. Dkt. 29-2, at 98. Sperm cells were detected. Dist. Dkt. 29-2, at 98. Dorsey could not be eliminated as the contributor of the DNA found on the vaginal swabs. Dist. Dkt. 29-2, at 100.

When Dorsey was interviewed by police officers, he confessed to the murders, telling officers they had the “right guy concerning the death of the Bonnies.” Dist. Dkt. 29-2, at 79. Dorsey also had S.B.’s social security card in his back pocket. Dist. Dkt. 29-2, at 78.

After the murder, S.B.’s parents began raising J.B. Dist. Dkt. 29-2, at 26. S.B.’s mother had to retire from working. Dist. Dkt. 29-2, at 26. J.B. began attending counseling. Dist. Dkt. 29-2, at 26. S.B.’s mother described J.B.’s “nightmares and crying” as “just horrible.” Dist. Dkt. 29-2, at 26.

2. Dorsey’s experienced trial attorneys advised him to plead guilty because, in one counsel’s view, “the evidence of [Dorsey’s] guilt was overwhelming” and there was “a substantial chance of losing on murder first degree” and “a very substantial chance that [Dorsey] would receive the death penalty.” Dist. Dkt. 29-11 at 588. Dorsey agreed with counsels’ advice and pleaded guilty.

Dorsey then received jury sentencing, where his counsels determined the best strategy was for Dorsey to accept responsibility, for Dorsey to try to get credit for that acceptance from the jury, and for Dorsey to show the jury that he “had some humanity in him.” Dist. Dkt. 29-11, at 589. One trial counsel hoped to show the jury that this murder was “an aberration for [Dorsey]; that [Dorsey] had a history of being a good person, that [Dorsey] had some things in him that a jury could connect to.” Dist. Dkt. 29-11, at 595. In that trial counsel’s experience, juries that returned life verdicts did so because of that kind of evidence. *Id.* Dorsey’s other trial counsel explained that the trial strategy was “to present [Dorsey] as best we could, as sorry, remorseful, deeply upset.” Dist. Dkt. 29-11, at 731. At the sentencing, the prosecutor described trial counsel’s closing argument as “a very eloquent plea for mercy.” Dist. Dkt. 29-2, at 145.

Dorsey’s trial counsel employed an investigator, and used that investigator as they worked through Dorsey’s case. Dist. Dkt. 29-2, at 566, 570, 579. Additionally, trial counsel received information and investigative materials from the Missouri State Public Defender System, and used that information as they prepared Dorsey’s defense.<sup>3</sup> Dist. Dkt. 29-2, at 247.

---

<sup>3</sup> In the petition, Dorey asserts that there “is no dispute regarding the following facts. . . .” Pet. at 11. The following list is argument, not facts, and is disputed by the State in any event.

Despite trial counsels' best efforts, the jury returned verdicts of death. Dist. Dkt. 29-2, at 149. The jury found seven aggravating circumstances, including that the murders were outrageously and wantonly vile, horrible, and inhuman, that the murders were committed so Dorsey could steal, and that Dorsey raped S.B.. Dist. Dkt. 29-2, at 149.

3. After his conviction and sentences of death, Dorsey appealed, and the Missouri Supreme Court affirmed Dorsey's convictions and sentences. *State v. Dorsey*, 318 S.W.3d 648 (Mo. 2010). This Court denied certiorari review. *Dorsey v. Missouri*, 562 U.S. 1067 (2010). Dorsey then sought collateral post-conviction relief, which the post-conviction court denied. The Missouri Supreme Court affirmed the denial of post-conviction relief. *Dorsey v. State*, 448 S.W.3d 276 (Mo. 2014). Dorsey requested and received additional time to file a certiorari petition in this Court from the Supreme Court of Missouri's denial of post-conviction relief. *Dorsey v. Missouri*, 14A-987 (2015). However, it does not appear that Dorsey filed for certiorari review. Instead, Dorsey petitioned for federal habeas review, and the district court denied Dorsey's claims without granting a certificate of appealability. *Dorsey v. Steele*, 2019WL 4740518 (W.D. Mo. Sept. 27, 2019). An administrative panel of the Eighth Circuit granted a certificate of appealability, but after briefing and argument, the merits panel determined that Dorsey was not entitled to habeas relief. *Dorsey v. Vandergiff*, 30 F.4th 752 (8th Cir. 2022). Dorsey litigated additional issues in federal court

unrelated to this certiorari petition. *See, e.g., Dorsey v. Vandergriff*, 23-5652 (2023).

4. After this Court denied certiorari review of Dorsey’s federal habeas petition, the State requested that the Supreme Court of Missouri issue an execution warrant. Dorsey opposed that motion on June 21, 2023. One of the reasons for Dorsey’s opposition was his claim that he had a “soon-to-be-filed [state habeas] petition,” and the Missouri Supreme Court should adjudicate that forthcoming petition first. Resp. App. A3. Over the next six months, Dorsey did not file his state habeas petition. The Missouri Supreme Court issued an order on December 13, 2023, setting Dorsey’s execution date for April 9, 2024. Then, after the Supreme Court of Missouri issued its execution warrant, Dorsey filed a state habeas petition, raising a claim that his trial attorneys labored under a conflict of interest due to their flat-fee arrangement with the Missouri State Public Defender System.

The Supreme Court of Missouri denied Dorsey’s state habeas petition. Pet. App. A. The Supreme Court of Missouri held that Dorsey’s conflict-of-interest claim was not “legally cognizable” and was “procedurally barred” under Missouri law because the claim had already been raised and denied on post-conviction appeal. *State ex rel. Dorsey v. Vandergriff*, 2024 WL 1194417 at \*1-\*2. In addition, the Supreme Court of Missouri performed *ex grata* review

of the merits of Dorsey's claim. *Id.* at \*6–7. The court found the claim was meritless.

## **Reasons for Denying the Petition**

### **I. This case is a poor vehicle for considering the questions presented.**

For at least two reasons, this case is a poor vehicle for the Court's consideration of Dorsey's questions presented. *First*, Dorsey's claim was adjudicated on an independent and adequate state law ground, and that deprives this Court of jurisdiction. And *second*, Dorsey's strategy of withholding the claim from this Court during federal habeas review in favor of a dilatory, eleventh-hour certiorari petition counsels strongly against granting review.

#### **A. The decision below rests upon an independent and adequate state-law ground.**

"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). The "well-established principle of federalism" means 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)).

Missouri’s state habeas procedural rules prohibit belated 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 (Mo. 2015) (quotations omitted). Despite this rule, Dorsey filed a state habeas petition complaining, *inter alia*, that his trial counsel received a flat-fee from the Missouri State Public Defender System to represent him. When the Supreme Court of Missouri considered the petition, it noted that Dorsey had presented this claim on post-conviction relief appeal, and that the court had denied the claim. *State ex rel. Dorsey v. Vandergiff*, 2024WL 1194417 at \*5 (Mo. Mar. 20, 2024). The Supreme Court of Missouri, having previously set out the state’s procedural rules, held that “Dorsey’s claim for relief must be denied as duplicative.” *Id.* (citing *Griffith*, 462 S.W.3d at 733–34). 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.

**B. The Court should not reward Dorsey’s strategy of twice withholding the claim from this Court, and then presenting the claim in an eleventh-hour certiorari petition from the denial of a procedurally barred state habeas petition.**

This petition suffers from yet another vehicle problem: Dorsey has engaged in a bad-faith litigation strategy designed to present his claim at the



eleventh hour, despite having two previous opportunities to raise the claim to this Court in certiorari petitions.

Dorsey could have raised this claim on certiorari review nearly a decade ago. As Dorsey conceded to the Missouri Supreme Court, he raised the claim in post-conviction relief. The Missouri Supreme Court denied Dorsey's post-conviction relief appeal on November 12, 2014. Dorsey then sought—and received—an extension of time to file a certiorari petition in this Court. *Dorsey v. Missouri*, 14A987 (Mar. 20, 2015). But Dorsey never filed a certiorari petition with the Court.

Instead, Dorsey proceeded with federal habeas review. In federal habeas review, Dorsey raised the flat-fee claim. *Dorsey v. Steele*, 4:15-CV-8000-RK, 2019WL 4740518 at \*4–\*6 (W.D. Mo. Sept. 27, 2019). The district court denied relief on the claim, finding that the Missouri Supreme Court's adjudication of the claim was not an unreasonable application of, or contrary to, clearly established federal law. *Id.* The district court also found that the Missouri Supreme Court's decision was not based on an unreasonable determination of the facts. *Id.* Dorsey did not receive a certificate of appealability on any claim from the district court, but did receive a certificate of appealability on a different claim from an administrative panel of the Eighth Circuit. After that court denied habeas relief, Dorsey sought certiorari review. *Dorsey v.*

*Vandergriff*, 23-1078 (July 6, 2023). But again, Dorsey did not raise the flat-fee claim.

The Court should not reward Dorsey’s bad-faith strategy of intentional delay. This Court has recently reaffirmed that it disfavors the use of a last-minute legal challenge as a pretext to achieve a stay of execution. *See, e.g., Nance v. Ward*, 597 U.S. 159, 174 (2022). While *Nance* spoke to the specifics of a § 1983 challenge, its reasoning applies with equal force to the situation here, namely, a dilatory certiorari petition seeking to present a procedurally defaulted, previously denied claim that the petitioner deliberately chose not to present to this Court on two prior occasions. *See id.* (holding “we do not for a moment countenance ‘last-minute’ claims relied on to forestall an execution.”). That is doubly true when, as here, review is discretionary. *Philadelphia & Reading Coal & Iron Co. v. Gilbert*, 245 U.S. 162, 165 (1917).

## **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 v. Ramirez*, 596 U.S. 366, 375 (2022) (citations omitted). The States are primarily responsible for enforcing criminal law and for “adjudicating constitutional challenges to state convictions.” *Id.* at 376 (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 377 (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 378; 28 U.S.C. § 2254(d), (e). Dorsey 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. In his petition to this Court, Dorsey did not raise a claim about the flat fee arrangement.

Dorsey’s convictions and sentences have been exhaustively reviewed and affirmed in state and federal court. A grant of certiorari now would allow Dorsey 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 Dorsey’s petition. *Shinn*, 596 U.S. 379 (quoting *Dretke v. Haley*, 541 U.S. 386, 388 (2004)).

### **III. Dorsey’s alleged split in authority does not warrant the Court’s discretionary review.**

In order to support his request for review, Dorsey attempts to manufacture a split in authority between the Missouri Supreme Court and the Kansas Supreme Court, the New Mexico Supreme Court, and the Fourth Circuit. Pet. at 15–20. But that does not make this case worthy of the Court’s review because the *ex gratia* portion of the decision below rests on the Missouri Supreme Court’s *factual determination* that Dorsey failed to present evidence to show he was entitled to relief, even under his theory of the case.

While Dorsey discusses, at considerable length, the theoretical impact of his alleged split in authority, Dorsey does not address the actual factual holdings of the Supreme Court of Missouri. Pet. at 20–25. Indeed, Dorsey demands that this Court grant review so that Missouri courts are forced to apply his version of *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).<sup>4</sup> But the Supreme Court of Missouri explained that it previously found, as a factual

---

<sup>4</sup> While Dorsey’s petition is focused on capital cases, Dorsey does not offer any reason why his announced rule would not prohibit flat-fee representation agreements in *all* criminal cases. There is none.

matter, that “Dorsey failed to demonstrate a conflict of interest” under the facts of his case. *State ex rel. Dorsey v. Vandergiff*, 2024WL 1194417 at \*6. The court further said that “trial counsel's actions were based on reasonable trial strategy and not financial limitations due to the flat-fee arrangement, and so Dorsey was not prejudiced.” *Id.* Accordingly, under the holding of the case below, Dorsey’s alleged split in authority is irrelevant because the Missouri Supreme Court found that Dorsey had failed to prove facts that showed he was entitled to relief, even under his theory of the case law.

#### **IV. The Supreme Court of Missouri’s *ex gratia* ruling is correct.**

In his state habeas petition, Dorsey argued that his trial counsels’ flat fee arrangement created a conflict of interest that required reversal under *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). The Supreme Court of Missouri, *ex gratia*, declined to find that a flat fee arrangement creates a per-se conflict of interest. *State ex rel. Dorsey v. Vandergiff*, 2024WL 1194417 at \*5–6. In its previous holding, the Supreme Court of Missouri held, based on the record before the post-conviction motion court, that the flat fee arrangement had no adverse impact on Dorsey’s representation. *Dorsey v. State*, 448 S.W.3d 276, 300 (Mo. 2014). Both holdings preclude relief here.

*First*, the Missouri Supreme Court reasonably found that flat fee arrangements do not create a *per se* conflict of interest reviewable under the *Cuyler* framework. *State ex rel. Dorsey v. Vandergiff*, 2024WL 1194417 at \*6.

As the court explained on post-conviction relief appeal, “No Missouri court has found that a flat fee arrangement creates a conflict of interest.” *Dorsey v. State*, 448 S.W.3d 276, 300 (Mo. 2014). In its opinion in the state habeas case, the Missouri Supreme Court also explained that it previously found, as a factual matter, that “Dorsey failed to demonstrate a conflict of interest” under the facts of his case. *State ex rel. Dorsey v. Vandergiff*, 2024WL 1194417 at \*6. The court further said that “trial counsel's actions were based on reasonable trial strategy and not financial limitations due to the flat-fee arrangement, and so Dorsey was not prejudiced.” *Id.*

Similarly, this Court’s precedents do not “clearly establish, or indeed even support” an expansive application of the *Cuyler* framework to “all kinds of alleged attorney ethical conflicts,” like when representation “somehow implicates counsel’s personal or financial interests.” *Mickens v. Taylor*, 535 U.S. 162, 174–75 (2002). Instead, this Court has only applied the *Cuyler* framework in cases involving the active representation of codefendants. *Id.* But Dorsey committed the offenses alone, so there were no codefendants; thus, the Missouri Supreme Court had no obligation to find a conflict of interest under clearly established federal law. *Id.*

*Second*, the state-court record precludes a finding that there was a conflict of interest in this case. The trial court found, after hearing testimony and receiving exhibits that “the fee arrangement did not influence counsel’s

decisions or impact the effectiveness of their representation.” *Dorsey v. State*, 448 S.W.3d 276, 300 (Mo. 2014). This finding is bound up with trial court’s determination that trial counsel’s testimony was credible. *Id.* Federal courts have “no license” to re-determine state-court credibility findings, so Dorsey’s claim must fail in light of counsels’ credible testimony that there was no adverse impact on Dorsey’s defense. *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983).

### **Reasons to Deny Dorsey’s Request for a Stay**

For many of the same reasons above, the Court should deny Dorsey’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). Dorsey’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 Dorsey’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.*

Dorsey cannot meet any of the traditional factors required for stay of execution. Dorsey has little possibility of success because, as discussed above,

Dorsey’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 the *ex gratia* portion of the decision below was correct.

Dorsey will not be injured without a stay. Dorsey murdered his victims nearly twenty years ago, and he has had ample time to seek review of his convictions in state and federal courts. Indeed, he has had *two* prior chances to raise this claim on certiorari review. 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*, 587 U.S. 119, 149 (2019). This Court’s role is to ensure that Dorsey’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.* Dorsey’s last-minute complaints about the technical requirements of state law cast no doubt on his guilt or the appropriateness of his sentence, and he has no legitimate interest in delaying the lawful execution of his sentence.

A stay would also irreparably harm both the State and Dorsey’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*, 596 U.S. at 376 (quoting *The Federalist* No. 39,



p. 245 (J. Madison) (Clinton Rossiter ed. 1961)); *see also Gamble v. United States*, 139 S. Ct. 1960, 1968–1969 (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).

Dorsey 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 Dorsey’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. Resp. Pet. at A14–A29. The parents of B.B. have explained under oath “the murders have had a terrible impact on us and our family” (*id.* at A14), that “We are certain that we cannot obtain closure until Brian Dorsey’s sentence is carried out” (*id.*), and that “Any

further delay would devastate us. Every court proceeding brings the pain of losing our son back. We want this part of our journey to end. It has been a long journey. We want justice to be done in this case” (*id.* at A15). Meanwhile, family members of S.B. have explained under oath that “As a result of the murders, my family and I have lived a nightmare every day for 17 years” (*id.* at A16), and that “If the execution is delayed, I will not be able to find justice and will be forced to continue to live this nightmare” (*id.* at A17). The victims’ orphaned daughter, also under oath, said “Because I was too young before, this is my first chance to participate in court proceedings. I wish to tell all courts: Please do not delay the execution.” *Id.* at A23.

In short, a stay would impose terrible suffering on the surviving victims. This Court should deny Dorsey’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/ Gregory M. Goodwin

GREGORY GOODWIN

*Chief Counsel, Public Protection Section*

*Counsel of Record*

P.O. Box 899

Jefferson City, MO 65102

Gregory.Goodwin@ago.mo.gov

(573) 751-7017

*Attorneys for Respondent*