Nos. 23-7153 and 23A890

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

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Capital Case

Questions Presented

1. Should this Court review a claim where the court below found the claim was not legally cognizable as a matter of state law?
2. Should this Court review a fact-bound claim when the petitioner failed to present the necessary facts to the factfinder?
3. Should this Court reconsider the "evolving standards of decency" framework?

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

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,* 2024WL 1194417 (Mo. Mar. 20, 2024). The opinion is reproduced as Pet. App. A.

Jurisdiction

The Supreme Court of Missouri issued its judgment denying Dorsey's state habeas petition 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).

Statement[1]

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 four-year old daughter, J.B., and S.B.'s mother. Dist. Dkt. 29-2 at 23.[2] 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*. Between 3:00

[1] 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, Dorsey makes statements of supposed fact and then cites to the decision below to support those statements. *See, e.g.,* Pet. at 2. But the opinion below says "Dorsey alleges . . . ." In other words, Dorsey made allegations below, which were rejected, and then cites to the opinion below as though that court agreed with Dorsey when it did not.

[2] Respondent cites to the record of the district court that adjudicated Dorsey's federal habeas petition.

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. B.B., S.B.'s husband, 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 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 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 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., 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 and calling for S.B. and B.B., S.B.'s father forced the bedroom door open and they 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 had 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 [S.B. and B.B.]." 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 to the jury that he "had some humanity in him." Dist. Dkt. 29-11, at 589. One trial counsel hoped to show to 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.[3] Dist. Dkt. 29-2, at 247.

Despite trial counsels' best efforts, the jury returned verdicts of death. Dist. Dkt. 29-2, at 149. The jury found seven aggravating circumstances beyond a reasonable doubt, 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-

[3] In the petition, Dorey asserts 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.

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. Vandergriff*, 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 of Missouri 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 the claim that is before this court in *Dorsey v. Vandergriff*, 23-7119.

Weeks later, Dorsey filed yet another state habeas petition, this time raising claims that he was actually innocent of the death penalty, that he could make a gateway claim of actual innocence, and that, as relevant here, the Eighth Amendment barred his execution. Dorsey offered no evidence to support his claim other than a declaration from a former warden, and two expert reports. The Missouri Supreme Court found that Dorsey's claim, as pleaded, was not legally cognizable because it was a plea for clemency. *State ex rel. Dorsey v. Vandergriff*, SC100486, 2024WL 1194417 at *1, *8 (Mo. Mar. 20, 2024). The court also performed *ex gratia* review, rejected his evidence, and found that his claim would fail. *Id*. at *8.

Reasons for Denying the Petition

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

For at least three reasons, this case is a poor vehicle for the Court's consideration of Dorsey's questions presented. *First*, Dorsey has brought this claim as part of a piecemeal litigation strategy of extreme delay. *Second*, Dorsey's claim is fact-bound, yet he presented no facts to support his claim, only opinions from retained persons, to the state courts. And *third*, the Supreme Court of Missouri found the claim was not legally cognizable in state habeas, and its rejection of the claim on that basis is an independent and adequate state law ground, which precludes this Court's review.

A. Dorsey's tactical decision to hold his claim in reserve until the eleventh hour is a sufficient reason to deny certiorari review.

Dorsey has engaged in a bad-faith litigation strategy designed to withhold his claim until the eleventh hour, despite having the opportunity to present this claim months or years ago.

Although Dorsey argues otherwise, Dorsey could have presented his claim long ago. The gravamen of Dorsey's complaint is that he has been sufficiently "rehabilitated" such that his execution will violate the Eighth Amendment. Pet. 25. Dorsey does not identify what constitutes "rehabilitation." Likewise, Dorsey does not identify when his "rehabilitation"

was complete.[4] However, during post-conviction relief proceedings in 2012, Dorsey was arguing that his prison records showed he should not be executed. Then, Dorsey used his alleged good behavior in prison to support his federal habeas petition. *Dorsey v. Steele*, 4:15-CV-8000-RK, 2019WL 4740518 at *18–19 (W.D. Mo. Sept. 27, 2019). That claim was reviewed by the Eighth Circuit. *Dorsey*, 30 F.4th at 754. Dorsey never says whether he was "rehabilitated" during post-conviction relief, federal habeas review, or only after an execution date was set. Pet. 4 n.2. If, as Dorsey suggests, his "rehabilitation" occurred when he was imprisoned because he was removed from drugs, then Dorsey was "rehabilitated" seventeen years ago.

Recognizing that he has delayed bringing the claim, Dorsey attempts to justify his delay by contending that his claim did not become ripe until an execution warrant was issued. Pet. 4 n.2. Even assuming that Dorsey is right, that means Dorsey believes his claim became ripe on December 13, 2023. But Dorsey did not file his claim in December. Nor did he file his claim in January. Instead, Dorsey waited more than two months, and then filed his claim on February 25, 2024. There is no plausible explanation for this delay.

[4] As explained in Point II, *infra*, this free-form analysis strongly counsels against adopting Dorsey's argument and against the "evolving standards of decency" framework.

Then, less than a month later, on March 20, 2024, the Missouri Supreme Court rejected Dorsey's claim. Instead of filing his petition for this Court's review immediately, Dorsey waited until Sunday, April 7, 2024, a mere 54 hours before the execution. Again, there is no plausible explanation for this delay, especially when, as here, Dorsey has already filed a petition for certiorari review arising from the same opinion that he now challenges in this case number.

The Court should not reward Dorsey's 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: a dilatory certiorari petition seeking to present a procedurally barred claim that the petitioner deliberately chose not to present to this Court until the eleventh hour. *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).

B. Dorsey's claim here is fact bound, but Dorsey refused to develop the factual basis in the record below.

Under Dorsey's own articulation of his theory for relief, Dorsey's claim is fact bound. That is, it turns on several nebulous pieces of evidence. For instance, Dorsey has alleged that many corrections officers have signed a letter in support of his clemency petition. Pet. 11. But Dorsey refused to provide those letters to the Supreme Court of Missouri. *State ex rel. Dorsey v. Vandergriff*, 2024WL 1194417 at *7 n.11 (Mo. Mar. 20, 2024). And when Respondent pointed out Dorsey's refusal below, Dorsey argued he was not required to include his evidence along with his petition because he had requested an evidentiary hearing. Reply in Supp. at 6, *State ex rel. Dorsey v. Vandergriff*, SC100486 (Mo). Dorsey's certiorari petition says nothing about the record now. Pet. 1–33. That is because the record is devoid of any evidence that could support his argument.

Elsewhere, Dorsey argues that he has a spotless prison record, and that "no death-sentenced person has ever had a better prison record." Pet. 5. Despite having the prison records, Dorsey refused to include them in the record below. *State ex rel. Dorsey v. Vandergriff*, 2024WL 1194417 at *7 n.11 (Mo. Mar. 20, 2024). But when the United States Court of Appeals reviewed some

of Dorsey's prison records, they described them as equivocal.[5] *Dorsey*, 30 F.4th at 754. That court noted that Dorsey "had not '[e]xpressed need for self-improvement,' had '[d]efied authority,' had not '[a]ccepted responsibility for his situation,' and was '[s]elf-centered.'" *Id.* (alterations in original). Dorsey's experts declined to confront the Eighth Circuit's finding.

Dorsey's argument relies on little more than his lawyers' arguments, and statements signed by those retained by Dorsey's attorneys. If the Eighth Amendment prohibits the execution of a person whose attorneys have retained experts to say the person's life should be spared, then there can be no capital punishment. And yet, capital punishment is not barred by the Eighth Amendment. *Bucklew v. Precythe*, 587 U.S. 119, 131–32 (2019) (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)).

At bottom, Dorsey has constructed a new theory, and he has contended that his theory's analysis depends on what he calls the unique facts of his case, but Dorsey has refused to include evidence that would support those facts in the record for this Court's consideration. His argument is unworkable, and his claim is unreviewable. That is reason alone to refuse certiorari review.

[5] When Dorsey committed the instant offenses, he was on supervision for another offense and he was returned to prison to serve his sentence while awaiting the trial.

C. The decision below rests on 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 does not allow state courts to adjudicate requests for clemency because the Missouri constitution reserves clemency decisions to the Missouri Governor. *See, e.g., Cooper v. Holden*, 189 S.W.3d 614, 620 (Mo. App. 2006); *see also* Mo. Const. art. IV, § 7. This rule is a jurisdictional in nature; pleas for clemency are outside the case-or-matter jurisdictional requirement of the Missouri constitution.[6] *Cooper*, 189 S.W.3d at 620. Because an adequate and

[6] The Missouri Supreme Court's holding in Dorsey's case is similar to Justice Frankfurter's statement respecting the denial of a motion for stay of execution more than 70 years ago. *Rosenberg v. United States*, 346 U.S. 322,

independent state-law ground supports the Missouri Supreme Court's order below, this Court has "no power to review" the order, and the "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.

None of this means that a properly constructed Eighth Amendment claim would be unreviewable. To be sure, Dorsey could have constructed a state habeas petition that would have properly presented an Eighth Amendment claim. But he did not. And if there were no state court procedure available, then Dorsey could have attempted to file a second-in-time federal habeas petition. But he did not. Instead, Dorsey decided to proceed in a way and in a forum that resulted in a decision that rests upon an adequate and independent state law ground. Dorsey's decision, in turn, precludes this Court's review.

II. If the Court grants certiorari review, it should also overrule the "evolving standards of decency" framework.

Dorsey's argument is premised on the "evolving standards of decency" framework announced by a plurality of the Court in *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). The Missouri Supreme Court rightly denied this claim. As set forth elsewhere, the Court should deny this petition. But if the Court grants review, it should also consider whether *Trop* and its

322 (1953) ("It is not for this Court even remotely to enter into the domain of clemency reserved by the Constitution exclusively to the President.").

progeny—in particular *Kennedy v. Louisiana*, 554 U.S. 407 (2008)—are consistent with the original public meaning of the Eighth Amendment.[7]

A. The original public meaning of the Eighth Amendment prohibits punishments that were cruel and unusual at the time of the founding.

In *Bucklew v. Precythe*, 587 U.S. 119, 130 (2019), the Court began with a brief discussion of the constitutionality of capital punishment. The Court first observed that capital punishment is provided for in the text of the constitution. *Id.* (citing Amend. V). Then the Court observed that, as a general principle, "the judiciary bears no license to end a debate [over capital punishment] reserved for the people and their representatives." *Bucklew*, 587 U.S. at 130.

B. The "evolving standards of decency" framework is ahistorical, atexual, and antithetical to the structure of our Constitution.

Dorsey's invocation of the "evolving standards of decency" framework for death penalty abolition—for him at least—runs counter to this country's

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[7] Respondents are without sufficient time to draft a conditional-cross petition because Dorsey delayed bringing his certiorari petition until 11:19 a.m. on Sunday, April 7, 2024. The Court could treat this point as a conditional cross petition. Or, if the Court grants certiorari, then the Court should add the following questions:

1. Whether the "evolving standards of decency" framework of *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion), is consistent with the original public meaning of the Eighth Amendment?

2. Whether *Kennedy v. Louisiana*, 554 U.S. 407 (2008), was rightly decided?

constitutional history. When the Constitution was adopted, the death penalty was "the standard penalty for all serious crimes." *Bucklew*, 587 U.S. at 129 (quoting S. Banner, The Death Penalty: An American History 23 (2002) (Banner)). Indeed, "The death penalty was an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights." *Glossip v. Gross*, 576 U.S. 863, 867 (2015). One need look no further than the text of the constitution itself, which expressly recognizes the possibility of capital punishment. Amend. V.

Nearly 150 years ago, this Court held that the Eighth Amendment's ban on cruel and unusual punishment required something more than "the mere extinguishment of life." *In re Kemmler*, 136 U.S. at 447 (citing *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878)). More recently, Justice Thomas articulated the Eighth Amendment's original public meaning as prohibiting a punishment that superadded pain. *Baze v. Rees*, 553 U.S. 35, 96 (2008) (Thomas, J., concurring). This Court has come just short of acknowledging the evolving-standard-of-decency's shortcomings. *Bucklew*, 587 U.S. at 135. Yet, the dissenting justices in *Bucklew* continued to rely on the "evolving standards of decency" framework, and on *Kennedy v. Louisiana*, 554 U.S. 407 (2008). *Bucklew*, 587 U.S. at 158 (Breyer, J., dissenting). But as *Bucklew*, *Glossip*, *Kemmler*, and *Wilkerson*, show, *Trop* and *Kennedy* are inconsistent with the

original public meaning of the Eighth Amendment, and if this Court grants certiorari review, then it should also direct that this question be briefed.

Little needs to be said to show that the "evolving standards of decency" framework is atextual. The *Trop* plurality did not attempt to tie its creation of this new framework to the Constitution's text. In its analysis, the *Trop* plurality first wrote, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop*, 356 U.S. at 100. From there, the plurality went on to hold that "the words of the Amendment are not precise, and that their scope is not static." *Id.* at 100–01. The plurality then concluded, "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101.

In this one paragraph, four justices wrote that the Eighth Amendment is unclear and that its text must be separated from its purpose, and they then invented a new framework to analyze Eighth Amendment claims that was "not static." *Id.* at 99–101. In other words, the "evolving standards of decency" framework is not accidentally atextual, it is purposefully atextual on purpose.

But the framework is more than just merely ahistorical and atextual; it is antithetical to the Constitution itself. The purpose of the test, according to the *Trop* plurality, is to allow five—or sometimes even four—justices to determine on an *ad hoc* basis whether they wish to allow the death penalty to continue in a given instance. In other words, as one commentator put it, the

"evolving standards of decency" framework is "an extraordinarily results-oriented approach to the Cruel and Unusual Punishments Clause." John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment As A Bar to Cruel Innovation*, 102 Nw. U.L. Rev. 1739, 1756 (2008). Other commentators have reached the same conclusion, writing that "'[e]volving standards of decency' has been an especially decisive factor in cases regarding capital punishment, creating a non-static standard that can vary with the composition of who sits on the bench." Jared Lockhart & Madeline Hill, *Evolving Standards of Decency: A View of 8th Amendment Jurisprudence and the Death Penalty*, 34 BYU Prelaw Review at 34 (2020). And still others have written that the framework is little more than "an expressly living constitution honoring framework of constitutional analysis." Jeffrey Omar Usman, *State Legislatures and Solving the Eighth Amendment Ratchet Puzzle*, 20 U. Pa. J. Const. L. 677, 725 (2018).

Of course, many writers expressly acknowledged that the end-goal of the "evolving standards of decency" framework is the abolition of the death penalty. *See e.g.,* Calla M. Mears, *Risk of Choking to Death on One's Own Blood Is Not Cruel and Unusual Punishment* Bucklew v. Precythe, 139 S. Ct. 1112 (2019), 85 Mo. L. Rev. 609, 630 (2020) ("then maybe we have no business imposing [the death penalty] at all."); John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of*

the U.S. Constitution's Eighth Amendment, 27 Wm. & Mary Bill Rts. J. 989, 1076 (2019) ("For the Eighth Amendment to be read in a principled manner, though, the punishment of death . . . must be declared unconstitutional."); John H. Blume *et. al.*, *Death by Numbers: Why Evolving Standards Compel Extending* Roper's *Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98 Tex. L. Rev. 921, 951 (2020).

The upshot is clear: the "evolving standards of decency" framework is inconsistent with the structure of our Constitution. Under "Our Federalism," it is the States, not the federal government, that bear primary responsibility for drafting, enacting, and enforcing criminal law. *Younger* v. *Harris*, 401 U.S. 37, 43–45 (1971); *see also Shinn v. Ramirez*, 596 U.S. 366, 376 (2022) ("The power to convict and punish criminals lies at the heart of the States' 'residuary and inviolable sovereignty.'") (citing The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison). But as Dorsey's argument and the above commentators show, the "evolving standards of decency" framework is little more than a method to allow federal courts to veto the application of the death penalty. The only difference is the scope of the veto. Some advocate for an all-out ban, others for a never-ending stream of categorical exceptions, and still others, like Dorsey, for the imposition of individualized vetoes. Pet. 20–24, 27–28.

None of that can be squared with the history, text, or structure of our Constitution. Again, "the same Constitution that permits States to authorize

capital punishment also allows them to outlaw it. But it does mean that the judiciary bears no license to end a debate reserved for the people and their representatives." *Bucklew*, 587 U.S. at 130.

C. A return to the original public meaning of the Eighth Amendment would not require reversal of all this Court's precedent.

A return to the original public meaning of the Eighth Amendment would not necessitate a wholescale reversal of this Court's jurisprudence. For instance, in *Ford v. Wainwright*, the majority opinion adopted a formal bar to execution of the insane, explaining that "[f]or centuries no jurisdiction has countenanced the execution of the insane". *Ford v. Wainwright*, 477 U.S. 399, 401 (1986). In *Panetti v. Quarterman*, the Court explained that State courts were required to follow certain minimum procedures when assessing these *Ford* claims. *Panetti v. Quarterman*, 551 U.S. 930, 950 (2007). In *Dunn v. Madison*, the Court stated, "[I]n *Ford*, we questioned the 'retributive value of executing a person who has no comprehension of why he has been singled out.' " *Dunn v. Madison*, 583 U.S. 10, 11 (2017). But the ultimate reasoning behind *Ford* and *Panetti* is that the history and tradition of the United States prohibited execution of the insane. In other words, *Ford* is consistent with the history, text, and structure of our Constitution, and would, therefore, continue after a return to the original public meaning of the Eighth Amendment.

In his petition, Dorsey concedes that this Court's long-standing precedent holds that the Eighth Amendment prohibits punishments that are disproportional to the offense. Pet. 20 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). The Court need not re-consider *Weems* because, as Dorsey observes, proportionality and the "evolving standards of decency" are two separate tests. Pet. 20 (quoting *Kennedy*, 554 U.S. at 441).

The Court should decline to grant certiorari review, as explained in point I, *supra*, and point III, *infra*. But if the Court does grant certiorari review, then the Court should reconsider the ahistorical, atextual, and anti-constitutional "evolving standards of decency" framework that Dorsey relies upon.

III. Dorsey's execution does not offend the Eighth Amendment.

If this Court disregards the Supreme Court of Missouri's holding that "Dorsey's claim . . . is a plea for clemency," *State ex rel. Dorsey*, 2024WL 1194417 at *8, and reviews the claim on the merits, the Court must conclude the claim is meritless. Dorsey offers no legal test to determine whether an inmate is "rehabilitated" such that the Eighth Amendment precludes punishment. Even under his own theory, Dorsey's refusal to accept responsibility shows that he is, in fact, not "rehabilitated."

A. The Eighth Amendment does not prohibit the execution of condemned murderers who have followed prison rules after their crimes.

In his petition, Dorsey argues that the Eighth Amendment categorically bars the execution of those who, in Dorsey's opinion, have changed. Pet. at 20–29. Dorsey has offered no guides or test to assess his claim. *Id*. There can be none. Instead, Dorsey offers only that the Court should trust him and trust his counsel when they say that he is categorically barred from execution by the Eighth Amendment. *Id*. The Court should reject Dorsey's unsupported claim.

Dorsey's legal analysis in this Court turns on a recitation of examples where this Court has applied the "evolving standards of decency" to carve out "classes of people who cannot be executed. . . ." Pet. 21–22. Next Dorsey identifies two theories of punishment (retribution and deterrence) and argues that, in his opinion, neither theory of punishment justifies the execution of Dorsey's sentence. Pet. 22–24. But that argument fails.

As explained elsewhere, the "evolving standards of decency" is a phrase in search of a definition. Moreover, despite his claims to the contrary, Dorsey's execution serves retribution and deterrence. Retribution recognizes the community's condemnation of the offense committed by the offender. *See Graham v. Florida*, 560 U.S. 48, 71 (2010). Here, Dorsey murdered S.B. and B.B. after they rescued him from drug dealers two days before Christmas. *State ex rel. Dorsey*, 2024WL 1194417 at *1. Because he used an unloaded, single-shot shotgun, Dorsey was forced to load the gun, fire, unload the gun, reload the gun, and fire again. *Id*. He raped S.B. and poured bleach on her body. *Id*.

He orphaned the victims' four-year-old daughter. *Id.* He stole their personal property. *Id.*[8] And Dorsey did all this despite the fact that his cousins were trying to help him. Dorsey even stole the victims' car because when Dorsey killed the victims, B.B. was in the process of fixing Dorsey's car without charge. *Id.* at *1 n.3. Dorsey's crime was morally outrageous, and the jury found seven aggravating circumstances and sentenced him to death. *Id.* at *2. The death penalty is not disproportional to two murders committed during the commission of a rape and to facilitate the theft of personal property.[9]

Dorsey also attempts to argue that his execution will not serve deterrence because of the delay between his crime and his execution. *See, e.g.,* Pet. 27. Although Dorsey cites to a collection of dissents and statements from individual justices over the course of 40 years, he identifies no holding of the Court to support his argument. There is none.

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[8] Dorsey attempts to justify his horrible crime by arguing that he only committed the offense because he was suicidal while coming down from a crack cocaine binge. Pet. 6–7. This argument is wrong. As this Court knows, there was an epidemic of crack cocaine usage in this country. Sadly, many users went on crack cocaine binges. Yet, there was no epidemic of users who committed double murders and raped their victims. And on top of that, the Missouri Supreme Court found Dorsey failed to prove even gateway innocence. *Dorsey*, 2024WL 1194417 at *5. In other words, the Missouri Supreme Court rejected Dorsey's argument that he was incapable of deliberation because of his use of crack cocaine.

[9] The jury found beyond a reasonable doubt that Dorsey murdered S.B. while seeking sexual gratification, making his crime outrageously and wantonly vile, horrible and inhuman. *State v. Dorsey*, 318 S.W.3d at 654.

Moreover, Dorsey should be judicially estopped from making this argument. State court review of Dorsey's convictions and sentences began in 2009 and ended in 2014. During state court review, Dorsey requested and received 418 days of extensions—nearly fourteen months. Federal review of Dorsey's sentences began in 2015 and ended in 2023. During that time, Dorsey requested and received 849 days of extensions and stays—more than two years and three months. And Dorsey opposed Respondent's motion to expedite the case in the Eighth Circuit. Once the case returned to state court, Dorsey requested and received another 94 days of extensions. In total, Dorsey requested and received 1,361 days of delay—more than three-and-a-half years. Dorsey's federal review took nearly ten years. Dorsey cannot be allowed to cause delay upon delay and then come to this Court to argue that his sentences must be set aside due to the passage of time.

The cases cited by Dorsey do not aid his argument. Dorsey cites Justice White's concurrence in *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring); as well as *Ford*; *Panetti*; *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982); and *Roper v. Simmons*, 543 U.S. 551 (2005).

None of these authorities aid Dorsey. He has not argued that, at the time of the offense, he possessed a characteristic that gives rise to a categorical bar, nor has he argued that his offense is disproportional to the death penalty. *Weems*, 217 U.S. at 317 (the Eighth Amendment prohibits "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.").

What Dorsey is really arguing is that, in his opinion, his post-conviction behavior while in prison means the death penalty cannot be imposed as a categorical principle. According to Dorsey, this comes from the fact that he has exhibited good behavior and the fact that he is allegedly well liked by the Department of Correction's staff.

Dorsey purports to craft a rule that overturns our well-established system where a jury must find aggravating factors, consider whether there are mitigating factors and, if so, whether the mitigating factors outweigh the aggravating factors, and then consider whether mercy should be given. In place of that system, Dorsey proposes that, in the days before an execution, this Court should become a roving commission, searching high and low for evidence about whether a defendant has "changed." That sort of system imposes severe costs on victims, litigants, and society. It also creates a result that would be far less deserving of confidence than the results of an adversarial proceeding

before a judge and jury, close in time to the crimes. This Court should reject Dorsey's request.

B. Dorsey has refused to accept responsibility for his offenses, and therefore is not within his self-described "unique class of people" who may never be executed.

Even if Dorsey could convince the Court to create a new categorical bar to punishment, he would not be entitled to relief. His argument that he has been "rehabilitated" focuses strongly on his alleged acceptance of responsibility. *See, e.g.,* Pet. 10. But Dorsey has not accepted responsibility.

Dorsey has blamed murdering S.B. and B.B. on drugs and the *possibility* that he was in psychosis. In his petition below, Dorsey did not even expressly admit that he shot S.B. and B.B. Instead, Dorsey's counsel wrote, "It was during this time that S.B. and B.B. were shot." Pet. at 11, *State ex rel. Dorsey v. Vandergriff*, SC100486 (Mo.).

Nor has Dorsey accepted complete responsibility for the entirety of his crimes. The jury found seven aggravating factors during the sentencing trial. *Dorsey*, 30 F.4th at 755. One of those factors was that Dorsey murdered S.B. while he was raping her. *Dorsey*, 318 S.W.3d at 654–55. The jury found that fact beyond a reasonable doubt, and the Missouri Supreme Court affirmed that finding on direct appeal. *Id*. at 655 ("The evidence showed that Dorsey used deadly force to overcome [S.B.'s] resistance and then engaged in sexual intercourse with her."); *see also Dorsey*, 448 S.W.3d at 282 ("The jury also found

the murder of [S.B.] was committed while Mr. Dorsey was engaged in the crime of rape."). Similarly, the Missouri Supreme Court found that while committing the murder of S.B., he sought sexual gratification, making his crime outrageously and wantonly vile, horrible and inhuman. *Id*. at 654 (noting the jury found beyond a reasonable doubt that Dorsey's murder of S.B. was "outrageously and wantonly vile, horrible and inhuman" and that the jury was instructed they could only make that finding if they found "That the defendant, while killing [S.B.] or immediately thereafter, had sexual intercourse with her.").

But Dorsey continues to deny responsibility for committing the rape. In his petition to this Court, Dorsey states, "At the penalty phase, the State presented evidence that Mr. Dorsey raped [S.B.] and poured bleach over her torso, even though it did not charge him with any crime related to this." Pet. 2. And just over a month ago, Dorsey called the State's recitation of the jury's conclusion that Dorsey raped Sarah a "misstatement[]" designed to "distract [the Missouri Supreme Court] . . . ." Reply in Supp. at 15, *Dorsey v. Vandergriff*, SC100388, (Mo. Feb. 21, 2024). Dorsey's argument ignores the evidence at trial and the Missouri Supreme Court's opinions, and it demonstrates his unwillingness to accept responsibility for his "outrageous and wantonly vile, horrible and inhuman" conduct. No matter how broad Dorsey's definition of

"rehabilitation" is, it *must* include full acceptance of responsibility. On that metric, Dorsey fails.

Dorsey's argument that he has reformed is also not fully supported by the evidence that he presented to the federal courts during federal habeas review. On federal habeas review, the United States Court of Appeals for the Eighth Circuit observed that, while some prison records were helpful to Dorsey, others were not. *Dorsey v. Vandergriff*, 30 F.4th at 754. Specifically, the Court highlighted prison information including the following quotes: Dorsey " '[h]ad difficulties with free time,' was not '[d]ependable in assignments,' and was '[s]luggish.' And another form indicated that Dorsey had not '[e]xpressed need for self-improvement,' had '[d]efied authority,' had not '[a]ccepted responsibility for his situation,' and was '[s]elf-centered.' " *Id*.

Simply put, Dorsey has not been "fully rehabilitated," and if he cannot even admit the full scope of his crimes, then he cannot credibly allege that he is in a "unique class of people" that can never be executed.

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's request fails on all four traditional stay factors.

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.

Dorsey will not be injured without a stay. Dorsey murdered the victims nearly twenty years ago, and he has had ample time to seek review of his convictions in state and federal court. 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,* 587 U.S. at 149. 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 decision to withhold his argument and then request a "brief" stay casts 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 of Missouri 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)). "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.

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,

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