CAPITAL CASE

No. 17-_____

In the Supreme Court Of the United States

MICHAEL TISIUS,

Petitioner,
v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSOURI

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE - QUESTIONS PRESENTED

The Missouri Supreme Court purports to apply *Strickland v. Washington*, 466 U.S. 668 (1984). However, the Missouri Supreme Court applies a performance prong imposing an intolerable burden – "unqualified support." Given the factual intensity of a proper performance prong inquiry, no type of evidence satisfies such an impossibly high burden that amounts to an irrebuttable presumption. Additionally, the Missouri Supreme Court applied a modified prejudice prong analysis, including the utilization of an outcome determinative prejudice standard that this Court rejected in *Williams v. Taylor*, 529 U.S. 362 (2000). The erroneous application of *Strickland* and its progeny lead to the following questions:

1. Whether the Missouri Supreme Court's creation of an irrebuttable presumption of effectiveness complies with the Sixth Amendment and *Strickland*?

2. Whether the Missouri Supreme Court's application of an outcome determinative test complies with the Sixth Amendment, *Strickland* and *Williams*?

RULE 29.6 STATEMENT

All parties to the proceedings are named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Tisius respectfully prays that a Writ of Certiorari issue to review the judgment of the Missouri Supreme Court.

OPINIONS BELOW

The Missouri Supreme Court's decision denying state post-conviction relief is reported at *Tisius v. Missouri*, 519 S.W.3d 413 (2017). (App. 1-11). On June 27, 2017, the Missouri Supreme Court denied Petitioner's request for rehearing. App. 12.

JURISDICTIONAL STATEMENT

The decision of the Missouri became final on June 27, 2017. On September 12, 2017, this Court entered an order extending the time to file this petition to November 24, 2017. App. 13. This Court has jurisdiction under 28 U.S.C. § 1254(1) and § 1257 to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which reads in the pertinent part: "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

STATEMENT OF THE CASE

Tisius's case comes to this Court in an unusual procedural posture. He previously received penalty phase relief – only to have death re-imposed in a subsequent penalty proceeding. In spite of that second opportunity, his resentencing counsel failed to investigate and present readily available, and compelling mitigating evidence.

In 2003, Tisius was convicted and sentenced to death. *State v. Tisius*, 92 S.W.3d 751 (Mo. banc 2003). Thereafter, in a state post-conviction proceeding, the trial court granted penalty phase relief. While Missouri did not appeal, Tisius challenged the denial of guilt phase relief, which was denied. *Tisius v. State*, 183 S.W.3d 207 (Mo. banc 2006).

For the penalty retrial, Missouri filed a supplemental notice of the intent to seek death premised upon a conviction for conduct that occurred in prison that post-dated the original offense and trial. (Ex. 4 p. 48-49; Ex. 1 p. 46). A jury again sentenced Tisius to death, which the Missouri Supreme Court affirmed on direct appeal. *State v. Tisius*, 362 S.W.3d 398 (Mo. banc 2012). Tisius then unsuccessful pursued Missouri post-conviction proceeding, which is the basis of this petition.

As stated more fully below, Tisius's resentencing trial counsel failed to conduct an adequate investigation to present and prepare mitigating evidence, or to respond to aggravating evidence that they knew Missouri intended to present in favor of death.

A. Trial Counsel Failed to Investigate and Present Tisius's Father and Step-Mother At Resentencing.

The jury did not hear mitigating evidence from Tisius's father, Chuck Tisius, or Tisius's stepmother, Leslie Tisius. Their testimony would have highlighted the severity of the adversity Tisius endured living with his mother, Patty, and half-brother, Joey, and the long-term consequences for Tisius of living in that environment.

In post-conviction proceedings, Chuck Tisius recounted that Michael Tisius was born in 1981 and that Chuck left for the military in 1982. (2nd PCR Tr. 141). When Chuck returned from training, Patty was involved with other men and engaged in inappropriate behavior, and he filed for divorce. (*Id.*). Patty went to bars and drank with men, while bringing Michael along. (*Id.* at 142-43). Chuck wanted primary custody of Michael, but Patty received custody. (*Id.*).

Patty frequently failed to make Michael available for visitation with Chuck and Leslie. (2nd PCR Tr. 144). Patty refused to make visitation accommodations that took into account Chuck's police officer work shifts. (*Id.* at 143).

The times Patty made Michael available for visitation, he was in ragged clothing and smelled of urine. (2nd PCR Tr. 145-46). Chuck and Leslie bought clothes for Michael that they kept at their house because if the clothes went to Patty's house, they were never returned. (*Id.*). Chuck often purchased clothing, including coats, for Michael. (*Id.* at 146-47). When Patty and Michael moved away from St. Louis, Chuck's letters and calls to Michael went unanswered. (*Id.* at 153-56).

When Michael was twelve, Chuck successfully petitioned for primary custody because he was concerned about Michael s well-being. (2nd PCR Tr. 156-58). Michael came to live with Chuck and Leslie, however, Michael ultimately resumed living with Patty. *Id.* at 159-60).

When Michael was fifteen, he again came to live with Chuck and Leslie. (2nd PCR Tr. 163-64). Michael suddenly appeared at their door with a trash bag of clothes, but he did not stay long. (*Id.* at 163-64).

None of Tisius's counsel ever contacted Chuck until Tisius's second post-conviction hearing. (2nd PCR Tr. 167). However, Chuck had made calls and left messages at offices responsible for representing Tisius. (*Id.* at 167-68). If Chuck had been contacted to testify on behalf of his son, he would have done so. (*Id.* at 169). When Chuck received a voicemail on his cell phone from the second 29.15 team's mitigation specialist, he immediately returned her call from where he was having work done on his car. (*Id.* at 169-70).

Leslie Tisius also testified at the post-conviction hearing. She was married to Michael's father, Chuck, and was Michael's stepmother. (2nd PCR Tr. 56). In addition to the information supplied by Chuck, Leslie remembers that at one point, Patty dumped Michael on their porch with a trash bag full of clothing stating: "He's your problem now." (*Id.* at 63). There was conflict between Chuck and Michael because Chuck had household rules he expected Petitioner to follow, while Patty did not have any rules she expected Michael to follow. (*Id.* at 64). Leslie indicated Michael was a sad boy in whom she observed signs of depression. (*Id.* at 70).

Leslie was not contacted by any counsel before Tisius's second state post-conviction proceeding. (2nd PCR Tr. 64).

B. Trial Counsel Failed to Investigate And Present Other Mitigating Witnesses At Resentencing Documenting An Abusive and Unstable Childhood.

Although the jury heard some testimony about the beatings Tisius endured at the hands of his brother, Jamey Baker and Deanna Guenther provided additional relevant details at the state post-conviction hearing describing the severity and magnitude of the beatings. Mr. Baker said that the beatings went beyond what was normal for sibling fighting. (2nd PCR Tr. 94). Tisius was

"brutal[ly]" beaten, he explained, and he commented that "could not imagine getting [his] butt beat like that." (*Id.*). Ms. Guenther explained that Tisius's brother treated Tisius "horribly." (*Id.* at 82-83). Ms. Guenther explained documented Tisius brother regularly physically assaulted him and verbally abused him. (*Id.*). She recalled a beating so bad that Tisius was knocked unconscious. (*Id.* at 83).

This testimony also established that Tisius's mother did not protect Tisius from these beatings. Ms. Guenther recalled that Tisius spent a lot of time at her house to escape from the beatings. (2nd PCR Tr. 81-82). In fact, Tisius's mother in some ways rewarded the brother's behavior: Mr. Baker recalled that Tisius's mother treated Tisius's brother better than she treated Michael. (*Id.* at 95).

Had the jury heard from Lynn Silverman, Tisius's G.E.D. teacher, the jury would have learned that Tisius was destitute and homeless while still a teenager. (Ex. 82 p.9). The jury would have learned the depth of despair Tisius felt at this time, which he exhibited by drawing a tombstone and expressing that he wanted to kill himself. (*Id.* p. 9-10). Leslie Ann Tisius corroborated this malaise and describing that Tisius was a sad boy who exhibited signs of depression. (2nd PCR Tr. 70).

The omitted evidence established that Tisius did not grow up in a consistent, stable, or caring environment; instead, Tisius's childhood was abuse, privation, and the trappings of mental illness.

C. Trial Counsel Did Not Present Expert Testimony Supporting A Statutory Mitigating Factor.

During the first post-conviction proceeding in Tisius' case, before his resentencing, post-conviction counsel presented the testimony of Dr. Stephen Peterson, a psychiatrist. Dr. Peterson

testified about Tisius's life, particularly his childhood, and the long-term mental health consequences of his deprived upbringing.

At the second sentencing phase, re-sentencing counsel did not present the live testimony of Dr. Peterson. Instead, trial counsel read into the record some—but not all—of Dr. Peterson's post-conviction testimony. The omitted testimony of Dr. Peterson explained that Tisius's illnesses were substantially impairing his cognition and judgment at the time of the crime:

> Q. Now, going back very briefly to the extreme mental or emotional disturbance issue, can you explain how major depression or PTSD acting together can cause a disturbance? Are these serious enough illnesses that they cause disturbance of thinking?
>
> A. I can explain it, and, yes, they do, in fact, cause disturbance in thinking.
>
> At the beginning, separately, major depression very commonly causes people to have impaired thinking, impaired reasoning ability, poor judgment, at least in the kind of major depression I'm talking about and that's where somebody needs psychotherapy and medication treatment, not the blues or having a bad day.
>
> Major depression also impairs people by causing problems with emotional control, especially anger control, whether it is directed towards themselves or others. Post-traumatic stress disorder for a young man who has had it since childhood, some of those symptoms actually overlap with major depression, but more predominantly such persons experience extreme anxiety end panic as well as the problems of identifying with the aggressor as a way to find some emotional solace. These are slightly separate -- well, they are not slightly separate. They are significantly separate in that not only would Michael experience cognitive impairment from his -- from his major depression, he would also experience severe impairment of his judgment due to making distinctions and thinking through problems and solving problems when he was extremely anxious and panicking.
>
> It is well-known that people who are panicking don't make good decisions. That's why they go through training to control their emotions and their thinking. Michael never had any kind of training like that.

PCR 1 280-81. Thus, any "choice" that Tisius made at the time of the crime could not be separated from the product of his medical illnesses he was suffering from at the time of the crime.

Second, the omitted testimony of Dr. Peterson explained that knowing right from wrong is not the same as being able to *refrain* from doing wrong in certain circumstances:

Q. On the issue of knowing right from wrong, did Mr. Tisius express that he feels very sorry for what -- for what happened -- for what he did in this case?

A. Yes. **And knowing right from wrong is different than being able to refrain from doing wrong or assuming doing right**.

Q. Can you describe what the difference is and why you think that is different?

A. Well, I think in -- in Michael Tisius, in large part, he was involved in this attempted breakout to please Roy Vance and to garner his affection and continue what he thought was a special relationship, errantly, actually, a special relationship. In fact, as he was driving away, he repeted to Tracie Bulington, "I'm sorry, Roy,' like he had failed Roy, and that shows his preoccupation and his substantial domination by Roy Vance.

Q. And as you said on direct, you believe that he acted under the extreme mental or emotional disturbance at the time of the shooting?

A. Yes.

PCR 1 291-92 (emphasis added).

D. Trial Counsel Did Not Investigate And Present Available Evidence Rebutting or Challenging Aggravating Circumstances on Which Missouri Intended to Rely.

After the first sentencing hearing but prior to the second sentencing hearing, prison officials found a "boot shank"[1] in a radio in Tisius's cell. Tisius was criminally charged with possession of this item, and the case was resolved with Tisius entering an *Alford* plea to the charge. The State provided notice of its intent to rely upon evidence related to post-crime conduct as a basis to impose death. PC Ex. 4 p. 48-49; PC Ex. 1 p. 46.

Although trial counsel possessed evidence explaining the reasons for the *Alford* plea—that Tisius possessed the shank because another inmate intimidated Tisius and forced Tisius to hold it in his cell—counsel did not present this evidence to the jury. The omitted evidence included a certified records showing that the inmate who allegedly was intimidating Tisius into holding the shank for him previously had been convicted of killing a cellmate with a "home-made knife." (Ex.

[1] A "boot shank" is a piece of metal that resembles a ruler that is found in the sole of the boot. The term itself is prejudicial and must be explained – because it incorporates "shank" – which is known in the prison setting as a homemade knife.

102 p. 58; Ex. 73 p.2-3). Certified prison records also established that Tisius never even owned a pair of boots the entire time he was in prison. (Ex.102 p. 59).

To corroborate this, Counsel also possessed the omitted portions of Dr. Peterson's testimony describing Tisius as someone who other inmates could manipulate and victimize in this way. For example, Tisius viewed Roy Vance as an influential person with whom Tisius could align himself and trust. PCR 1 274. Tisius perceived his friendship with Vance as one between equals, not that Vance was taking advantage of him. *Id* p. 274-75. Tisius was vulnerable to being influenced by Vance because of the childhood trauma Tisius endured with no one to advocate for him and to protect him. *Id.* p. 275. Tisius's history of depression also clouded his judgment about Vance. *Id.* p.276.

Despite possessing evidence rebutting the aggravating evidence of the boot-shank *Alford* plea, trial counsel did not present it. The State used the boot shank *Alford* plea to argue that Tisius posed a specific threat to the law enforcement community:

> And more importantly than that, he might not have had a prior criminal history, but even though he's in the Department of Corrections for at least the rest of his life, what is he doing? He's committing more crimes. He has a boot shank. He's got a boot shank. Because, you know what he knows? There is nothing worse we can do to him. He got five years for that, and they just ran it concurrent with his life sentence. Every crime he commits from this day forward as long as he's alive is a freebie. It's a freebie.
>
> He's going to be -- continue to be a danger to our society, and we have an obligation. As representatives of our state, we all have an obligation to protect those jailers in those Departments of Correction, those staff members, those doctors, those nurses. And you know what? The Roy Vances of the world that are in those prisons we have to protect from murderers like him.
>
> Ladies and gentlemen, if he killed twice to try and get a friend out, do you think if he's given the opportunity he would kill again to get himself out?

TR 2 1189-90. The State then explicitly asserted that that death was necessary to stop Tisius from killing again:

> I'm asking you on behalf of the entire law enforcement community, I'm asking you to protect us, protect them from people like Michael Tisius. . . . But if we have a man who is willing to kill a law enforcement officer inside a correctional center, what does that say about our society?
>
> What I'm asking you to do is justified, and, ladies and gentlemen, it's necessary.

TR 2 1192.

In rebuttal argument, the State continued to assert that death was necessary to stop Tisius from doing this again:

> And you know what? Maybe he will die in prison. I think our goal is to make sure he's the only one that does and that no other guard, no other nurse, no other person that works there with him, no other inmate that's in that facility is going to be vulnerable to the same type of decision-making that these two officers suffered from.

TR 2 1213. The prosecutor closed his argument with one last plea for death as the only way to stop Tisius: "If the death penalty means anything, if it has any application at all, it can eliminate one thing here. It can stop Michael Tisius from doing this again. And it is an answer to the plea from the families of Leon and Jason and Randolph County that you do justice in this case." TR 2 1219.

The state's final argument dismissed the defense evidence:

> Now -- but the important thing here is this: When you talk about being under the dom -- it doesn't matter if he was wanting to please Roy or not; it doesn't matter, because his experts, all of them, Dr. Peterson who the transcript was read in, Dr. Taylor, all of them said what? He knows the difference between right and wrong. He could choose to act in a criminal fashion or not. He knows what he's doing. So if he's doing this to please Roy, that's fine. The important thing is, does he know right from wrong?
>
> . . .
>
> You choose to do these things. Michael Tisius chose to commit these crimes. You know, and I go back again. We don't need a $6,000 doctor to tell us that. His brother, from the same family, from better circumstances, committed serious felony offenses too. He didn't murder anybody. As Dr. Taylor would say, yet.

It's not what your childhood is. It's not who your dad was, not who your morn was. It's what -- when you walk out of these environments, it's what you choose to do. We all know that. We all know that.

TR 2 1187, 1191.

Another principal theme in the state's argument was that because Tisius was the type of person who would plan and commit such a crime, the jury had a duty to stop him before he did it again in prison:

> And more importantly than that, he might not have had a prior criminal history, but even though he's in the Department of Corrections for at least the rest of his life, what is he doing? He's committing more crimes. He has a boot shank. He's got a boot shank. Because, you know what he knows? There is nothing worse we can do to him. He got five years for that, and they just ran it concurrent with his life sentence. Every crime he commits from this day forward as long as he's alive is a freebie. It's a freebie.
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> He's going to be -- continue to be a danger to our society, and we have an obligation. As representatives of our state, we all have an obligation to protect those jailers in those Departments of Correction, those staff members, those doctors, those nurses. And you know what? The Roy Vances of the world that are in those prisons we have to protect from murderers like him.
>
> Ladies and gentlemen, if he killed twice to try and get a friend out, do you think if he's given the opportunity he would kill again to get himself out?

TR 2 1189-90.

The prosecutor closed his argument on this note:

> But even -- I have another request though. I'm asking you on behalf of the entire law enforcement community, I'm asking you to protect us, protect them from people like Michael Tisius. There is three categories of people in this world. There's the wolves. Michael Tisius is a wolf. What does the wolf do? He stays around the edges of the flock, and when the flock runs, he picks off the slowest member. That's what the wolf does. Picks off the slowest member of the sheep. The sheep are the second community, second group of people. That's what wolves do; they pick off that slowest member. Okay?
>
> That third group of people in our society that isn't a wolf, that isn't a sheep, they are the law enforcement officers. They are here to protect those sheep, and they can't be everywhere at every time. But if we have a man who is willing to kill a law enforcement officer inside a correctional center, what does that say about our society?
>
> What I'm asking you to do is justified, and, ladies and gentlemen, it's necessary.

TR 2 1192.

By receiving pre-trial notice of the "boot-shank" evidence, trial counsel knew that the State would rely on it as a basis to impose death. Trial counsel did nothing to mitigate this aggravation, even though the tools were readily available.

REASONS FOR GRANTING THE WRIT

In Tisius's case, the Missouri Supreme Court applied a reformulated and heightened standard for *both prongs* of the ineffective assistance of counsel test from *Strickland v. Washington*, 466 U. S. 668 (1984). The Missouri Supreme Court's application of those standards conflict with the long-standing decisions of this Court. This Court should grant certiorari to clarify whether state courts can avoid this Court authority and employ a modified *Strickland* test. Alternatively, this Court should grant, vacate, and remand to ensure that the Missouri Supreme Court assess Tisius's *Strickland* claims utilizing the correct constitutional standard.

I. The Missouri Supreme Court Improperly Applied *Strickland's* Performance Prong.

In assessing Tisius' argument that trial counsel failed to present mitigating evidence from his own father and step-mother, the Missouri Supreme Court employed an irrebutable presumption of effectiveness. When considering *Strickland's* first prong, the Missouri Supreme Court improperly held that counsel's performance was not deficient because the evidence they did not present "did not wholly support the defense's theory at trial….") *Tisius*, 519 S.W.3d at 428.

And thus, the Missouri Supreme Court applied a reformulated and heightened standard that can never be met:

> Ordinarily, the failure to call a witness will not support an ineffective assistance of counsel claim because the choice of witnesses is presumptively a matter of trial strategy. *Davis v. State*, 486 S.W.3d 898, 909-10 (Mo. banc 2016). "If a potential witness's testimony would not unqualifiedly support a defendant, the failure to call

> such a witness does not constitute ineffective assistance." *Worthington v. State*, 166 S.W.3d 566, 577 (Mo. banc 2005) (internal quotation omitted).

Tisius, 519 S.W.3d at 428. This improper reformulation of the *Strickland* standard comes from past misapplications of the *Strickland* standard employed by the Missouri Supreme Court. *See id.*; *Leisure v. State*, 828 S.W.2d 872, 875 (Mo. banc 1992).

It is a practical reality that there is not a single piece of evidence or testimony that unqualifiedly supports any position in either post-conviction or at trial – the single possible exception being the stipulation of an element. The state appellate court's imposition of an irrebutable presumption is unreasonable under and at odds with *Strickland*, 466 U. S. 668. Indeed, in empowering *Strickland* to create an irrebuttable presumption of effective performance, the Missouri Supreme Court has created a standard that amounts to a categorical rejection of *Strickland* claims for an inevitable and unavoidable failure to satisfy the performance prong.

A rule that automatically defeats ineffective assistance of counsel claims unless the evidence "unqualifiedly supports" the ineffectiveness allegation is contrary to *Strickland*. This Court should review the decision below and correct it.

To be sure, tactical trial decisions receive deference from reviewing courts. But such deference merely reflects the practical difficulties facing trial counsel, and the risk that the hindsight perspective of reviewing courts not as intimately familiar with those difficulties will too often fault trial counsel for making less than perfect choices. *E.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1984) ("[U]nless consideration is given to counsel's overall performance, before and at trial, it will be 'all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.'" (quoting *Strickland*, 466 U.S. at 689)).

In assessing counsel's conduct, in *Strickland*, this Court articulated the familiar two-prong approach to ineffective-assistance-of-counsel claims. A defendant must show both deficient performance and prejudice. *Id.*, at 687.

Tisius does not challenge that in assessing deficiency, a court starts with the presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*, at 690. Nor does he challenge that the burden to rebut that presumption rests with the defendant. *Id.*, at 687.

While the presumption unquestionably remains strong (*id.*, at 689-90), this Court has never, however, ratchetted that standard to the level of or treated it as irrebutable. Nor has this required evidence "unqualifiedly support" or "wholly support" such an allegation. Perhaps this is because there is no such evidence that exists. Indeed, the terminology implies that the evidence supporting the ineffectiveness claim *is* supported by the record – just not "wholly" or "unqualifiedly" so.

A reviewing court should consider the entirety of the record and the totality of the circumstances – and not focus on whether a particular piece of evidence "unqualifiedly supports" the defense theory. As recently noted in a dissent from denial of certiorari, "[r]ather, *Strickland* and its progeny establish that when a court is presented with an ineffective-assistance-of-counsel claim, it should look to the full record presented by the defendant to determine whether the defendant satisfied his burden to prove deficient performance." *Reeves v. Alabama*, 2017 U.S. LEXIS 6770 at *12 (2017) (Sotomayor, J., Dissent).

In analogous circumstances, this Court looks askance at irrebuttable presumptions. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978) (refusing to permit a "'conclusive presumption [of intent],'" which "'would effectively eliminate intent as an ingredient of the offense'" (quoting *Morissette v. United States*, 342 U.S. 246, 275, (1952)). Likewise, a

State must permit the defendant to raise challenges to the State's conviction and/or sentence. *See Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) (affirming the defendant's right to "have a meaningful opportunity to present a complete defense" (internal quotation marks omitted)). The *Strickland* rule; the rules against irrebutable presumptions and the principle that Tisius have a meaningful consideration of his ineffectiveness allegation – demonstrate the obvious and far-reaching nature of the error committed by the Missouri Supreme Court.

This Court has taken a similar misapplication of a legal standard in *Rosales-Mirales v. United States*, Case No. 16-9493. In *Rosales-Mirales*, this Court is considering a more strenuous application of the *United States v. Olano*, 507 U.S. 725, 736 (1993) standard.[2] The heightened *Strickland* standard employed by the Missouri Supreme Court, like the heightened plain error standard employed by the Fifth Circuit, merits this Court's consideration.

This case is an ideal vehicle for this Court to review the issue. This is a capital case, and Tisius presents a substantial claim of the ineffective assistance of trial counsel for failing to present readily available and compelling mitigating evidence. This mitigation testimony would likely have prevented the jury from imposing a sentence of death. However, the Missouri Supreme Court created a irrebuttable presumption of effective counsel, and thus, the merits of his ineffectiveness claim was never considered.

[2] The Question presented reads:

> In United States v. Olano, this Court held that, under the fourth prong of plain error review, "[t]he Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." 507 U.S. 725, 736 (1993). To meet that standard, is it necessary, as the Fifth Circuit Court of Appeals required, that the error be one that "would shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge?"

This Court should grant review to correct this outlier application of *Strickland* and to correct an improper ruling that trial counsel are irrebuttably presumed effective under the Sixth Amendment. Because the Missouri Supreme Court has decided an important federal question in a way that conflicts with the relevant decisions of this Court, this Court should grant, vacate and remand pursuant to Sup Ct. R. 10 (c).

II. The Missouri Supreme Court's Prejudice Analysis Is An Outlier And Conflicts With Prejudice Analysis This Court Identified In *Strickland* And Has Applied Since.

Under this Court's authority, to establish prejudice due to counsel's failures, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In the capital sentencing context, courts assess prejudice by "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *see also Sears v. Upton*, 561 U.S. 945, 952-57 (2010) (per curiam); *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005). The critical question is whether "there is a reasonable probability that at least one juror would have struck a different balance" in weighing the evidence for and against sentencing the defendant to death. *Wiggins*, 539 U.S. at 537. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If such a probability exists, then the defendant has established a Sixth Amendment violation. *Id.*

In this case, the Missouri Supreme Court failed to apply the proper prejudice standard to Tisius's ineffective assistance of counsel claims. The proper burden of proof requires a defendant to establish **a reasonable probability** that **at least one juror** would have struck a different balance. *Wiggins*, 539 U.S. at 537. The Missouri Supreme Court misapplied this standard in at

least three ways. First, the court erroneously applied an outcome-determinative test that ignored whether the result of the proceeding was fundamentally unfair or unreliable. Second, the court erroneously imposed a higher burden of proof—a preponderance-of-the-evidence standard of proof—than the Constitution requires. Third, the court erroneously required Tisius to prove that the entire jury—as opposed to just one juror—would have decided against the death penalty. As will be explained further below, each of these applications of law are contrary to the proper prejudice analysis this Court has identified in *Strickland* and *Strickland's* progeny. Accordingly, this Court should either (1) grant certiorari or (2) remand this case back to the Missouri Supreme Court with directions to apply the proper prejudice standard.

A. The Missouri Supreme Court Erroneously Applied An Outcome-Determinative Test That Failed To Give Adequate Consideration To Whether The Result Of The Proceeding Was Fundamentally Unfair Or Unreliable.

This Court has held that the prejudice analysis cannot be solely outcome-determinative. *Lockhart v. Fretwell*, 506 U.S. 364 (1993). However, in more than one instance, the Missouri Supreme Court limited its prejudice analysis to an outcome-determinative test without regard to whether the result of Tisius's sentencing proceeding was unreliable or fundamentally unfair. The court's application of this outcome-determinative test is contrary to established law.

The essence of the Sixth Amendment right to counsel is the protection of the fundamental right to a fair trial. *Lockhart*, 506 U.S. 364 (1993). Counsel's role in an adversarial sentencing proceeding is like counsel's role at trial: "to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Strickland,* 466 U.S. at 687 (1984). "Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart*, 506 U.S. 364 (1993). In other words, a reviewing court must assess the reliability of the result of the

proceedings given counsel's failure to counter the State's evidence and argument. *See Rompilla*, 545 U.S. at 386-93 (assessing prejudice resulting from counsel's failure to rebut the aggravating evidence).

In contrast with this law, the Missouri Supreme Court limited its prejudice analysis to an outcome-determinative test. For example, regarding whether counsel's failure to present the full testimony of mitigation witness Dr. Peterson, the court concluded as follows:

> The motion court concluded that, even if the additional excerpts of Dr. Peterson's prior testimony had been presented to the jury, there was not a reasonable probability of a different outcome. Much of the testimony that Mr. Tisius argues should have been presented related to his mental health issues and his relationship with Mr. Vance. As the motion court reasoned, that information was also presented to the jury through other witnesses, such as Dr. Taylor and Dr. Daniels, or through other excerpts of Dr. Peterson's testimony that were read into evidence. It follows that trial counsel had presented a clear view of Mr. Tisius' mental health issues to the jury without the additional excerpts of Dr. Peterson's testimony. Accordingly, Mr. Tisius has not established that a reasonable probability exists that the result of the penalty phase would have been any different had the additional portions of Dr. Peterson's prior testimony been presented to the jury.

Tisius, 519 S.W.3d at 427 (footnote omitted). This Court has spoken on state courts utilization of an improper prejudice test.

In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court found, under the heightened AEDPA standard not applicable here, that the Virginia Supreme Court similarly misapplied the *Strickland* standard. Relying on *Lockhart*, the Virginia Supreme Court has converted the *Strickland* prejudice prong into an outcome determinative test, and this was improper. *Williams*, 529 U.S. at 397. The Missouri Supreme Court applied a prejudice test this Court specifically rejected in *Williams*.

B. The Missouri Supreme Court Erroneously Imposed A Higher Burden Of Proof Than The Constitution And This Court Requires.

This Court consistently has rejected the application of the preponderance-of-the-evidence standard of proof to ineffective assistance of counsel claims. *Strickland*, 466 U.S. at 693; *Kyles v.*

Whitley, 514 U.S. 419, 434 (1995); *Porter*, 558 U.S. at 44. However, the Missouri Supreme Court determined that "[b]oth prongs of the *Strickland* test 'must be shown by a preponderance of the evidence in order to prove ineffective assistance of counsel.'" *Tisius*, 519 S.W.3d at 420 (quoting *Strong v. State*, 263 S.W.3d 636, 642 (Mo. banc 2008)). The court's application of this preponderance-of-the-evidence standard of proof is contrary to established law. *Strickland*, 466 U.S. at 693, 694; *Kyles*, 514 U.S. at 434; *Williams*, 529 U.S. at 405-06; *Porter*, 558 U.S. at 44.

The application of the preponderance-of-the-evidence standard would require a petitioner to establish that counsel's errors more likely than not altered the outcome of the case. *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328-29 (2007) (explaining that a preponderance-of-the-evidence standard of proof requires a petitioner to prove that she is more likely than not entitled to relief); *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 622 (1993) ("The burden of showing something by a preponderance of the evidence . . . requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [the court] may find in favor of the party who has the burden to persuade the [court] of the fact's existence.") (internal quotation marks omitted). On more than one occasion, this Court explicitly has held that the preponderance-of-the-evidence standard is not applicable to ineffective assistance of counsel claims.

In *Strickland*, this Court explained that, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. Similarly, in *Kyles*, this Court again concluded that, "[a] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*." 514 U.S. at 434. More recently, in *Porter*, this Court reaffirmed that the law "do[es] not require a defendant to show that counsel's deficient performance more likely

than not altered the outcome of his penalty proceeding, but rather that he establish a probability sufficient to undermine confidence in that outcome." 558 U.S. at 44 (internal quotations omitted). Thus, a state court decision applying a preponderance of the evidence standard of proof is contrary to clearly established precedent requiring a petitioner to meet only the reasonable probability standard of proof. *Williams*, 529 U.S. at 405-06 (explaining that a state court decision applying a preponderance of the evidence standard would be contrary to clearly established precedent requiring a petitioner to meet only the reasonable probability standard of proof).

This Court also has recognized that the reasonable probability standard of proof is lower than the preponderance of evidence standard. A "reasonable probability" is only "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. As this Court explained in *Strickland*, "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, **even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome**." *Id.* (emphasis added). Furthermore, (as mentioned above), this Court has recognized that that a state court decision requiring a petitioner to meet a preponderance of the evidence standard instead of the reasonable probability standard is contrary to clearly established precedent requiring only the reasonable probability standard of proof. *Williams*, 529 U.S. at 405-06. Thus, the quantum of proof required to satisfy the reasonable probability standard is less than that required to satisfy the preponderance of evidence standard. *Strickland*, 466 U.S. at 693, 694; *Kyles*, 514 U.S. at 434; *Williams*, 529 U.S. at 405-06; *Porter*, 558 U.S. at 44.

In contrast with these decisions, the Missouri Supreme Court determined that "[b]oth prongs of the *Strickland* test 'must be shown by a preponderance of the evidence in order to prove ineffective assistance of counsel.'" *Tisius*, 519 S.W.3d at 420 (quoting *Strong*, 263 S.W.3d at

642). This ruling conflicts with this Court's announced prejudice test defining the requisite standard of proof to the reasonable probability standard. *Williams*, 529 U.S. at 405-06. Furthermore, because the reasonable probability standard is a lower standard than the preponderance of the evidence standard, *Strickland*, 466 U.S. at 694, the court's analysis prejudiced Tisius.

C. The Missouri Supreme Court Erroneously Required Mr. Tisius To Prove That The Entire Jury—As Opposed To Just One Juror—Would Have Decided Against The Death Penalty.

This Court consistently has recognized that the reasonable probability standard of proof is the reasonable probability that **one juror** would have a struck a different balance, not that the entire jury as a whole would have struck a different balance. *See, e.g.*, *Strickland*, 466 U.S. at 694 (emphasis added). However, the Missouri Supreme Court determined that Tisius's burden extended to the entire jury as a whole: "'Regarding a sentence to death, a defendant must show with reasonable probability that **the jury**, balancing all the circumstances, would not have awarded the death penalty.'" *Tisius*, 519 S.W.3d at 420 (quoting *Strong*, 263 S.W.3d at 642) (emphasis added). The court's extension of Tisius's burden of proof to encompass the entire jury is contrary to established law.

The court repeated this language in other portions of its opinion, such as in its analysis of counsel's failure to rebut evidence of the boot shank conviction:

> It follows that the plea transcript and the photographs would not have rebutted the impression that Mr. Tisius was a risk to correctional staff or other inmates sufficient to create a reasonable probability that **the jury** would not have imposed the death penalty had such evidence been presented. Accordingly, the motion court did not clearly err in concluding that trial counsel were not ineffective for failing to further investigate or rebut the boot shank evidence.

Tisius, 519 S.W.3d at 423.

In its analysis of Tisius's claim regarding counsel's failure to present all of Dr. Peterson's testimony, the court did not repeat the entire-jury language, but the context of the court's analysis establishes that it was considering the effect the omitted evidence would have had on the entire jury's decision, not the effect that it could have had on one juror:

> The motion court concluded that, even if the additional excerpts of Dr. Peterson's prior testimony had been presented to the jury, there was not a reasonable probability of a different outcome. Much of the testimony that Mr. Tisius argues should have been presented related to his mental health issues and his relationship with Mr. Vance. As the motion court reasoned, that information was also presented to the jury through other witnesses, such as Dr. Taylor and Dr. Daniels, or through other excerpts of Dr. Peterson's testimony that were read into evidence. It follows that trial counsel had presented a clear view of Mr. Tisius' mental health issues to the jury without the additional excerpts of Dr. Peterson's testimony. Accordingly, Mr. Tisius has not established that a reasonable probability exists that the result of the penalty phase would have been any different had the additional portions of Dr. Peterson's prior testimony been presented to the jury.

Tisius, 519 S.W.3d at 427.

Not once did the court refer to the correct one-juror standard. Instead, the court consistently required Tisius to prove that absent counsel's failures, the entire jury would not have awarded the death penalty.

In *Strickland*, this Court explained that a petitioner establishes prejudice when he has shown the existence of a "reasonable probability that at least **one juror** would have struck a different balance." 466 U.S. at 694 (emphasis added). In *Wiggins*, this Court reaffirmed that the critical assessment is whether "there is a reasonable probability that **at least one juror** would have struck a different balance." 539 U.S. at 537 (emphasis added). The Eighth Circuit also has recognized that the appropriate prejudice standard considers how the omitted evidence may have changed the weighing calculus of only one juror, not the jury as a whole. *Simmons v. Luebbers*, 299 F.3d 929, 939 (8th Cir. 2002) (concluding, in a Missouri case, that the appropriate prejudice

is standard is whether "there is a reasonable probability that at least one of the jurors would have voted against the imposition of the death penalty.").

The Missouri Supreme Court acts as an outlier and applies a standard in contravention to this Court's well-established *Strickland* one juror standard. *See Strickland*, *Williams*, *Wiggins*. Because this improper amendment of the prejudice standard required Tisius to satisfy a higher standard of proof than the Constitution requires, the court's analysis prejudiced Tisius and this Court should intercede. *See Hodge v. Kentucky*, 568 U.S. 1056 (2012) (Sotomayor, J., dissenting) (explaining that the state high court's "brief discussion of the weight and impact of [the post-conviction petitioner's] mitigation evidence reasonably suggests that its prejudice determination flowed from its legal errors.").

D. There Is A Reasonable Probability One Juror Would Have Struck A Different Balance.

Trial counsel failed to present compelling and available mitigation. Tisius's father and step-mother could have provided a complete picture of Tisius's childhood. An erractic and physically abusive childhood with a pronounced lack of stability. A childhood that laid the seeds for the development of mental impairments that not only impacted Tisius's day-to-day functioning but also provided a nexus for his actions the day of the crime. While a nexus is not needed for mitigation, Dr. Peterson could have informed the jury that Tisius's actions were so impaired that he met the criteria for a statutory mitigating circumstance of extreme mental or emotional disturbance issue. Dr. Peterson could have explained how Tisius's major depression in conjunction with his post-traumatic stress disorder acted together to impair Tisius during the crime. PCR 1 280-281. The jury heard no evidence of this kind and could not have conducted its individualized sentencing responsibility without such a complete picture.

While *Rompilla*, 545 U.S. at 386-93 (assessing prejudice resulting from counsel's failure to rebut the aggravating evidence) imposes an obligation upon trial counsel to rebut aggravation, trial counsel did nothing to challenge the "boot-shank" evidence. In addition to testimony that the "boot-shank" was not Tisius's, trial counsel could have presented Dr. Peterson's testimony regarding how Tisius was someone whom other inmates could manipulate and victimize in this way's would have made a difference.

In short, trial counsel had available not only affirmative mitigation but evidence rebutting the aggravation upon which the State vociferously relied. Trial counsel could have added weight to the life side of the scale while simultaneously lessening the weight of the death side of the scale. In these circumstances, there is a reasonable probability one juror would have struck a different balance.

E. The Missouri Supreme Court Has Decided An Important Federal Question In A Way That Conflicts With The Relevant Decisions Of This Court.

This Court should grant review to correct this outlier application of *Strickland's* prejudice prong. Because the Missouri Supreme Court has decided an important federal question in a way that conflicts with the relevant decisions of this Court (*see e.g. Strickland*, *Williams*, *Wiggins*, *Rompilla*, and *Porter*), and this Court should grant, vacate and remand pursuant to Sup Ct. R. 10 (c).

CONCLUSION

For the foregoing reasons, Tisius respectfully requests this Court grant his petition for writ of certiorari, vacate the opinion of the Missouri Supreme Court, and remand the case for further review.

Respectfully Submitted,

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