No. 17-6938
Capital Case

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

MICHAEL TISIUS,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent

On Petition for a Writ of Certiorari
To the Supreme Court of Missouri

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Capital Case

Did the Missouri Supreme Court properly apply *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny when it ruled (1) that the petitioner failed to prove that counsel was ineffective for failing to call mitigation witnesses that contradicted counsel's mitigation strategy and (2) that the petitioner failed to prove that counsel's failure to present certain other mitigating evidence created a reasonable likelihood of a different result at his penalty trial retrial?

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Statement of the Case

The petitioner, Michael Andrew Tisius, was convicted of two counts of murder in the first degree, Mo. Rev. Stat. § 565.020 (2000), in connection with the June 2000 murders of Randolph County, Missouri, Sheriff's Deputies Leon Egley and Jason Acton, and sentenced to death for each murder. *State v. Tisius*, 362 S.W.3d 398, 404 (Mo. banc 2012). His original death sentences for those murders were set aside during post-conviction relief proceedings. *Id.* After a second penalty phase trial, the petitioner was again sentenced to death for each murder. *Id.* The Missouri Supreme Court affirmed those death sentences. *Id.* The facts relating to the petitioner's offenses are summarized in the opinion of the Missouri Supreme Court in *State v. Tisius*, 92 S.W.3d 751, 757-59 (Mo. banc 2002).

After his second set of death sentences were affirmed on direct appeal, the petitioner sought post-conviction relief in the trial court. *Tisius v. State*, 519 S.W.3d 413, 420 (Mo. 2017). In his motion for post-conviction relief, the petitioner alleged, *inter alia*, multiple claims of ineffective assistance of trial counsel related to thirty-three purported errors by counsel (2nd PCR L.F. 22-120). The trial court denied the motion. *Tisius*, 519 S.W.3d at 420.

On appeal to the Missouri Supreme Court, the petitioner raised the denial of claims related to twelve of the allegations of deficient performance

by trial counsel. *Tisius*, 519 S.W.3d at 421-31. Among those were four categories of claims that the petitioner now raises in his petition: 1) that counsel failed to investigate and call appellant's father and stepmother to testify about appellant's life living with his mother and brother; 2) that counsel failed to investigate and call two family friends and a former teacher to testify about his brother's abuse of him and his adolescent homelessness and suicidal depression; 3) that counsel failed to present portions of prior expert testimony from Dr. Stephen Peterson to support the submission of a statutory mitigating circumstance; and 4) that counsel failed to investigate and present testimony from a prison inmate, a photograph, and the transcript of the petitioner's *Alford* plea hearing to refute aggravating evidence that appellant entered an *Alford* plea to possession of a prohibited item (a "boot shank") in the Department of Corrections (Pet. 3-11). *Id.* at 421-23, 426-28.

In evaluating the performance prong of the *Strickland* standard, the Missouri Supreme Court stated:

> To satisfy the *Strickland* performance prong, a movant "must overcome the strong presumption that counsel's conduct was reasonable and effective." … This presumption is overcome if the movant identifies "specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of professional competent assistance."

Tisius, 519 S.W.3d at 420 (internal citations omitted). The court stated the prejudice prong as follows:

> To establish *Strickland* prejudice, a movant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." …"A reasonable probability exists when there is a probability sufficient to undermine confidence in the outcome."…"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."

Id.

The court denied the petitioner's claim regarding the failure to investigate and call his father and stepmother. *Id.* at 427. The court, citing its own previous cases, stated that the failure to call a witness "[o]rdinarily" will not support a claim of ineffective assistance of counsel because there is a presumption that counsel's choice of witnesses was a matter of trial strategy. *Id.* The court stated, "If a potential witness would not unqualifiedly support a defendant, the failure to call such a witness does not constitute ineffective assistance." *Id.* It also stated that counsel will not be deemed ineffective for failing to present cumulative evidence. *Id.* The court held, "Because the testimony from Mr. Tisius' father and stepmother would not have *unqualifiedly supported the theory put forward by the defense during the penalty phase retrial*, trial counsel's failure to call them to testify was not

unreasonable trial strategy." *Id.* at 428 (emphasis added).

The court found that counsel's strategy was that the petitioner's will had been overborne by his accomplice, who became a father figure to him, and found that counsel had supported this theory with multiple witnesses who testified that the petitioner lacked a father figure while growing up due to his father's lack of involvement in his life *Id.* The court also noted that the petitioner's father and stepmother's testimony "placed some of the blame" on petitioner because their testimony portrayed the petitioner as "uncooperative and a troublemaker." *Id.* The court concluded, "Because the testimony from Mr. Tisius' father and stepmother had the potential to present Mr. Tisius in a negative light, their testimony did not wholly support the defense's theory at trial." *Id.* The Court thus concluded counsel were not ineffective for failing to call them. *Id.*

As to the claim regarding the three other potential mitigating witnesses, the court concluded that the proposed testimony was cumulative to testimony trial counsel did present establishing the petitioner's abuse at the hands of his brother, the petitioner's homelessness, and the petitioner's suicidal attempts and threats. *Tisius*, 519 S.W.3d at 428. Thus, the court concluded that counsel was not ineffective for failing to present cumulative testimony. *Id.*

As to the claim regarding the failure to present portions of expert testimony to support a statutory mitigating circumstance, the court noted that, through their investigation, counsel had obtained opinions from three different mental health experts and decided to present live testimony from a different doctor and to have portions of the other two doctors' prior testimony read into the record. *Tisius*, 519 S.W.3d at 426. The court ruled that the record supported the motion court's conclusion that the decision not to read additional portions of the testimony into the record and seek a statutory mitigating circumstance based on extreme mental or emotional disturbance was reasonable trial strategy; counsel had testified that they chose to present the best portions of the prior testimony and that they believed Dr. Peterson's testimony about extreme mental or emotional disturbance "would have been difficult to support in front of the jury based on the facts of the case." *Id.* at 426-27. The court also concluded that the petitioner failed to prove that there was a reasonable probability of a different result had Dr. Peterson's testimony been read in full because much of the testimony was cumulative to the other portions of Dr. Peterson's testimony and that of the other two doctors and thus that "trial counsel had presented a clear view of Mr. Tisius's mental health issues to the jury without the additional excerpts of Dr. Peterson's testimony." *Id.*

As to the claim of failure to present the additional "boot shank" evidence, the court concluded that the proposed testimony of the inmate was inadmissible because the testimony was not based on the witness's personal knowledge but was hearsay; thus, counsel was not ineffective for failing to offer inadmissible evidence. *Tisius*, 519 S.W.3d at 421-22. The court found that the other evidence related to the boot shank would not have created a reasonable probability of a different result because the plea transcript and photo of the boot shank would have emphasized the dangerous nature of the offense and thus would not have sufficiently "rebutted the impression that Mr. Tisius was a risk to correctional staff or other inmates[.]" *Id.* at 422-23.

Reasons for Denying the Writ

I. The Petition Does Not Raise an Issue Warranting this Court's Review

Under Rule 10, certiorari is granted "only for compelling reasons." Rule 10. In reviewing of a decision of a state court of last resort, review is generally limited to claims that (1) the state court decided an important federal question in a way that either conflicts with another state's court of last resort or the United States court of appeals; (2) the state court decided an important federal question that has not been, but should be, settled by this Court; or (3) the state court decided an important federal question in a way that conflicts with relevant decisions of this Court. Rule 10(b), (c). A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Rule 10.

Here, the petition only raises claims that the Missouri Supreme Court's decision conflicts with opinions of this Court, primarily *Strickland v. Washington*, 466 U.S. 668 (1984) (Pet. 11-23). But, as explained below, the Missouri Supreme Court properly stated the rules found in *Strickland* and its progeny. Thus, the petition merely seeks to challenge the court's application of *Strickland* to the facts of the petitioner's case. Such claims raise issues

that would be limited to the facts of this case, would not recur with regularity or give rise to a split in authority among the United States court of appeals or state courts of last resort, and would not provide helpful precedent to future courts and litigants beyond what has already been stated by this Court in *Strickland* and its progeny. Therefore, the petitioner has not raised a claim of general importance warranting this Court's review.

II. The Missouri Supreme Court's Application of the *Strickland* Performance Prong Did not Conflict with this Court's Precedents

The petitioner alleges that the Missouri Supreme Court's rule that counsel is not ineffective for failing to present evidence that does not "unqualifiedly support a defendant" creates an irrebuttable presumption of effectiveness that a movant could never overcome because "there is not a single piece of evidence or testimony that unqualifiedly supports any position in either post-conviction or at trial" (PCR Tr. 11-15). But this argument overstates the meaning of the Court's language.

As used in this case (and in prior Missouri cases), the language does not create an irrebuttable presumption; it does not even require that potential evidence be only and entirely beneficial to the defense. Instead, the application of that language stands for the uncontroversial proposition that counsel is not constitutionally deficient for choosing not to present evidence

that is contrary to, inconsistent with, or potentially harmful to the defense's trial strategy and case.

In another capital case, *Rousan v. State*, 48 S.W.3d 576 (Mo. 2001), the Missouri Supreme Court more fully stated the same rule in this way: "When defense counsel believes a witness' testimony 'would not *unqualifiedly support his client's position*, it is a matter of trial strategy not to call him to the stand, and the failure to call such witness does not constitute ineffectiveness of counsel.'" *Id.* at 587 (emphasis added) (internal citation omitted); *see also State v. Johnson*, 901 S.W.2d 60, 63 (Mo. 1995). The court has stated the same rule using the word "unequivocally." In *Winfield v. State*, 93 S.W.3d 732 (Mo. 2002), the court stated, "When defense counsel believes a witness' testimony would not *unequivocally support his client's position*, it is a matter of trial strategy not to call him, and the failure to call such witness does not constitute ineffective assistance of counsel." *Id.* at 739; *see also Davis v. State*, 486 S.W.3d 898, 914 (Mo. 2016). Thus, the rule in Missouri is not that evidence omitted by counsel must be irrebuttably perfect to merit a finding of ineffective assistance of counsel. Instead, it requires merely that the post-conviction movant prove that counsel's decision to omit the evidence was unreasonable.

The Missouri Supreme Court applied this rule to the petitioner's claim that counsel was ineffective for failing to call the petitioner's father and stepmother. *Tisius*, 519 S.W.3d at 427-38. Counsel's strategy was that abandonment by his father made the petitioner susceptible to his accomplice's influence as a substitute father figure; without that influence, appellant would not have committed the murders. *Id.* at 428. The trial record shows that this was a consistent theme of the defense (2nd Trial Tr. 920-925, 932, 942-943, 973, 976, 980-987, 996, 1009, 1022-1023, 1090, 1108-1110; 2nd PCR Mov. Exh. 5 240, 243). The proposed testimony of his father and stepmother was inconsistent with this strategy as it portrayed the petitioner's father in a positive light.

Moreover, the proposed testimony of petitioner's father and stepmother established that, when the petitioner did live with his father, he refused to follow rules, got into trouble, and committed at least two criminal offenses (2nd PCR Tr. 63, 161-165). As the Missouri Supreme Court held, the proposed evidence potentially portrayed the petitioner in a negative light; thus, calling his father and stepmother would not have supported the defense strategy. *Tisius*, 519 S.W.3d 428. Therefore, the Missouri Supreme Court's rule regarding evidence that does not "unqualifiedly support" the defense did not create an irrebuttable presumption, but merely established that counsel is

not ineffective for failing to present evidence that is contrary to, and potentially harmful to, the defense.

The Missouri Supreme Court's language does not contradict *Strickland*. In *Strickland*, this Court stated, "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. Thus, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. There are "countless ways to provide effective assistance in any given case." *Id.* at 689. Counsel may make strategic choices after "less than complete investigation" as long as counsel makes a reasonable decision that makes particular investigations unnecessary, and a "heavy measure of deference" is applied to that judgment. *Id.* at 690-91; *see also Harrington v. Richter*, 562 U.S. 86, 106 (2011). Where counsel has reason to believe certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not be later challenged as unreasonable. *Strickland*, 466 U.S. at 691. Further, courts have a duty not simply to give counsel the benefit of the doubt, but to affirmatively entertain the range of possible reasons that counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011).

The Missouri Supreme Court's reasoning that trial counsel can reasonably omit evidence that does not support (or conflicts with) the defense strategy is an appropriate application of *Strickland* and its progeny. That the court used the phrase "unqualifiedly support" does not turn the court's rationale into a rule establishing an improper irrebuttable presumption of reasonableness; rather, it merely means that counsel can reasonably elect to omit evidence of equivocal value. Therefore, the petitioner's claim regarding the Missouri Supreme Court's performance-prong analysis under *Strickland* does not warrant granting a writ of certiorari under Rule 10(c).

III. The Missouri Supreme Court's Application of the *Strickland* Prejudice Prong Did not Conflict with this Court's Precedents

A. The Missouri Supreme Court Did Not Apply an Outcome-Determinative Test

First, the petitioner argues that the Missouri Supreme Court's opinion erroneously applied an outcome-determinative test for *Strickland* prejudice. It is true that *Strickland* does not require "solely outcome-determinative" proof that, but for counsel's deficient performance, the outcome of the trial would have been different (Pet 16). As this Court stated in *Strickland*, "The defendant must show that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

"When a defendant challenges a death sentence…the question is whether there is a reasonable probability that, absent the errors, the sentencer…would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. The "ultimate focus of inquiry must be on the fundamental fairness of the proceeding," but that inquiry into fundamental fairness is still focused on determining whether or not "the result of the particular proceeding is unreliable[.]" *Id.* at 696. In short, it is well settled that a defendant must show a "reasonable probability" that the result of the proceeding would have been different but for counsel's errors. *See, e.g., Lee v. United States*, 137 S.Ct. 1958, 1969-70 (2017); *Buck v. Davis*, 137 S.Ct. 759, 776 (2017); *Hinton v. Alabama*, 134 U.S. 1081, 1089 (2017).

The Missouri Supreme Court expressly applied that test here. *Tisius*, 519 S.W.3d at 420. The court recognized, as *Strickland* requires, that a reasonable probability of a different result is one sufficient to undermine confidence in the outcome, and it applied that standard to each of the claims argued here. *See id.* at 423 (the boot shank evidence) and 427 (the additional

portions of Dr. Peterson's testimony). Thus, the Missouri Supreme Court's application of the *Strickland* standard was consistent with *Strickland* and its progeny.

B. The Missouri Supreme Court Did Not Require Proof of a Different Outcome at Trial by a Preponderance of the Evidence

The petitioner argues that the Missouri Supreme Court improperly required proof by a preponderance of the evidence that counsel's alleged errors affected the outcome of his trial (Pet. 17-20). This is incorrect. The Missouri Supreme Court requires post-conviction movants to prove claims raised in post-conviction motions by a preponderance of the evidence. Missouri Supreme Court Rule 29.15(*i*). Thus, the petitioner was required to prove his claim of ineffective assistance of counsel (including the *Strickland* prejudice prong) by a preponderance of the evidence. *Tisius*, 519 S.W.3d at 420. But that did not mean that the petitioner had to prove a "more likely than not" effect on the trial from counsel's errors. Instead, the petitioner was required to prove prejudice (a reasonable probability of a different resulted) by a preponderance of the evidence. Thus, the petitioner was not required to prove anything more than *Strickland* required: that there was a reasonable probability of a different result but for counsel's deficient performance.

This Court rejected the same claim the petitioner now raises in

Holland v. Jackson, 542 U.S. 649 (2004). This Court noted that the state court had properly stated the *Strickland* standard and, thus, that its language about proving post-conviction claims by a preponderance of the evidence "is reasonably read as addressing the general burden of proof in postconviction proceedings[.]" *Id.* at 654. Because the state court stated and applied the *Strickland* prejudice standard, there was no reason to interpret the preponderance of the evidence language as anything other than a reference to a general burden of proof, as "such a reading would needlessly create internal inconsistency in the opinion." *Id.* The same is true here. The Missouri Supreme Court's general statement of the burden of proving post-conviction claims did not modify the *Strickland* prejudice analysis.

C. The Missouri Supreme Court Did Not Require a Showing of a Reasonable Probability of Jury Unanimity to Choose a Life Sentence

The petitioner's third claim is that the Missouri Supreme Court required proof that the "entire jury," as opposed to one juror, would have decided against the death penalty in order to prove *Strickland* prejudice (Pet. 20-22). The petitioner cites to language where the court stated that the movant was required to prove a reasonable probability "that the jury, balancing all of the circumstances, would not have awarded the death penalty" (Pet. 20). *Tisius*, 519 S.W.3d at 420. This Court has held that, in the

death sentencing context, the defendant need only prove that "at least one juror would have struck a different balance." *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 513 (2003); *Pinholster*, 563 U.S. at 236. But while the Missouri Supreme Court did not explicitly use the "one juror" language, under Missouri law, its statement that "the jury" would not have awarded the death penalty is fully consistent with that standard.

Under Missouri's death penalty sentencing scheme, the defendant can only be sentenced to death if the jury unanimously agrees to impose a death sentence. Mo. Rev. Stat. § 565.030 (2001). The jury is instructed that it "cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it[.]" MAI-CR 3d 314.48 (2006). Thus, by necessity, if one juror decided against a death sentence, the jury, "balancing all of the circumstances, would not have awarded the death penalty." *Tisius*, 519 S.W.3d at 420. In short, while the court employed different language, the meaning was the same: one juror balancing the choice between life and death in favor of life means that the jury would not have decided to impose death. There is no conflict between this Court's *Strickland* jurisprudence and the Missouri Supreme Court's opinion in this case.

The petitioner further asserts that he did prove a reasonable probability of a different result in this case because he proved that one juror

would have "struck a different balance" (Pet. 22-23). But inasmuch as the Missouri Supreme Court properly applied *Strickland*, the petitioner is merely arguing for a different outcome. Because there is no conflict between any opinion of this Court and the Missouri Supreme Court, the petitioner's request for a writ of certiorari should be denied.

Conclusion

The petition should be denied.

Respectfully submitted,

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