THIS IS A CAPITAL CASE

No. _______

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL TISIUS, Petitioner,

v.

PAUL BLAIR,
Warden, Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Eighth Circuit redefined and amended Congress's lenient certificate of appealability (COA) standard found in 28 U.S.C.§ 2253 with a more restrictive and onerous one. As a result, the court denied a COA as to any of the 32 grounds in Mr. Tisius's initial habeas petition, which leads to the following questions:

1. Was the denial of a COA proper when a reasonable jurist could conclude that (1) it was improper for the jury to consider, as a reason for death, evidence of the surviving family members pleas for death sentences, when this Court prohibited such evidence in *Booth v. Maryland*, 482 U.S. 496 (1987), *Payne v. Tennessee*, 501 U.S. 808 (1991), and *Bosse v. Oklahoma*, 580 U.S. 1 (2016), and (2) counsel's failure to object to the victim opinion evidence therefore was deficient performance?

2. Was the denial of a COA proper when a reasonable jurist could conclude that the state court, in finding no conflict of interest due to counsel's flat-fee arrangement of $10,000 apiece for a capital sentencing proceeding, failed to consider what counsel failed to do and instead relied exclusively on counsel's testimony that the flat fee did not affect their representation?

3. Was the denial of a COA proper when a reasonable jurist could conclude that trial counsel performed deficiently by failing to investigate and present available expert evidence establishing statutory mitigating circumstances that were not otherwise presented to the jury?

4. Do the Eighth Circuit's *pro forma* unexplained blanket denials of COAs over previous state court dissents and dissents from federal circuit court judges in capital habeas cases conflict with 28 U.S.C. § 2253, and this Court's decisions in *Slack v. McDaniel*, 539 U.S. 473 (2000), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Hohn v. United States*, 524 U.S. 236 (1998), and *Barefoot v. Estelle*, 463 U.S. 880 (1983), by preventing a condemned prisoner from obtaining meaningful appellate review on a first habeas corpus petition?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Michael Tisius is the petitioner in this case and was represented in the Court below by Elizabeth Unger Carlyle, Keith O'Connor, and the Federal Defender for the Western District of Missouri.

Paul Blair, Warden of Potosi Correctional Center, is the Respondent. He and his predecessors in that position, Cindy Griffith and Richard Jennings, were represented in the court below by Assistant Missouri Attorney General Andrew Crane.

Pursuant to Rule 29.6, no parties are corporations.

RELATED PROCEEDINGS

United States Court of Appeals for the Eighth Circuit:
Michael Tisius v. Paul Blair, No. 21-1682 (Jan. 12, 2022)

United States District Court for the Western District of Missouri:
Michael Tisius v. Richard Jennings, No. 4:17-CV-00426-SRB (Oct. 30, 2020)

Supreme Court of Missouri:
State of Missouri v. Michael Tisius, No. SC84036 (direct appeal) (Dec. 10, 2002)

Michael Tisius v. State of Missouri, No. SC86534 (first post-conviction appeal) (Jan. 10, 2006)

State of Missouri v. Michael Tisius, No. SC91209 (resentencing direct appeal) (March 6, 2012)

Michael Tisius v. State of Missouri, No. SC95303 (second post-conviction appeal) (April 25, 2017)

Circuit Court of Boone County, Missouri:
State of Missouri v. Michael Tisius, No. 01CR-164629 (trial) (Oct. 1, 2001)

Michael Tisius v. State of Missouri, No. 03CV-165704 (first post-conviction) (Nov. 4, 2004)

State of Missouri v. Michael Tisius, No. 01CR-164629 (resentencing) (Sept. 28, 2010)

Michael Tisius v. State of Missouri, No. 12BA-CV02901 (second post-conviction) (Sept. 3, 2015)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Tisius prays that a writ of certiorari be granted to review the judgment of the Eighth Circuit Court of Appeals entered on November 9, 2021.

OPINIONS BELOW

The November 9, 2021 order of the Eighth Circuit Court of Appeals summarily denying a Certificate of Appealability (COA) and dismissing Mr. Tisius's appeal is unpublished and appears in the Appendix (hereinafter "App.") at 1a. The Eighth Circuit's January 12, 2002, order denying panel and en banc rehearing is unpublished and appears at App. 138a. The memorandum and order of the district court denying habeas relief is unpublished and appears at App. 2a. The order denying relief under Fed. R. Civ. P. 59(e) is unpublished and appears at App. 79a - 80a.

JURISDICTION

On November 9, 2021, the Eighth Circuit Court of Appeals summarily denied a COA and dismissed Mr. Tisius's appeal. App. 1a. The Eighth Circuit denied a timely petition for panel and en banc rehearing, on January 12, 2022. App. 138a. Upon application of Mr. Tisius under Rule 31 in Case No. 21A548, on March 25, 2022, Associate Justice and Eighth Circuit Justice Brett M. Kavanaugh extended

the time for filing the petition for writ of certiorari in this cause on or before June 11, 2022.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

This case also involves the Eighth Amendment to the United States Constitution that states, in pertinent part, that "cruel and unusual punishments [shall not be] inflicted." U.S. Const. Amend. VIII.

This case also involves the Fourteenth Amendment to the United States Constitution that states, in pertinent part: "no state shall. . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

This case also involves 28 U.S.C. § 2253 that states, in pertinent part:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

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[1] Because June 11 is a Saturday, this order had the effect of extending the time to June 13, 2022. U.S. Sup. Ct. R. 30.1.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Mr. Tisius's case comes before the Court via a circuitous route. He obtained sentencing relief due to the state's presentation of inaccurate evidence, and his initial trial counsel's ineffectiveness in failing to discover the lie. At resentencing, new counsel hampered by a flat-fee did absolutely nothing new. Indeed, they did not even present the mitigation evidence that led a state court judge to grant sentencing relief. Trial Counsel acted in such a dilatory manner at the resentencing even though guilt was not at issue in this horrendous tragedy that left two people dead.

Mr. Tisius received two sentences of death for the 2000 murders of Leon Egley and Jason Acton, jailers at the rural Randolph County jail in Macon,

Missouri. The deaths occurred when the 19-year-old Mr. Tisius and his older accomplice, Tracie Bulington, attempted unsuccessfully to help the much older and manipulative Roy Vance, with whom Mr. Tisius had been jailed at the facility, escape.

This unspeakable tragedy represents, for Mr. Tisius, the culmination of a life of neglect and abuse. He was neglected and abused by his father, his mother, his older brother, and his extended family. Although this abuse and neglect was known to others, virtually no one did anything to help. At the time of the offense, Mr. Tisius was homeless, under severe emotional stress, and powerless against the inducements of Roy Vance.

Mr. Tisius did not do much better after his arrest when he was represented by counsel. Charged with saving his life, counsel failed to investigate, prepare, and present available evidence that could have secured at a minimum a life sentence and quite possibly conviction of a lesser offense. His lawyers did not investigate or present available evidence that would have led to the retention of experts to explain the organic brain damage and the interplay of that brain damage with Mr. Tisius's post-traumatic disorder, long standing depression, and dependent personality disorder.

His first trial lawyers did not even view the vehicle used for Mr. Tisius's and Ms. Bulington's flight after the offense. Had they done so, they would have learned that the prosecutor placed false evidence before the jury as to a song Mr. Tisius

allegedly listened to on the way to the jail. As a result of this error, Mr. Tisius's first death sentences were reversed, and he was appointed new counsel.

This time, the state relied on new evidence: Mr. Tisius's conviction for possession of a dangerous object in prison (an unmodified "boot shank" in his radio). Although resentencing counsel represented Mr. Tisius at the time of the new offense and his capital resentencing was then pending, counsel did not investigate the circumstances allegedly supporting this conviction.[2] Nor did counsel investigate or mount any challenge to the voluntariness of Mr. Tisius's guilty plea.

Even though counsel knew that the state intended to present this aggravating evidence during the resentencing trial, counsel did not investigate or present available evidence rebutting the aggravating evidence.

At Mr. Tisius's first post-conviction proceeding, a psychiatrist, Dr. Stephen Peterson, testified that Mr. Tisius suffered from major depressive disorder, severe without psychotic features; childhood onset post-traumatic stress disorder; dysthymia or dysthymic disorder; alcohol and marijuana abuse and/or dependence; and some problematic personality traits such as passive/aggressive personality or compulsive personality. In addition to supporting the substantial domination mitigating circumstance, which counsel intended to present to the jury, Dr. Peterson's testimony also supported two other statutory mitigating circumstances: that Mr. Tisius acted under the influence of extreme mental or emotional disturbance, and that Mr. Tisius' capacity to appreciate the criminality of his

[2] The Washington County public defender represented Mr. Tisius on this charge.

conduct or conform his conduct to the requirements of law was substantially impaired.

Mr. Tisius's resentencing counsel were not full-time public defenders. Instead, the Missouri Public Defender System retained two small firm criminal defense attorneys, paying them a flat fee of $10,000 each for their representation. It is small wonder that, given this limited compensation, they did not do much investigation. They never spoke to Dr. Peterson, electing to have portions of his post-conviction deposition testimony read to the jury in lieu of presenting him live. Nor did they present other evidence developed in Mr. Tisius's first post-conviction proceeding. And they presented virtually no new evidence at all.

As a result, the jury did not hear expert testimony detailing the effects of Mr. Tisius's childhood trauma on his brain and his behavior, particularly that his extensive trauma "history shaped the development of his nervous system in a manner that created a desperate need for someone to love him and resulting gullibility, manipulability, and vulnerability such that he was especially susceptible to others taking advantage of him." Doc. 29-1 p. 47[3]; see also pp. 13, 39-47. Nor did the jury hear neuropsychological and neuropsychiatric evidence of Mr. Tisius's damaged and immature brain and its corresponding impaired functioning at the time of the offense, which not only explained Mr. Tisius's behavior but also

[3] This and similar references to the state court record refer to documents filed in district court.

established two mental-impairment statutory mitigating circumstances that the jury did not consider. Doc. 29-1 pp. 99-100, 111-13, 141-45.

Nor did the jury hear good conduct prison evidence, which was particularly important given the state's emphasis on the boot shank conviction to urge the jury to conclude that Mr. Tisius is a "wolf" who "has a boot shank" and "continues to be a danger to our society" and that the only way they could protect the jailers and other members of the community was to fulfill their "obligation" to kill him, action that was not only "justified" but "necessary." In addition, without objection, the prosecutor argued that the families of the victims wanted Mr. Tisius to be executed, and the jury to impose death in response to the families' "plea."

Mr. Tisius was again sentenced to death. His second sentences of death were affirmed by the Missouri Supreme Court on direct appeal. *State v. Tisius*, 362 S.W.3d 398 (Mo. banc 2012). That court also affirmed the denial of post-conviction relief. *Tisius v. State*, 519 S.W.3d 413 (Mo. banc 2017). The issues of ineffective assistance of counsel for failing to object to the victim opinion evidence, conflict of interest due to a flat fee, and ineffective assistance of counsel for failing to offer the full testimony of Dr. Peterson, were raised in the circuit court motion for post-conviction relief and the appeal from the denial of that motion.

As to the issue regarding victim impact evidence, the court found, "Because it is not improper for a prosecutor to 'seek and request the most severe penalty'", *State v. Clayton*, 995 S.W.2d 468, 480 (Mo. banc 1999), any objection would have been nonmeritorious." *Id.* at 429, App. 52a. As to the flat fee issue, the court held, "The

motion court found trial counsel's testimony credible that the flat fee arrangement had no adverse impact on their representation of Mr. Tisius. The record supports the motion court's finding." *Tisius v. State*, 519 S.W.3d 413, 430 (Mo. banc 2017) (App. 12a.) As to the issue regarding Dr. Peterson, the court held, "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." *Id.* at 427, App. 21a.

Mr. Tisius then filed his habeas corpus petition. After briefing but without an evidentiary hearing, the district court denied relief and a COA as to all 32 grounds in the petition. Mr. Tisius appealed this determination to the U.S. Court of Appeals, Eighth Circuit. The Eighth Circuit issued an unexplained, summary and *pro forma* order denying a COA, and then denied rehearing in a similarly unexplained order. App. 1a. The federal review of Mr. Tisius's case is but another instance of neglect. This petition follows.

REASONS FOR GRANTING THE WRIT

I. VICTIM OPINION EVIDENCE IN CAPITAL CASES HAS BEEN PROHIBITED BY THIS COURT FOR DECADES AND A COA SHOULD HAVE ISSUED TO DETERMINE THE STATE COURT'S UNREASONABLE APPLICATION OF *BOOTH V. MARYLAND*, 482 U.S. 496 (1987).

This Court steadfastly rejects that victim opinion evidence may be considered in a capital sentencing hearing. In *Booth v. Maryland*, 482 U.S. 496 (1987), this Court held that it is constitutional error to present victim impact and opinion

evidence. In *Payne v. Tennessee*, 501 U.S. 808 (1991), this Court lifted the bar on victim impact evidence subject to limitations but left in place the constitutional prohibition of victim *opinion* evidence. *Id.* at 830 n. 2.

This Court has held that because the state cannot admit testimony *Booth* prohibits, a prosecutor likewise cannot discuss such evidence in closing argument. *South Carolina v. Gathers*, 490 U.S. 805, 811 (1989), *overruled on other grounds by Payne v. Tennessee*, 501 U.S. 808 (1991) (explaining that the fact that a prohibited statement came from a prosecutor rather than the victim's survivors did not mean that *Booth* was inapplicable). Informing the jury as to the sentencing desires of the victims' family is unconstitutional and not tolerated by this Court. *Bosse v. Oklahoma*, 580 U.S. 1 (2016).

The prosecutor argued: Do those Miller[4] kids—do those Miller kids get to kill somebody because their dad, their father figure is gone? If so, Mr. Tisius, write down the name. Tell me who they get to kill, because I bet your name would be on that piece of paper." R. Doc. 46-19 p. 179. A reasonable jurist could find the prosecutor s argument about whom the Miller children wish to kill, Mr. Tisius, improper under *Booth*. *See*, *e.g.*, *Baer v. Neal*, 879 F.3d 769, 785 (7th Cir.) cert denied *Neal v. Baer*, 139 S.Ct. 595 (2018) (concluding that trial counsel's failure to object to closing argument stating, "We would not be here if that's not what the

[4] Jason Acton, one of the victims, was engaged at the time of his death to Lori Miller, who had children from a previous marriage. Ms. Miller testified as to the impact of Mr. Acton's death on the children.

Clarks wanted [,]" and similar comments stated in voir dire, constituted deficient performance).

The prosecutor concluded in his **rebuttal** argument that death was the ***only*** sentence that could satisfy a plea from the victim s family: ***It is an answer to the plea from the families of Leon and Jason and Randolph County that you do justice in this case."*** Doc. 46-19 p. 186 (emphasis added). Death was the plea from the families. A reasonable jurist could find this family plea for death offends *Booth*. *See*, *e.g.*, *Baer*, 879 F.3d at 785.

The Eighth Circuit's summary denial conflicts with other reported Eighth Circuit authority recognizing the existence of the *Booth* prohibition on victim opinion evidence still existed. In *Parker v. Bowersox*, 188 F.3d 923, 931 (8th Cir. 1999), the Eighth Circuit noted the prohibition on victim opinion evidence: "family members of the victim may not state 'characterizations and opinions about the crime, the defendant, and the appropriate sentence' at the penalty phase." In *Williams v. Norris*, 612 F.3d 941, 951 (8th Cir. 2010), the Eighth Circuit again recognized the Supreme Court left intact the prohibition against statements about the crime, the defendant, and the appropriate sentence ; such statements violated the Eighth Amendment and were inadmissible.").

In *Williams*, the Eighth Circuit found a *Booth* violation when arguments requested future action" and suggested that the jury act affirmatively and impose a death sentence." 612 F.3d at 952. Here, the prosecutor bet that the Miller children s future actions would be to write down Mr. Tisius s name to impose a

death sentence. The rebuttal argument went further, specifically suggest[ing] that the jury act affirmatively and impose a death sentence [as an answer to the plea the families of Leon and Jason and Randolph County]." *Id.* And in *Parker*, 188 F.3d at 931, the Eighth Circuit noted the prohibition on victim opinion evidence: "family members of the victim may not state 'characterizations and opinions about the crime, the defendant, and the appropriate sentence' at the penalty phase." Thus, the Eighth Circuit's ruling in this case there creates an intra-circuit split.

Other federal circuit courts of appeals have universally recognized the continuing prohibition on victim opinion evidence in capital cases. The Eighth Circuit ruling in this case stands against every circuit to have addressed the issue: the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh Circuits, as well as the military court system. *See United States v. Savage*, 970 F.3d 217, 299 (3d Cir. 2020); *Humphries v. Ozmint*, 397 F.3d 206, 217 (4th Cir. 2005) (en banc); *United States v. Bernard*, 299 F.3d 467, 480 (5th Cir. 2002); *Fautenberry v. Mitchell*, 515 F.3d 614, 638 (6th Cir. 2008); *Baer*, 879 F.3d 769, 785 (7th Cir.); *United States v. McVeigh*, 153 F.3d 1166, 1217 (10th Cir. 1998); *United States v. Mikhel*, 889 F.3d 1003, 1053 (9th Cir. 2018); *United States v. Brown*, 441 F.3d 1330, 1351 (11th Cir. 2006); *United States v. Akbar*, 74 M.J. 364, 393 (CAAF 2015).[5]

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[5] The First Circuit has not considered the question, although a district court within the First Circuit noted the continuing prohibition on victim opinion evidence. *United States v. Sampson*, 335 F.Supp.2d 166, 187 (Mass. 2004). The Second Circuit also has not considered the question, although a district court within the Second Circuit noted the continuing prohibition on victim opinion evidence in a capital case. *United States v. Blake*, 89 F.Supp.2d 328, 348 (E.D. NY 2000). The D.C. Circuit similarly has not considered the question, although a district court within the D.C.

The Eighth Circuit disregarded this Court's *Booth* precedent and created both an intra- and inter-circuit split. Reasonable jurists could conclude that the state court opinion finding that counsel's failure to object could not have been deficient performance because counsel did not have any basis for objecting to the victim opinion testimony was (1) contrary to or an unreasonable application of *Booth* or (2) rests on an unreasonable determination of fact. This Court should grant certiorari on the basis of this Court's well-established and recognized *Booth* precedent. Sup. Ct. R. 10 (a); Sup. Ct. R. 10 (c).

II. THE DISTRICT COURT AND COURT OF APPEALS WRONGLY DENIED A COA ON MR. TISIUS'S CLAIM OF CONFLICT OF INTEREST.

Mr. Tisius's resentencing counsel received a flat fee of $10,000 per attorney for a death penalty resentencing trial. The representation covered approximately four years. During post-conviction proceedings, counsel self-servingly testified that the paltry fee did not affect the quality of their representation. Instead of examining the representation counsel actually provided, the state court instead relied solely on these denials to find no evidence that this fee arrangement affected their representation. *Tisius v. State*, 519 S.W.3d 413, 430 (Mo. banc 2017). (App. 12a)

The fee was grossly inadequate. The 2010 revision of the 1998 "Report to the Committee on Defender Services. Judicial Conference of the United States: Update

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Circuit noted the continuing prohibition on victim opinion evidence. *United States v. Perry*, 1994 U.S. Dist.LEXIS 20462 at *21 n. 14 (D.C. 1994).

on the Cost and Quality of Defense Representation in Federal Death Penalty Cases" ("Revised Spencer Report") clearly demonstrates this fact. The report includes data derived from federal capital cases tried between 1998 and 2004. During that period, for death penalty cases that went to trial, the median attorney cost paid under the Criminal Justice Act was $352,530. Assuming that half of that cost was for guilt and half for penalty phase, the median for a resentencing would be at least $176,000. During that period, the hourly rate of compensation for appointed counsel in federal cases was $125. Revised Spencer Report, p. x. Thus, the median time necessary was 1,408 hours.

By the time of Mr. Tisius's retrial, the CJA rate rose to $178. The contrast between $176,000, which reflects the below-market payments made to federal appointed counsel at $125 per hour, and the $20,000 paid to Mr. Tisius's counsel is dramatic. In addition, the report concludes,

> There was a strong association between a lower cost defense representation and an increased likelihood of a death sentence at trial. For trial cases in which defense spending was among the lowest one-third of all trial cases, the rate of death sentencing was 44 percent. For trial cases in which defense resources were in the remaining two-thirds of cost, the likelihood of a death sentence was 19 percent. Thus, the lowest cost cases were more than twice as likely to yield sentences of death.

Id.

Based on the data in the Revised Spencer Report, to perform the required work on Mr. Tisius's case, each lawyer would only receive $14.00 per hour. Working at that rate, for a solo or small firm lawyer like these two contract-counsel, is patently adverse to their financial interests. Indeed, $14.00 per hour would not

cover an average attorney's overhead. Stated another way, any hour worked on Mr. Tisius's case represented a net loss to these lawyers.

Reasonable jurists could conclude that the state court's analysis rests on an unreasonable determination of fact or was contrary to or an unreasonable application of clearly established federal law. *First*, reasonable jurists could conclude that the state court unreasonably accepted counsels' post hoc assessment—that the $10,000 flat-fee arrangement had no adverse impact on their representation—as conclusively determinative of whether the arrangement created a conflict of interest. *Tisius*, 519 S.W.3d at 430. Clearly established federal law required the court instead to center the adverse impact inquiry on what counsel failed to do.

The Sixth Amendment right to effective assistance of counsel includes a "correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). Courts have "an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that the legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988). Because the right to conflict-free counsel is part of the constitutional guarantee of effective assistance of counsel, courts must focus the adverse impact inquiry on what counsel failed to do because of the alleged conflict. *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980).

This Court has expressed distrust of a lawyers' ability to appreciate conflicts and communicate them to their clients. *Wheat*, 486 U.S. 153 at 162-63. "The

existence of an actual conflict cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict." *Saunders v. Ratelle*, 21 F.3d 1446, 1452 (9th Cir. 1994); *see also Sullivan*, 446 U.S. at 349; *United States v. Infante*, 404 F.3d 376, 392-93 (5th Cir. 2005) (finding conflict despite attorney's denial and remanding for examination of adverse effect).

Courts in other circuits regularly examine the actual conduct of counsel to determine whether a conflict of interest adversely affected the client. In *Daniels v. United States*, 54 F.3d 290, 294-295 (7th Cir. 1995), the court noted, "when an attorney's pecuniary interests are adverse to his client's interests, a conflict of interest may be created." The court then granted a hearing to allow Mr. Daniels to present evidence on the issue of whether his failure to pay the full fee affected his attorney's advice to accept a plea agreement. In *United States v. Mullen*, 748 Fed. Appx. 491, 493-494 (4th Cir. 2018), the court granted an evidentiary hearing to determine whether a fee dispute resulted in counsel's failure to assist his client in obtaining a psychological evaluation. In *United States v. Messina*, 131 F.3d 36, 40 (2d Cir. 1997), the court rejected a claim of adverse effect from a fee dispute, but only after carefully examining counsel's conduct of the defense and concluding that it was reasonable. In none of these cases was the court satisfied with the self-serving statements of counsel. These cases are at odds with the state court's approach in Mr. Tisius's case and the Eighth Circuit's silent acceptance of that approach, creating a circuit split.

The record includes many instances of counsel's failure to spend time developing Mr. Tisius's case. Despite having almost four years before the resentencing trial to work on the case, counsel:

- failed to interview witnesses who had not previously testified, including Mr. Tisius's father and stepmother; and his childhood friends Jamey Baker and Deanna Guenther and teacher Lynne Silverman;
- failed to interview Dr. Peterson, (a psychiatrist who had evaluated Mr. Tisius and testified in the first post-conviction case), despite knowing that Dr. Peterson's testimony established two statutory mitigating circumstances the first jury did not consider;
- failed to provide testifying expert Dr. Taylor with non-statutory aggravating evidence alleging that Mr. Tisius "bragged" about committing the offenses that counsel knew or should have known would come out on cross; and
- failed to investigate available evidence rebutting the "bragging" evidence and boot shank aggravating evidence, including failing to raise any challenge to Mr. Tisius's guilty plea.

Furthermore, resentencing counsel, despite knowing that such evidence existed or likely existed, (a) failed to investigate and present good conduct prison evidence; (b) failed to investigate and present neuropsychological and neuropsychiatric evidence of Mr. Tisius's impaired functioning at the time of the offense; and (c) failed to investigate and present expert testimony detailing Mr. Tisius's childhood trauma and its effects on his behavior. They similarly failed to

talk to Mr. Tisius's co-defendant Tracie Bulington and inmates who were in the jail with Mr. Tisius and Roy Vance, despite knowing that these witnesses possessed or likely possessed information relevant to the "substantial domination" mitigation case; and failed to investigate Mr. Vance's criminal history and present evidence of his prior escape attempt.

Resentencing counsel testified that their investigator did not do significant investigation, because "[a]s a general reason I couldn't afford to have him do a tremendous amount of work on this case. . . ." Doc. 46-36 p. 107. Counsel further admitted that being paid only $10,000 for Mr. Tisius's case, made it "hard to afford to have him do too much." *Id.*

This evidence shows that, despite counsel's insistence that the flat-fee arrangement had no adverse effect on their representation, counsel did not perform many pre-trial investigative tasks, even though counsel had reason to believe that such investigation would have been beneficial. Instead, counsel simply repackaged a failed mitigation case from the first trial.

Under the Sixth Amendment, "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins v. Smith,* 539 U.S. 510, 521 (2003). When the known evidence would lead a reasonable attorney to investigate further, counsel's failure to do so is objectively unreasonable. *Id.* at 527.

In *Kenley v. Armontrout*, 937 F.2d 1298, 1298, 134-1308 (8th Cir. 1991), the Eighth Circuit held that counsel's failure to talk to witnesses identified in a prior

case was objectively unreasonable. Defense counsel had a social history from the prior case documenting "Kenley's troubled home life and childhood" and knew of a psychiatrist who had evaluated Kenley previously and family members who could have testified about Kenley's background. *Id.* But counsel did not speak to the family witnesses or Kenley's prior expert. *Id.* at 1300, 1306-07. In *Johnson v. Mitchell*, 585 F.3d 923, 939-43 (6th Cir. 2009), the Sixth Circuit similarly held that the failure of second-trial counsel to investigate witnesses identified in prior proceedings was an abdication of counsel's duty to investigate and was ineffective.

As in *Kenley* and *Johnson*, the known evidence in this case would have led a reasonable attorney to investigate further. Counsel wished to present mitigating evidence of Mr. Tisius's troubled childhood, and counsel knew that no prior defense team had ever talked to his father or stepmother. Counsel knew many childhood friends possessed relevant mitigation information. Counsel knew that Dr. Peterson had evaluated Mr. Tisius, that his findings established additional statutory mitigating circumstances the first jury did not consider, and that counsel wanted the resentencing jury to hear from Dr. Peterson. Counsel also knew that the state would rely on non-statutory aggravating evidence involving Mr. Tisius "bragging" about committing the offenses and the "boot shank" conviction.

Given their knowledge, counsel's failure to talk to these witnesses and conduct further investigation to rebut the aggravating evidence was objectively unreasonable. Because this behavior must be considered in a judicial review of the adverse effects of the alleged conflict, *Sullivan*, 446 U.S. at 349; *Wheat*, 486 U.S.

153 at 162-63, reasonable jurists could conclude that the state court's sole reliance on an attorney's perception of whether adverse effects occurred—without consideration of what counsel failed to do—was unreasonable.

Second, reasonable jurists could conclude that the reason counsel failed to investigate adequately was due to the disincentive to work on this case created by the flat-fee arrangement. To prevail on this issue, Mr. Tisius need only show that "'the conflict caused the attorney's choice, not that the choice was prejudicial in any other way.'" *Covey v. United States*, 377 F.3d 903, 908 (8th Cir. 2004) (citation omitted).

Courts, professional guidelines, and judicial conferences have recognized the disincentive to work flat fees create and how this adversely affects capital cases. *See, e.g., State v. Cheatham*, 292 P.3d 318, 341 (Kan. 2013) (explaining that an attorney in these circumstances has "little financial incentive to invest the significant time commitment a capital case requires. On the contrary, his incentive would have been to pay attention to those cases whose billable hours were more likely to produce actual income."); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. 2003), *reprinted in* 31 Hofstra L.Rev. 913, 981 (2003) ("Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases."); Revised Spencer Report (finding "a strong association between a lower cost defense representation and an increased likelihood of a death sentence at trial.").

Counsel recognized that they could not afford to investigate the case given the limited payment they received. Doc. 46-36 p. 107. Accordingly, they requested and received the assistance of a mitigation specialist from the public defender system. Despite having these services available, counsel nonetheless failed to conduct the necessary investigative tasks listed above. Thus, that these services were available does not negate the adverse effects of the conflict.

Finally, jurists of reason could conclude that Mr. Tisius is entitled to relief. This Court has explained that once a petitioner has shown the existence of an actual conflict adversely affecting counsel's representation, prejudice is presumed. *Mickens v. Taylor*, 535 U.S. 162, 171-72 (2002); *see also United States v. Stitt*, 441 F.3d 297, 305 (4th Cir.), opinion recalled, 459 F.3d 483 (4th Cir. 2006) (rejecting "the Government's contention that *Sullivan* only applies to conflicts involving multiple representation[,]" and applying it to the personal conflict of interest arising out of a flat-fee arrangement). But even if prejudice is not presumed, reasonable jurists could conclude that had counsel adequately investigated the case and presented the omitted mitigating evidence, particularly the evidence neutralizing the non-statutory aggravating evidence of poor prison behaviors and establishing two statutory mental-impairment mitigating circumstances, a reasonable probability exists that at least one juror would have viewed the sentencing calculus differently. *See*, *e.g.*, *Skipper*, 476 U.S. at 8 (recognizing the prejudice resulting from future dangerousness arguments based on prison conduct); *Antwine v. Delo*, 54 F.3d 1357, 1368 (8th Cir. 1995) (finding prejudice due to counsel's failure to

investigate the defendant's mental impairments because effective presentation of the mental condition would have Supported the submission of additional statutory mitigating instructions.). Thus, under either prejudice standard, reasonable jurists could conclude this violation of the Sixth Amendment warrants relief.

For all the above reasons, the issue of conflict of interest based on a flat fee presents a debatable question warranting further review, and this Court should grant certiorari and order the issuance of a COA.

III. THE DISTRICT COURT AND COURT OF APPEALS WRONGLY DENIED A COA ON MR. TISIUS'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PRESENT AVAILABLE EVIDENCE OF STATUTORY MITIGATING CIRCUMSTANCES.

Missouri's death penalty statute, Mo. Rev. Stat. § 565.032, specifies specific factors a jury "shall consider" in determining whether to impose a sentence of death or life without parole on a person convicted of first-degree murder. These factors include both mitigating and aggravating factors. Among the mitigating factors listed are "(2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;" and "(6) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired."

Counsel possessed the deposition testimony of Dr. Stephen Peterson, a psychiatrist who had evaluated Mr. Tisius. This testimony established that at the time of the offense, Mr. Tisius was under extreme emotional distress and his

capacity to conform his conduct to the law was impaired. However, when resentencing counsel read to the jury Dr. Peterson's testimony, they eliminated his testimony establishing the two statutory mitigating factors. Thus, resentencing counsel prevented the jury from considering these statutory mitigating factors in sentencing deliberations.

The Missouri Supreme Court found that this limitation of mitigating evidence did not constitute ineffective assistance of counsel, and the district court agreed. Reasonable jurists could conclude that (1) the Missouri Supreme Court s denial of this claim rests on an unreasonable determination of fact or is contrary to or an unreasonable application of law and (2) Mr. Tisius is entitled to relief.

Despite having almost *four years* to investigate the case, *defense counsel never even spoke to Dr. Peterson*. ECF 46-26 p. 250; ECF 46-36 p. 21. *Without ever meeting this expert*, trial counsel decided to read his previous testimony into the record–but excluded the testimony regarding the two statutory mitigators.

The district court concluded that the state court s determination was reasonable because resentencing counsel read through" Dr. Peterson s deposition testimony and therefore did not have any obligation to talk with him personally. Doc. 84 p. 20. The court asserted that Mr. Tisius has not pointed to any information that would have come from interviewing Dr. Peterson that was not part of his deposition." *Id.* The court further found that counsel s redaction of information from the deposition supporting mitigating circumstances that trial counsel did not otherwise present was not ineffective because the failure to present

testimony that would be cumulative or would harm the defense is not ineffective assistance of counsel." *Id.* Reasonable jurists could disagree with these conclusions. The district court and the state court failed to abide by this Court's precedent that a strategic" decision to omit mitigation evidence is only as reasonable as the investigation underlying it. In *Strickland*, the Court recognized that trial counsel have a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Counsel s strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.

Here, trial counsel testified at the post-conviction hearing that *without talking to Dr. Peterson*, he concluded that Dr. Peterson's testimony about these matters was "something you might be able to sell to a judge in a post-conviction relief proceeding but not to a jury." *Tisius*, 519 S.W.3d at 426-427. The Missouri Supreme Court concluded that this was a permissible decision because it was "trial strategy." *Id.*

But of course, the question in the *Strickland* analysis is not whether there was a trial strategy. The question is whether the strategy was reasonable. The court must determine whether counsel's actions "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The proper focus of the *Strickland* inquiry in failure-to-present-mitigating-evidence-cases is whether the investigation

supporting counsel s decision not to introduce mitigating evidence of [the defendant s] background was itself reasonable." *Wiggins*, 539 U.S. at 523.

In Mr. Tisius's case, the Missouri Supreme Court failed to consider the reasonableness of counsels' investigation supporting the decision to limit Dr. Peterson's testimony. This was an unreasonable application of *Strickland*. Moreover, the fact that the Missouri legislature considered these two factors significant enough to include them as statutory mitigators weighs strongly against the reasonableness of counsel's conclusion that evidence of these factors was unlikely to persuade a jury.

Failing to interview witnesses relates to preparation, not strategy. Lack of diligent investigation is not protected by a presumption in favor of counsel and cannot be justified as strategy. Inattention does not equate to a reasoned strategic decision entitled to the presumption of reasonableness. *Rompilla v. Beard,* 545 U.S. 374, 395-96 (2005) (O Connor, J., concurring); *Wiggins,* 539 U.S. at 533-34.

A reasonable jurist could find that the truncated analysis of *Strickland* s deficiency prong was unreasonable because that assessment did not include consideration of the reasonableness of the investigation underlying that decision. *Wiggins*, 539 U.S. at 527. Courts repeatedly have determined that when counsel were aware of mitigation witnesses identified in prior proceedings, the failure to talk to those witnesses is objectively unreasonable. *See*, *e.g.*, *Kenley*, 937 F.2d at 1304-08; *Johnson*, 585 F.3d at 939-43.

The record contains significant evidence that counsel could have learned from Dr. Peterson that was not a part of his deposition. Dr. Peterson explained at the second post-conviction proceeding that had the attorneys talked to him before the resentencing hearing, he would have told them that what they were removing from his deposition weakened his testimony because for the omitted testimony supported his medical conclusions. Doc. 46-26 pp. 281-82. Counsel further would have learned that subsequent to Dr. Peterson's testimony and deposition, he had obtained new medical information that re-affirmed the severity of Mr. Tisius s difficulties at the time of the offense, which would further have supported the two additional statutory mitigators. Doc. 46-26 pp. 280-81. Counsel could have used this information to update Dr. Peterson s evaluation and improve it with the use of the latest medical science. Doc. 46-26 pp. 297-98.

Reasonable jurists could disagree with the district court's finding that there was no prejudice because the omitted evidence was cumulative of the evidence presented, and the state court's finding that the jury heard a clear view of Mr. Tisius's mental health issues. The omitted evidence established two additional statutory mitigating circumstances *that the presented evidence did not establish*. Thus, it cannot have been the same as what the jury heard.

This Court has noted the importance of similar statutory mitigation when evaluating *Strickland* prejudice. *Porter v. McCollum*, 558 U.S. 30, 36, 41-43 (2009); *Rompilla,* 545 U.S. at 392-93; *see also Sears v. Upton*, 561 U.S.945, 956 (2010) (recognizing the strength of organic impairment in establishing prejudice);

Williams, 529 U.S. at 398 (prejudice found when new evidenced indicate that Williams's violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation."). Accordingly, multiple courts have found prejudice from the failure to present available evidence supporting statutory mitigating factors. *Antwine,* 54 F.3d at 1368 (finding prejudice due to counsel's failure to investigate the defendant's mental impairments because "effective presentation of [the defendant]'s mental condition would have required the submission of additional statutory mitigating instructions."); *Hill v. Lockhart*, 28 F.3d 832, 845-46 (8th Cir. 1994); *Pruitt v. Neal*, 788 F.3d 248, 274 (7th Cir. 2015); *Bond v. Beard*, 539 F.3d 256, 290-92 (3d Cir. 2008); *Brownlee v. Haley*, 306 F.3d 1043, 1072-74 (11th Cir. 2002); *see also Haliym v. Mitchell*, 492 F.3d at 718-19; *Ferrell v. Hall*, 640 F.3d 1199, 1234 (11th Cir. 2011).

Because the state s argument was that Mr. Tisius chose to commit the offenses but *only* the omitted portions of Dr. Peterson s testimony explained that Mr. Tisius s choices" were the product of his intellectual impairments, reasonable jurists could conclude that counsel s failure prejudiced Mr. Tisius. *Only* the omitted testimony explained how Mr. Tisius s medical illnesses affected his judgment in a way that substantially impaired his ability to control his behavior or use appropriate judgment, despite knowing the difference between right and wrong. *Only* the omitted testimony regarding Mr. Tisius s cognitive dysfunction at the time of the offenses established the two additional mental-state statutory mitigating

circumstances and therefore would have countered the aggravating evidence in a way that the other mitigating evidence could not. *Antwine*, 54 F.3d at 1368.

Jurists of reason could disagree with the district court s determination that the state court opinion was a reasonable interpretation of fact and a reasonable application of *Strickland*. This Court should grant certiorari and order the issuance of a COA.

IV. THIS COURT SHOULD GRANT OR ALTERNATIVELY GRANT, VACATE, AND REMAND TO REQUIRE THE EIGHTH CIRCUIT TO COMPLY WITH CONGRESS'S COA STATUTORY PROVISIONS IN 28 U.S.C. § 2253 (c) AND THIS COURT'S PRECEDENT .

To obtain a COA, the petitioner need only make "a substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) ("*Miller-El I*") (quoting 28 U.S.C. § 2253(c)(2)). That showing is satisfied when "jurists of reason could disagree with the district court's resolution of [any] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.*; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The standard is not burdensome: "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El I*, 537 U.S. at 338. In a capital case, "the nature of the penalty is a proper consideration" to weigh in favor of granting a COA. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); *see also Slack*, 529 U.S. at 483-84 (holding that the COA requirement codified the pre-AEDPA *Barefoot* standard).

Holland v. Florida, 560 U.S. 631, 646 (2010), reminded, and again affirmed, that this Court "will not construe a statute to displace courts' traditional equitable authority absent the clearest command." (internal quotation marks omitted). The clear command from Congress was to codify the lenient pre-AEDPA *Barefoot* standard. *Slack*, 529 U.S. at 483-84. The Eighth Circuit does not comply with the statute as passed by Congress, and as applied by this Court.

In *Shinn v. Ramirez*, 142 S.Ct. 1718, 2022 WL 1611786 (U.S. May 23, 2022), this Court expressed that federal courts "have no power to redefine" (*id.* at *10) and "lack authority to amend" AEDPA statutory requirements. *Id.* at *11. This Court could not have been clearer: "we lack equitable authority to amend a statute." *Id.* Just as this Court cannot amend 28 U.S.C.§ 2253(c), nor may the Eighth Circuit do so by imposing a stricter version of COA requirements than Congress and this Court's authority envision and proscribe.

As this Court noted in *Miller El I*: "the COA determination under § 2253(c) *requires* an overview of the claims in the habeas petition and *a general assessment* of their merits." 537 U.S. at 336 (emphasis added). This Court further noted that the COA process "must not be *pro forma* or a matter of course." *Id.* at 337. Accordingly, this Court reversed the Fifth Circuit's COA denial in *Miller El I* because it had "sidestep[ped]" the appropriate procedure. *Id.* at 336.

In *Slack*, this Court held: "The COA statute establishes procedural rules and *requires* a threshold inquiry into whether the circuit court may entertain an appeal." *Slack*, 529 U.S. at 482 (emphasis added); *see also Hohn v. United States*,

524 U.S. 236, 248 (1998). In *Tennard v. Dretke*, 542 U.S. 274, 283 (2004), this Court also reversed the Fifth Circuit for "paying lip service" to the COA standard and remanded the case for further proceedings.

The Eighth Circuit does not even attempt to explain to capital litigants (or to a reviewing court) why their claims are not debatable. When denying a COA motion, the Eighth Circuit always issues a uniform three-line summary order like that issued in Mr. Tisius's case (or a similar summary denial). The Eighth Circuit does not appear to have explained its reasons for denying a COA on a capital habeas petition since 1997.

In both capital and non-capital cases, the Eighth Circuit routinely issues unexplained orders like that in this case, stating only: "The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied." App. 1a; *see also* Order, *Deck v. Steele*, No. 18-1617 (8th Cir. Aug. 20, 2018); Order, *Barton v. Griffith*, No. 18-2241 (8th Cir. Dec. 21, 2018); Order, *McLaughlin v. Precythe*, No. 18-3628 (8th Cir. Apr. 22, 2019); Order, *Montgomery v. United States*, No. 17-1716 (8th Cir. Jan. 25, 2019) (§ 2255 case). This is a *pro forma*, cut and paste denial.[6] Other COA denial orders in capital cases

[6] This Court has previously been informed of the disparity between circuits in the granting of certificates of appealability in capital cases. *See Buck v. Davis*, brief of petitioner, Appendix A, showing that, between 2011 and 2016, "[A] COA was denied on all claims in 58.9% (76 out of 129) of the cases arising out of the Fifth Circuit, while a COA was only denied in 6.3% (7 out of 111) and 0% of the cases arising out of the Eleventh and Fourth Circuits respectively." The data for the Eighth Circuit have been compiled for this court through 2016 in the case of *Greene v. Kelley*, No. 16-7425, 137 S.Ct. 2973 (2017). This data indicated that from 2011-2016, 47.6% of

contained minimal variance on the language but none contained any legal analysis. *See e,g.* Order, *Lee v. United States*, No. 19-2432 (8th Cir. Nov. 4, 2019) (§ 2255 case); *Johnson v. Steele*, 999 F.3d 584 (8th Cir. 2021) (opinion on a procedural issue included summary denial of COA).

In many cases, the Eighth Circuit utterly ignores the statute and declines a COA even when there were state court dissents and even when fellow Eighth Circuit Judges that voted to grant a COA. Order, *Rhines v. Young*, No. 18-2376 (8th Cir. Sep. 7, 2018); Order, *Barton v. Griffith*, No. 18-2241 (8th Cir. Dec. 21, 2018); Rehearing Order, *Barton v. Griffith*, No. 18-2241 (8th Cir. Mar. 20, 2019); Order, *Lee v. United States*, No. 19-2432 (8th Cir. Nov. 4, 2019); Order, *Johnson v. Blair*, No. 20-3529 (8th Cir. Jan. 21, 2022). Mr. Tisius raised an identical issue to that in which the Eighth Circuit granted a COA in another capital case, *see* Order, *Dorsey v. Vandergriff*, No. 20-2099 (8th Cir. Feb. 1, 2021), yet the Eighth Circuit offered no explanation as to why the issue did not merit a COA herein, but did in another capital case.

The Eighth Circuit's COA practice is simply outside the norm for courts of appeals. Its denial rate sits substantially higher than at least two other circuits. For first-in-time capital habeas petitions within the Eighth Circuit, COAs were denied in 47.6% of cases between 2011 and 2016. Since that time, the COA denial rate in capital cases exceeds 50%.

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capital cases as to which COA was sought in the Eighth Circuit had their COAs denied. Since that time, the disparity has only gotten worse in capital cases.

In contrast, other circuits regularly issue reasoned opinions denying COA. *See, e.g., Swisher v. True*, 325 F.3d 225 (4th Cir. 2003); *Chanthakoummane v. Stephens*, 816 F.3d 62 (5th Cir. 2016); *Smith v. Mays*, No. 18-5133, 2018 WL 7247244 (6th Cir. Aug. 22, 2018); *Dickens v. Ryan*, 552 F. Appx 770 (9th Cir. 2014); *Lafferty v. Benson*, 933 F.3d 1237 (10th Cir. 2019); *Woods v. Holman*, No. 18-14690, 2019 WL 5866719 (11th Cir. Feb. 22, 2019) (all providing reasons for denying COA); *cf. Woods v. Buss*, 234 F. Appx 409 (7th Cir. 2007) (reasoned denial in successive posture). The Sixth Circuit, which issues reasoned decisions denying COA, explained the importance of reasoned opinions in *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). There, the court reversed a blanket denial of a COA, remanding to the district court for analysis of the individual issues presented in the petition. Citing its earlier decision in *Porterfield v. Bell*, 258 F.3d 484 (6th Cir. 2001), the court held that remand was required because "The district court here failed to consider each issue raised by Murphy under the standards set forth by the Supreme Court. . . ." *Murphy*, 263 F.3d at 467. Other circuits likewise regularly issue reasoned opinions denying COA. *See, e.g., Swisher v. True*, 325 F.3d 225 (4th Cir. 2003); *Chanthakoummane v. Stephens*, 816 F.3d 62 (5th Cir. 2016); *Smith v. Mays*, No. 18-5133, 2018 WL 7247244 (6th Cir. Aug. 22, 2018); *Dickens v. Ryan*, 552 F. Appx 770 (9th Cir. 2014); *Lafferty v. Benson*, 933 F.3d 1237 (10th Cir. 2019); *Woods v. Holman*, No. 18-14690, 2019 WL 5866719 (11th Cir. Feb. 22, 2019) (all providing reasons for denying COA); *cf. Woods v. Buss*, 234 F. Appx 409 (7th Cir. 2007) (reasoned denial in successive posture).

Because the Eighth Circuit's practice diverges from that of other circuits. Mr. Tisius has never had the benefit of a reasoned analysis of whether his claims meet the standard for COA. The Eighth Circuit's practice diverges from that of other circuits.

Inconsistently, the Eighth Circuit does not permit blanket *grants* of a COA. *Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). In *Tiedeman*, the Eighth Circuit noted that, in certain circumstances a defective COA process in the court below would require a remand to the district court for corrective action. *Id.* at 522. The defective COA process here similarly requires a remand.

Under *Hohn*, 524 U.S. 236, this Court has jurisdiction to review the denial of a COA by a lower court. But when there is an unexplained denial, this Court is left with the responsibility of reviewing unexplained COA denials *de novo.* Stated another way, the availability of review presupposes something for the Court to review in the first place. By omitting any reasoning on the merits of any claim, the Eighth Circuit's practice insulates a conviction and death sentence from the additional review to which the petitioner is entitled.

Pursuant to *Lonchar v. Thomas*, 517 U.S. 314 (1996), Mr. Tisius has an absolute right to have his conviction and death sentence to be reviewed by the federal courts. *Lonchar's* holding is rooted in the full and fair consideration of the merits of first habeas petitions. Otherwise, as noted in *Lonchar*, "dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the Petitioner the protections of the Great Writ entirely, risking injury to an

important interest in human liberty." *Id.* at 324 (citing *Ex parte Yerger*, 75 U.S. 85, 8 Wall. 85, 95, 19 L. Ed. 332 (1869) (the writ "has been for centuries esteemed the best and only sufficient defence of personal freedom")) (emphasis in the original).

Review of first habeas petitions is essential in capital cases, in which subsequent federal remedies have become disfavored as the prisoner's execution draws near. *See, e.g., Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (urging courts to "dismiss or curtail suits that are pursued in a 'dilatory' fashion or based on 'speculative' theories") (quoting *Hill v. McDonough*, 547 U.S. 573, 584-85 (2006)). That disfavor, of course, rests on the availability of meaningful habeas corpus remedies during earlier stages of review. By defying the plain language of this Court's COA standard and taking refuge under a cloak of secrecy, the Eighth Circuit's practice allows potentially unconstitutional convictions and sentences to evade judicial scrutiny.

The great disparity between the rates at which COAs are granted in the various circuits makes the need for clarification by the courts of appeals even more important. The COA standard should be clear enough that any court reviewing a habeas case will be able to apply it uniformly. Again, Mr. Tisius raised an identical issue to that where the Eighth Circuit granted a COA, *see* Order, *Dorsey v. Vandergriff*, No. 20-2099 (8th Cir. Feb. 1, 2021), yet the Eighth Circuit offered no explanation as why a COA was unwarranted in Mr. Tisius's case. Uniformity obviously is not happening. And permitting the Eighth Circuit to completely insulate its reasoning from this Court review contributes heavily to that inequity.

The Eighth Circuit's disregard of Congress's requirements of 28 U.S.C.§ 2253 (Cc) and this Court's COA precedent has metastasized. Further, the Eighth Circuit acts inconsistently with the practice of other United States Circuit Courts of Appeals. This Court should grant certiorari and make clear the need for reasoned denials of COAs in capital first habeas petitions, or alternatively grant, vacate, and remand on the basis of this Court's COA precedent. Sup. Ct. R. 10(a); Sup. Ct. R. 10(c).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,
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