**No. 21-8153**

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**Michael Tisius,**

Petitioner,

v.

**Paul Blair, Warden,**

Respondent.

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Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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**ERIC S. SCHMITT**
Missouri Attorney General

Andrew J. Crane
Counsel of Record
Assistant Attorney General
Missouri Bar No. 68017
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573) 751-0264
Andrew.Crane@ago.mo.gov

Attorneys for Respondents

**Capital Case**

## Questions Presented

I. Did the lower courts correctly decline to issue a certificate of appealability where the Missouri Supreme Court reasonably applied clearly established federal law to deny Tisius's claims for relief?

II. Should this Court require federal courts of appeals to issue written opinions when declining to issue a certificate of appealability even though no such requirement exists in statute or this Court's precedent?

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## Statutes Involved

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## Statement of the Case

Tisius awaits execution for the murder of Randolph County Sherriff's Deputies Jason Acton and Leon Egley. Tisius planned to break his former cellmate, Roy Vance, out of the Randolph County jail. Dist. Dkt. 46-2 at 795–97, 835, 881–82. Vance, Tisius, and Vance's girlfriend, Tracie Bulington, planned the jailbreak over the course of several weeks. Dist. Dkt. 46-1 at 597–98; Dist. Dkt. 46-2 at 761–62, 794–97, 835, 881–82. Tisius and Bulington obtained a gun, tested it, and cased the Randolph County jail to make sure that Deputy Acton was working because Tisius and Vance believed Deputy Acton would not have the "heart to play hero" and stop them. Dist. Dkt. 46-2 at 1021–22. Tisius and Bulington passed coded messages to Vance to communicate with him about the jailbreak. Dist. Dkt. 46-2 at 697–701, 755–60, 762, 887–88. While planning the jail break, Tisius repeatedly listened to a song with lyrics about "mo[re] murder" and a "shotgun." Dist. Dkt. 46-2 at 1026–27; Dist. Dkt. 46-19 at 790. Tisius told Bulington that he planned to go in to the jail "and just start shooting," that he would "do what he had to do" and "go in with a blaze of glory." Dist. Dkt. 46-2 at 1031–32.

Just after midnight on June 22, 2000, Tisius and Bulington entered the Randolph County jail under the pretense of bringing cigarettes for Vance. Dist. Dkt. 46-2 at 797–99, 835, 842, 891. Deputies Acton and Egley were working in the jail that night. Dist. Dkt. 46-2 at 613–14. Tisius chatted amicably with

Deputy Acton for about 10 minutes, thanking him for helping Tisius in the past when Tisius had been an inmate at the jail. Dist. Dkt. 46-2 at 835–36, 842–43, 882, 891–92. Both Deputies Acton and Egley were unarmed. Dist. Dkt. 46-2 at 666, 754. Bulington turned to leave because she had cold feet about the jailbreak, but Tisius raised his concealed gun and shot Deputy Acton in the head, killing him. Dist. Dkt. 46-1 at 579–80, 592; Dist. Dkt. 46-2 at 836, 838–39, 843, 854, 875–77, 882–83, 886, 891–892. Deputy Egley charged around the counter trying to stop Tisius, but Tisius shot Deputy Egley in the head. Dist. Dkt. 46-1 at 606; Dist. Dkt. 46-2 at 799, 836, 839, 843, 854, 883, 886, 892.

Tisius tried to unlock the cell doors in the jail, but could not find the right keys. Dist. Dkt. 46-2 at 800–01, 805, 836, 843, 854, 883, 892–93. Deputy Egley was still alive, and crawled toward Bulington, trying to grab her leg. Dist. Dkt. 46-2 at 801, 836–37, 843, 854, 883–84, 887, 893. Then Tisius returned and shot Deputy Egley several more times in the forehead, cheek, and shoulder. Dist. Dkt. 46-2 at 801, 836–37, 843, 854, 883–84, 887, 893. Tisius and Bulington fled the scene, disposed of the murder weapon, and crossed into Kansas in an attempt to evade police. Dist. Dkt. 46-2 at 837–38, 843, 864, 884–85, 893. Bulington's car broke down, so the two continued on foot and were arrested the afternoon after the murders. Dist. Dkt. 46-2 at 837, 885–86. Tisius agreed to speak with police and confessed to the murders in oral and written statements. App. 89a.

The jury convicted Tisius of two counts of first-degree murder in the deaths of Deputies Acton and Egley. Dist. Dkt. 46-2 at 1298–99. The jury found aggravating factors for both murders and recommended that Tisius be sentenced to death for both counts. Dist. Dkt. 46-2 at 1298–99. Tisius's convictions and sentences were affirmed on direct appeal, App. 89a–98a, but overturned during state post-conviction proceedings because the motion court found the State had played the "wrong song" for the jury during sentencing, and Tisius had actually listened to a different "murder-inspiring" song before killing Deputies Acton and Egley. Dist. Dkt. 46-13 at 554–55.

At resentencing, a second jury unanimously found aggravating facts in both murders, and recommended that Tisius should be put to death on both counts. Dist. Dkt. 46-19 at 1229–30. The sentencing court agreed and imposed two death sentences. Dist. Dkt. 46-19 at 1242.

## Reasons for Denying the Petition

### I. The lower courts correctly declined to grant Tisius a certificate of appealability.

In his first three questions presented, Tisius asks this Court to grant review of the lower courts' decisions denying a certificate of appealability on claims previously denied by the Missouri Supreme Court. Federal law required those courts—and requires this Court—to apply a highly deferential standard of review.

#### A. Federal law limits appellate review of federal habeas claims that were denied under § 2254(d).

In a habeas proceeding under 28 U.S.C. § 2254, state prisoners have no right to an automatic appeal from the denial of a federal habeas petition. 28 U.S.C. § 2253(c)(1). A petitioner may not appeal a district court's final order "[u]nless a circuit justice or judge issues a certificate of appealability." § 2253(c). For a certificate to issue, the petitioner must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2).

While this Court has described the certificate requirement as a "threshold inquiry," *Miller-El v. Cockrell,* 537 U.S. 322, 337 (2003), that inquiry is layered with statutory provisions that require deference to state courts and denial of defaulted claims. *Id.* at 341; *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). In addition to the "substantial showing" required by § 2253(c), federal courts must deny a certificate of appealability where reasonable jurists would

conclude "that a substantive provision of the federal habeas statute bars relief." *Miller-El,* 537 U.S. 349–50 (Scalia, J., concurring).

When federal habeas claims are denied on procedural grounds, courts may not grant a certificate of appealability unless a state prisoner shows that both the procedural ruling and the underlying merits issue are debatable among jurists of reason. *Slack,* 529 U.S. at 484. Similarly, federal courts may only certify a claim previously denied in state court if jurists of reason could disagree about "the [d]istrict [c]ourt's application of AEDPA deference" under § 2254(d)(2) and § 2254(e)(1). *Miller-El,* 537 U.S. at 341.

Even in certificate-of-appealability review, the deferential standard required by § 2254(d) is intentionally "difficult to meet" and stops just short of a "complete bar" on federal review of claims denied in state court. *Harrington v. Richter,* 562 U.S. 86, 102 (2011). States possess "primary authority" for deciding constitutional challenges to state convictions. *Shinn v. Ramirez,* 142 S. Ct. 1718, 1730–31 (2022). To respect the country's system of dual sovereignty, federal habeas review is "narrowly circumscribed" to remedy only "extreme malfunctions in the state criminal justice systems." *Id.* at 1730, 1731 (citations and quotations omitted).

Federal review is limited to deciding whether the state courts "reasonably appl[ied] the rules squarely established by this Court's holdings." *White v. Woodall,* 572 U.S. 415, 427 (2014) (quotation omitted). "In order for a

state court's decision to be an unreasonable application of this Court's case law, the ruling must be 'objectively unreasonable, not merely wrong; even clear error will not suffice.'" *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (quoting *Woods v. Donald*, 575 U.S. 312, 316 (2015)). A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. *Harrington,* 562 U.S. at 101.

Combining the certificate-of-appealability standard with the deference required under § 2254(d), the relevant question is whether Tisius has made a substantial showing that his constitutional rights were denied in a way that is "well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103; *Miller-El,* 537 U.S. at 341; § 2253(c). Put another way, Tisius must show that it is reasonably debatable that "*every* fairminded jurist" would vote to reverse the state-court decision. *Dunn v. Reeves,* 141 S. Ct. 2405, 2411 (2021) (quotations and alterations omitted).

### B. Reasonable jurists could not disagree with the district court's application of AEDPA to Tisius's claims.

Tisius's claims do not meet the standard of analysis required by *Miller-El, Harrington,* and *Dunn,* so there is no basis to grant a certificate of appealability on the claims raised in his first three questions presented.

### 1. The lower courts correctly declined to certify Tisius's claim that counsel were ineffective for failing to object to the prosecutor's closing argument encouraging the jury to do justice.

In his first question presented, Tisius challenges the lower courts' decisions denying a certificate of appealability on a portion of Claim 10 of his district court habeas petition. Dist. Dkt. 38 at 126. In Claim 10, Tisius argued that his counsel were ineffective for failing to object to three portions of the State's closing argument during the resentencing trial. Dist. Dkt. 38 at 126. In his petition before this Court, Tisius focuses on two portions of the State's argument. First, he points to the State's argument rebutting the defense that Tisius was less responsible for his actions because he lacked a father figure:

> And, you know, it's pretty audacious to come in here now, as this defendant is doing, and saying, I didn't have a dad and, boy, look what happened. Do those Miller kids—do those Miller kids get to go 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.

App. 134a.

Second, he points to the State's argument that the jury should do justice for the victims' families:

> 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.

App. 134a.

Instead of arguing, as he did below, that resentencing counsel were ineffective for failing to object to these arguments, Tisius now appears to argue that the State's arguments violated *Booth v. Maryland,* 482 U.S. 496 (1987). That argument was not raised below, so the Court should reject it as waived and procedurally defaulted. In the alternative, Tisius's claims do not merit a certificate of appealability under *Booth* or *Strickland v. Washington,* 466 U.S. 668 (1984).

**a. Tisius's first question presented was not raised in the district court or in state court.**

Tisius's first argument for certiorari bears little resemblance to the claim he raised in district court and in state court. Even though Tisius's claims below were ineffective-assistance-of-counsel claims, the first question presented in his petition before this Court does not cite *Strickland* or substantially argue that counsel were ineffective. Instead, Tisius argues that the state court misapplied *Booth,* 482 U.S. 496 (1987). But Tisius has not preserved that claim for review.

At trial, Tisius did not object to either portion of the prosecutor's closing argument. Dist. Dkt. 46-19 at 1184–85, 1219. In the direct appeal from his resentencing, Tisius sought discretionary plain error review of the arguments, Dist. Dkt. 46-22 at 102, and cited Justice O'Connor's concurrence in *Payne v. Tennessee*, 501 U.S. 808 (1991). The Missouri Supreme Court reviewed for

plain error and found that the arguments were not "inadmissible as family members' characterizations and opinions about the appropriate sentence," but were admissible arguments that the jury should impose the death penalty. App. 118. In his district court habeas petition, Tisius did not raise the direct appeal claim as a basis for habeas relief.

Instead, he raised his claim under a theory that counsel were ineffective for failing to object to the challenged portion of argument. Dist. Dkt. 38 at 126. The district court denied the claim under that theory. App. 52a–53a. That claim was also previously denied by the Missouri Supreme Court on post-conviction appeal. App. 134a–135a. In his brief before the Missouri Supreme Court on post-conviction appeal, Tisius did not argue that his counsel should have objected to the prosecutor's argument under *Booth* or its progeny. Dist. Dkt. 46-30 at 111–113. Instead, Tisius said that that the arguments were appeals to emotion and based on facts outside the record. Dist. Dkt. 111–113. So, the claim before the district court did not preserve an argument based on *Booth* or other similar cases.

To the extent Tisius's claim in this Court argues the state court improperly admitted the prosecutor's argument under *Booth,* that claim was not pressed or passed on in the lower federal courts, so the Court should not grant certiorari review. *United States v. Williams,* 504 U.S. 36, 41–42 (1992). To the extent Tisius argues that his counsel were ineffective for failing to object

to the argument under *Booth,* he never made that argument to Missouri's courts, so the Court should decline certiorari. *Shinn,* 142 S.Ct. at 1732 (federal courts should decline to hear claims "not presented to the state courts consistent with the State's own procedural rules.") (citations and alterations omitted).

**b. Tisius's claim does not meet the standard for granting a certificate of appealability under AEDPA.**

In the Missouri Supreme Court, Tisius claimed that counsel should have objected that the prosecutor's arguments were appeals to emotion and based on facts outside the record. Dist. Dkt. 111–113. Because that claim was previously denied on its merits in state court, he can only receive a certificate of appealability if there is a reasonable debate as to whether "*every* fairminded jurist would agree that *every* reasonable lawyer would have [objected to the prosecutor's arguments]," *Dunn,* 141 S.Ct. at 2411 (quotations and alterations omitted), and Tisius must also make a substantial showing that he was prejudiced under *Strickland.* Tisius cannot meet that standard.

**First,** Tisius's claim is precluded by state-court fact findings. While Tisius argues that the prosecutor's arguments were "inadmissible as family members' characterizations and opinions about the appropriate sentence[,]" the state courts found that the arguments did not fall under that category based on the context in the state-court record. App. 118a. The Missouri

Supreme Court found, as a matter of fact, that the prosecutor's argument about the "Miller kids" was not "commenting upon the victim's future stepchildren's desire for Tisius to be executed, but was a sarcastic response to [Tisius's] belief he was less responsible for his actions because he was rejected by his father." App. 118a. The Missouri Supreme Court found the argument about the "answer to the plea from the [families of the victims] and Randolph County that you do justice in this case," was not based on facts outside the record, but simply "equated imposition of the death penalty with justice" and asked the jury to impose "the most severe penalty." App. 134a.

This Court strongly presumes that the state courts had the best vantage to view and determine the state-court evidence. § 2254(e)(1). Tisius has not presented "clear and convincing evidence" to rebut the Missouri Supreme Court's findings about the context of the arguments, and this Court has no clearly established precedent that would apply to the arguments in their proper context, so Tisius's claim fails. § 2254(d); § 2254(e)(1).

**Second,** the prosecutor's arguments were permissible under clearly established federal law. *Payne,* 501 U.S. at 828 n.2. In *Payne,* this Court found that *Booth* and *South Carolina v. Gathers,* 490 U.S. 805 (1989), "were wrongly decided" and overruled them. *Id.* at 830. This Court clarified that the holdings of *Booth* and *Gathers* were overruled except for *Booth*'s holding that "the admission of a victim's family members' characterizations and opinions about

the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Id.* at 830 n.2. The *Payne* Court noted that "no evidence of the latter sort was presented" in the case before it. *Id.* This Court has since reaffirmed that holding of *Booth,* but has never reaffirmed any holding of *Gathers*. *Bosse v. Oklahoma,* 137 S. Ct. 1, 1–2 (2016). So there is no clearly established federal law that limits the prosecutor's arguments made in this case. *White,* 572 U.S. at 427.

In *Payne,* the Court affirmed the prosecutor's arguments that:

> Somewhere down the road [the victim's child] is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer.

*Payne,* 501 U.S. at 815. The prosecutor's arguments affirmed in *Payne* were similar to the State's arguments at Tisius's sentencing, and are not the kind of evidence that is prohibited by the remaining holding of *Booth*. *See id.*

There is no merit to Tisius's attempt to manufacture a circuit split on this issue. Even if the federal courts of appeal disagree about how to apply the portions of *Booth* that remain good law, that would not create a split of authority on whether the Missouri Supreme Court unreasonably applied clearly established federal law. Because there is no clearly established federal law prohibiting the prosecutor's arguments in Tisius's case and the only on-

point case affirmed similar arguments, the Missouri Supreme Court's decision denying relief under *Strickland* was reasonable.

**Third,** Tisius has failed to show that the Missouri Supreme Court unreasonably applied *Strickland*. Although Tisius focuses on the state court's finding that the prosecutor's arguments were not objectionable, he fails to show that he can meet the *Strickland* standard applied through the lens of § 2254(d). There was no reason for counsel to object to the prosecutor's closing argument. This Court overruled *Gathers* and upheld similar arguments in *Payne,* and the arguments were admissible under Missouri law. App. 134a–35a. So Tisius cannot show that "*every* fairminded jurist would agree that *every* reasonable lawyer would have [objected to the prosecutor's arguments]." *Dunn,* 141 S.Ct. at 2411 (quotations and alterations omitted).

Additionally, Tisius made no arguments to the state courts "other than speculation" that the exclusion of the prosecutor's arguments would have affected the outcome of his sentencing. App. 118a. Indeed, the state post-conviction motion court found that there was "no reasonable probability that the result of the trial would have been different if the trial court had sustained" objections to the prosecutor's closing argument. Dist. Dkt. 29 at 352. Tisius makes no argument to this Court that he was prejudiced by counsels' choice not to object, so his claim fails. *Strickland,* 466 U.S. at 694.

### 2. The lower courts correctly declined to certify Tisius's claim that counsel had a financial conflict of interest.

In his second question presented, Tisius argues that the lower courts should have granted a certificate of appealability on his claim that counsel operated under a financial conflict of interest because they were paid a flat fee for representing Tisius during the resentencing trial. Tisius's claim does not merit certification because there is no clearly established federal law that would allow reversal of the Missouri Supreme Court. *Mickens v. Taylor,* 535 U.S. 162, 174–76 (2002).

In state court, Tisius argued that his resentencing counsels' flat fee arrangement created a conflict of interest that required reversal under *Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980). Dist. Dkt. 46-30 at 121–22. The Missouri Supreme Court declined to find that a flat fee arrangement creates a conflict of interest. App. 135a. In an alternative holding, the Court found, based on the record before the post-conviction motion court, that the flat fee arrangement had no adverse impact on Tisius's representation. App. 135a. Both holdings preclude relief here.

**First,** the Missouri Supreme Court reasonably found that flat fee arrangements do not create a conflict of interest reviewable under the *Cuyler* framework. App. 135a. "No Missouri court has found that a flat fee arrangement creates a conflict of interest." App. 135a (citing *Dorsey v. State,*

448 S.W.3d 276, 300 (Mo. 2014)). Similarly, this Court's precedents do not "clearly establish, or indeed even support" an expansive application of the *Cuyler* framework to "all kinds of alleged attorney ethical conflicts" like when representation "somehow implicates counsel's personal or financial interests." *Mickens,* 535 U.S. 162, 174–75. Instead, this Court has only applied the *Cuyler* framework in cases involving the active representation of codefendants. *Id.* Tisius and his codefendants were not represented by the same counsel, so the Missouri Supreme Court had no obligation to find a conflict of interest under clearly established federal law. *Id.*

Even if the Court were to expand *Cuyler* to apply in other situations, that rule could not apply to invalidate the Missouri Supreme Court's decision denying Tisius's claim. *Williams v. Taylor,* 529 U.S. 362, 379–80 (2000); § 2254(d). Tisius's arguments relying on American Bar Association guidelines, a Kansas Supreme Court case, and a withdrawn Fourth Circuit opinion are not relevant to this Court's consideration, because none of those sources can bind the Missouri Supreme Court under § 2254(d). *White,* 572 U.S. at 427. Because Tisius's conflict-of-interest claim does not implicate clearly established federal law, it raises no debatable issue for appeal. *Id.*

**Second,** the state-court record precludes a finding that there was a conflict of interest in this case. Both of Tisius's resentencing counsel testified that none of their decisions were impacted by the fee arrangement in the case.

Dist. Dkt. 46-26 at 343–345; Dist. Dkt. 46-36 at 9–10. Even though the Missouri Public Defender's Office did not hire counsels' firm's investigator, the public defender provided a mitigation specialist and could have provided additional resources at counsels' request. Dist. Dkt. 46-36 at 107–108. Federal courts have "no license" to redetermine state-court credibility findings, so Tisius's claim must fail in light of counsels' credible testimony that there was no adverse impact on Tisius's defense. *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983).

**Third,** the Missouri Supreme Court reasonably applied federal law in declining to analyze Tisius's cumulative claims under *Strickland*. On post-conviction appeal, Tisius argued that because of the flat fee arrangement, counsel were ineffective based on the allegations he made in his other claims for relief. Dist. Dkt. 46-30 at 123. The Missouri Supreme Court rejected all of Tisius's other ineffective-assistance-of-counsel claims, and so did the federal district court. Missouri courts do not allow cumulative ineffective-assistance-of-trial-counsel claims because "[n]umerous non-errors cannot add up to error." *State v. Gray,* 887 S.W.2d 369, 390 (Mo. 1994).

Tisius makes the same cumulative-error argument here, but there is no clearly established federal law that could justify relief. This Court has no decision requiring cumulative *Strickland* analysis, and the Eighth Circuit Court of Appeals has held that claims of cumulative error are not supported by

this Court's precedent and cannot form a basis for habeas relief. *Middleton v. Roper,* 455 F.3d 838, 851 (8th Cir. 2006) (citing *Wiggins v. Smith,* 539 U.S. 510 (2003)). Even if other federal appellate courts engage in cumulative-error analysis, the Missouri Supreme Court reasonably declined to do so because this Court's precedents do not require it. *White,* 572 U.S. at 426–27; *Colvin v. Taylor*, 324 F.3d 583, 587 (8th Cir. 2003). Besides his request for cumulative-error analysis, Tisius does not seek certiorari review of his other previously-denied *Strickland* claims, and there is no basis for further review of them, individually or cumulatively.

### 3. The lower courts correctly declined to certify Tisius's claim that counsel were ineffective in selecting portions of Dr. Peterson's prior testimony to present to the jury.

In his third question presented, Tisius argues that the lower courts should have granted a certificate of appealability on his claim that resentencing counsel were ineffective for failing to present live testimony from Dr. Peterson, an expert witness who testified at the first sentencing trial about Tisius's mental health. Counsels' strategic decision to present portions of Dr. Peterson's prior testimony rather than call him to testify live is "virtually unchallengeable," *Strickland,* 466 U.S. at 691, and Tisius cannot make a substantial showing that "*every* fairminded jurist would agree that *every* reasonable lawyer would have [called Dr. Peterson to testify at the

resentencing trial.]" *Dunn,* 141 S.Ct. at 2411 (quotations and alterations omitted).

Tisius's claim fails because the Missouri Supreme Court reasonably applied this Court's precedent in finding that counsels' decision was reasonable. The state-court record shows that counsel reviewed the mental health defense presented at the first sentencing trial and narrowed the mental health evidence to focus on Vance's role in planning the jailbreak and manipulating Tisius. Dist. Dkt. 46-26 at 348. That evidence was the "core of what [the defense] wanted to present." Dist. Dkt. 46-26 at 358. At the resentencing, Tisius presented prior testimony from Dr. A.E. Daniel and live testimony from Dr. Shirley Taylor to explain the effect of Tisius's upbringing, his mental disorders, and Vance's influence on Tisius's actions during the murders. Dist. Dkt. 46-19 at 1077; Dist. Dkt. 26-15; Dist. Dkt. 46-26 at 1101–1164

While resentencing counsel believed some of Dr. Peterson's prior testimony was helpful to their theme, they thought the remainder "was something you could sell to a judge in a PCR process but that was, in my mind, an over-sell for a jury." Dist. Dkt. 46-36 at 14. For instance, counsel believed that Dr. Peterson's conclusions regarding extreme mental or emotional disturbance at the time of the offense were difficult to support in light of the facts of the case. Dist. Dkt. 46-36 at 20. While Dr. Peterson previously testified

that Tisius suffered from a diminished capacity due to mental illness in the time leading to the murders, the jury heard considerable evidence of careful planning which showed the murders were "pre-meditated," "calculating," and "brazen." App. 121a. Resentencing counsel thought it was best to take the focus away from that evidence and reached an agreement with the State that allowed them to "pick and choose" beneficial information from Dr. Peterson's testimony. Dist. Dkt. 46-36 at 15–16. Counsel "felt confident" that presenting select portions of Dr. Peterson's testimony was "the way to present it" as the prior testimony had all of the information they wanted to present. Dist. Dkt. 46-26 at 356–357.

The Missouri Supreme Court found that counsels' strategy was reasonable and none of this Court's cases require a different result. While the Constitution requires counsel in a capital case to conduct an investigation for mitigating evidence, *Wiggins,* 539 U.S. 510; *Rompilla v. Beard,* 545 U.S. 374 (2005), no case requires counsel to present all possible mitigating evidence regardless of its quality. This Court has granted relief where counsel failed to conduct any mitigation investigation beyond the presentencing report prepared by the state, *Wiggins*, 539 U.S. at 523–24, and where counsel failed to investigate the defendant's prior convictions that formed the basis for the State's case in aggravation. *Rompilla,* 545 U.S. at 383–84. Neither of these cases apply here.

Unlike *Wiggins* and *Rompilla,* counsel conducted a thorough review of the mitigation evidence and presented numerous witnesses in mitigation according to a strategic theme. Tisius's assertions that counsel should have presented more or different evidence is not sufficient to state a claim under this Court's precedents.

While Tisius complains that counsel did not personally interview Dr. Peterson, that fact does not help his claim. Counsel reviewed Dr. Peterson's prior testimony, and chose not to present portions that did not support their mitigation strategy. During the post-conviction evidentiary hearing, Dr. Peterson testified that none of his opinions about the evidence had changed, so there is no basis to find that counsel could have gained additional information after speaking with him. Dist. Dkt. 46-26 at 270–71, 292, 325. Tisius also complains that Dr. Peterson's testimony could have supported the submission of additional statutory mitigating factors based on Tisius's allegedly diminished capacity. But those factors are based on the portions of Dr. Peterson's testimony that counsel believed was "an oversell" that would be difficult to support in light of the facts of the case. Dist. Dkt. 46-36 at 20.

Resentencing counsel made a reasonable strategic choice, and Tisius's arguments present no basis to find that "*every* fairminded jurist would agree that *every* reasonable lawyer would have [called Dr. Peterson to testify at the

resentencing trial.]" *Dunn,* 141 S.Ct. at 2411 (quotations and alterations). The lower courts correctly declined to issue a certificate of appealability.

## II. There is no support for Tisius's argument that a Court of Appeals must issue a reasoned opinion when it denies a certificate of appealability.

This Court should deny certiorari on Tisius's fourth question presented because no law supports his argument and there is no conflict worthy of this Court's review.

### A. The well-established legal standards for reviewing a certificate of appealability do not require courts to issue a statement of written reasons.

In a habeas proceeding under 28 U.S.C. § 2244, state prisoners have no right to an automatic appeal from the denial of a federal habeas petition. § 2253(c)(1). A petitioner may not appeal a district court's final order "[u]nless a circuit justice or judge issues a certificate of appealability." § 2253(c). For a certificate to issue, the petitioner must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2). Additionally, a judge *issuing* a certificate must "indicate what specific issue or issues" are certified for appeal. § 2253(c)(3). Yet nothing in the statute requires a court to explain why it has *declined* to issue a certificate.

Nor does this Court's precedent require such an explanation. The certificate of appealability requirement mandates "a threshold inquiry into whether the circuit court may entertain an appeal." *Slack,* 529 U.S. at 482. The

certificate process "screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels." *Gonzalez v. Thaler,* 565 U.S. 134, 145 (2012). In this way, certification review serves an important gatekeeping function. *Miller-El,* 537 U.S. at 337.

The certificate analysis "is not coextensive with merits analysis." *Buck v. Davis,* 137 S. Ct. 759, 773 (2017). This Court has cautioned that the courts of appeals should not engage with the merits of a petitioner's claim in order to justify denying a certificate. *Id.* (quoting *Miller-El,* 537 U.S. at 337). Courts reviewing issues for certification conduct a limited review necessary to determine the need for a certificate instead of deciding the full merits of a petitioner's case.

This Court has explained the standard that applies in that limited review of certificate of appealability applications. To receive a certificate, a petitioner must make "a substantial showing of the denial of a constitutional right," § 2253(c)(2), by "demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El,* 537 U.S. at 327. If the district court denies a petition on procedural grounds, a certificate is only appropriate if "jurists of reason" could disagree as to both "whether the petition states a valid claim of

the denial of a constitutional right" and "whether the district court was correct in its procedural ruling." *Slack,* 529 U.S. at 484.

Applying these standards, the district court and Eighth Circuit declined to issue a certificate of appealability on any of Tisius's claims for habeas relief. App. 2a–28a, 138a. In his fourth question presented, Tisius does not challenge the decision to deny a certificate. Instead, he asks this Court to read *Miller-El* and *Slack* to require an additional procedural step not found in the text of § 2253. Nothing requires the courts of appeals to issue written opinions when denying a certificate of appealability.

### B. There is no conflict of authority warranting this Court's review.

Tisius tries to manufacture a circuit split by arguing that the Eighth Circuit has a practice of declining to issue written opinions when denying a certificate of appealability that is unique among federal courts of appeals. Pet. at 30–31. But Tisius has failed to identify the only on-point case, which undermines his position, and his review of practice in the courts of appeals shows that federal courts have discretion in deciding whether to issue written findings denying a certificate of appealability. Pet. at 13–14.

Tisius ignores the Eighth Circuit's decision in *Dansby v. Hobbs,* 691 F.3d 934, 936 (8th Cir. 2012), and that case counsels against his argument. In *Dansby,* the Eighth Circuit found that neither § 2253 nor this Court's cases

"dictate that a court of appeals must or must not publish a statement of reasons when it denies an application for a certificate." *Id.* "Whether to issue a summary denial or an explanatory opinion," it continued, "is within the discretion of the court." *Id.* *Dansby* is the only published decision concerning a court of appeals's authority or obligation to issue an opinion when denying a certificate. Thus, there is no conflicting authority for this Court to clarify.

Tisius's survey of what other courts of appeals do supports the Eighth Circuit's analysis in *Dansby*. Tisius argues that the courts of appeals in other circuits more frequently issue written opinions when denying a certificate of appealability in capital cases. Pet. at 30–31. But, as Tisius admits, the courts of appeals exercise discretion in deciding whether to write a written opinion. Pet. at 30–31. Though the courts of appeals sometimes issue written explanations when denying a certificate, they also deny certificates in summary orders. As a result, there is no conflict in circuit practice. In this way, the courts of appeals follow this Court's example[1] of issuing summary denials when reviewing original applications for a certificate of appealability. *See e.g.*, *Grayson v. Thomas*, 10A917 (August 15, 2011); *Milton v. Thaler*, 10A1246 (June 12, 2011) (denying application for certificate of appealability in a capital case); *Patrick v. United States*, 03A1020 (September 3, 2004). There is no basis

[1] The provisions of § 2253(c) apply equally to a "circuit justice or judge" that issues or, in Tisius's view, denies a certificate of appealability.

for this Court to grant certiorari to examine the Eighth Circuit's discretionary decision in this case.

### C. Even if federal law required written findings, this case is a poor vehicle for review because the district court issued written findings and the record shows extensive review of Tisius's application.

Tisius was not harmed by the Eighth Circuit's decision to issue a summary order. The summary denial does not, as Tisius claims, "insulate[] a conviction and death sentence from additional review." Pet. at 32. The administrative panel had the benefit of, and reviewed, the district court's exhaustive seventy-seven page opinion explaining the reasons it denied relief on Tisius's claims. App. 2a–78a. Unlike *Miller-El,* where this Court found that the district court had not "give[n] full consideration to the substantial evidence petitioner put forth," 537 U.S. at 341, the district court in this case clearly explained the reasons for denying Tisius's claims and for denying a certificate of appealability. App. 2a–78a.

The administrative panel (and now this Court) could review the district court's findings when deciding Tisius's application for certification. Because the district court is already "deeply familiar with the claims raised by [a] petitioner," it is in a "far better position" to make written findings about which claims should be certified. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001). The district court's thorough opinions conclusively show that Tisius's claims

presented no basis for further review, and no judge on the administrative panel thought otherwise.

## Conclusion

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

**ERIC S. SCHMITT**
Attorney General

*/s/Andrew J. Crane*
Andrew J. Crane
Counsel of Record
Assistant Attorney General
Missouri Bar No. 68017
P.O. Box 899
Jefferson City, MO 65102
Telephone: (573) 751-0264
Andrew.Crane@ago.mo.gov

Attorneys for Respondents