

Case No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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MICHAEL TISIUS, Petitioner,

v.

DAVID VANDERGRIFF,  
Warden, Potosi Correctional Center, Respondent.

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On Petition for Writ of Certiorari  
to the Missouri Supreme Court

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\*\*THIS IS A CAPITAL CASE\*\*  
EXECUTION SCHEDULED FOR JUNE 6, 2023

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## **CAPITAL CASE**

### **QUESTION PRESENTED**

Michael Tisius was sentenced by a Missouri jury that included an individual who was not qualified to serve under Missouri law. This juror was, and is still, illiterate. The juror concealed his illiteracy from the sentencing court by declining to honestly answer a question posed in voir dire and was assisted in doing so by a county official who read him the juror qualification form, filled in the juror's answers for him, then concealed the fact that the juror had disclosed his illiteracy.

The case presents the following question:

1. Did the Missouri Supreme Court's failure to enforce Missouri's mandatory exclusion from the jury of persons who cannot read or write violate Mr. Tisius's right to due process of law?

## **LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT**

Michael Tisius was the appellant in the case below and is an indigent death-sentenced prisoner within the Missouri Department of Corrections. He was represented in the Court below by Elizabeth Unger Carlyle and Keith O'Connor.

David Vandergriff, Warden of Potosi Correctional Center, was the appellee in the case below. He was 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 Supreme Court:

Michael Tisius v. State of Missouri, No. 11-10906 (Oct. 1, 2012) (cert denied)  
Michael Tisius v. Paul Blair, No. 21-8153 (Oct. 3, 2022) (cert denied)  
Michael Tisius v. David Vandergriff, No. 22-7398 (pending)  
Michael Tisius v. David Vandergriff, No. 22-7625 (pending)

### United States Court of Appeals for the Eighth Circuit:

Michael Tisius v. Paul Blair, No. 21-1682 (Jan. 12, 2022) (habeas corpus appeal)

### United States District Court for the Western District of Missouri:

Michael Tisius v. Richard Jennings, No. 4:17-CV-00426-SRB (Oct. 30, 2020) (habeas corpus)

### Supreme Court of Missouri:

Michael Tisius v. David Vandergriff, No. SC100059 (state habeas proceeding) (May 23, 2023)

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 proceeding) (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 proceeding) (Sept. 3, 2015)

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<sup>1</sup> The Appendix includes exhibits redacted to remove the identity of the juror whose qualifications are at issue in this case. Unredacted versions of these documents were filed under seal in the Missouri Supreme Court. They are not included because counsel for petitioner does not believe they are necessary to this Court's determination as to whether to grant certiorari. At the Court's direction, counsel will provide the unredacted documents to the Court.

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Michael Tisius respectfully requests that a writ of certiorari issue to review the order and judgment of the Missouri Supreme Court, which overruled Mr. Tisius's petition for habeas corpus. Appendix (hereinafter "App.") at 1a.

### **OPINIONS BELOW**

The Missouri Supreme Court's May 23, 2023 order denying Mr. Tisius's petition for habeas corpus is unpublished and appears in the App at 1a.

### **JURISDICTION**

The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The Missouri Supreme Court overruled Mr. Tisius's petition for habeas corpus on May 23, 2023. App. 1a. This petition is timely under Rule 13.1.

### **STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED**

The Fourteenth Amendment to the United States Constitution states, in pertinent part, "Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

## STATEMENT OF THE CASE

At Mr. Tisius's final sentencing hearing in 2010, to avoid the effects of pretrial publicity, jurors were selected in Greene County, Missouri, and then bused to Boone County, Missouri, where the trial was held.

Juror 28 served on the jury that sentenced Mr. Tisius to death. On April 28, 2023, members of Mr. Tisius's defense team interviewed Juror 28 at his home in Wisconsin. During the interview, which was focused on the juror's views regarding clemency since Mr. Tisius has a June 6, 2023, execution date, the juror volunteered that he could not read or write. He then signed a statement—under penalty of perjury—which included the fact that a Greene County official assisted him in filling out his juror form. App. p. 66a. Three days later, Juror 28 signed an affidavit containing the same information and clarifying that he had told the Greene County official of his inability to read, that the official “took [him] into a private room,” read the form “word for word” to [him], and then filled out the answers for him. App. 68a.

In Greene County, venire members were provided with a form to fill out before jury selection began. According to a Greene County official who spoke with Mr. Tisius's direct appeal attorney, Jeannie Willibey in 2011, the forms were destroyed while appeal proceedings were pending. The official told Ms. Willibey that, the form “lists the reasons you would not be qualified (under 21, not a resident, etc.), then has the person check a box ‘I am qualified and will appear on—whatever date—’ or ‘I am not qualified.’” App. p. 65a.

Mo. Rev. Stat. § 494.425 provides in pertinent part,

The following persons shall be disqualified from serving as a petit or grand juror:

...

(5) Any person unable to read, speak and understand the English language, unless such person's inability is due to a vision or hearing impairment which can be adequately compensated for through the use of auxiliary aids or services. . . .

During jury selection, the court asked the venire panel, “Is there anyone here who does not read, speak and understand English?” No one responded. Sentencing Trial Transcript, p. 92.

After discovering this information, Mr. Tisius promptly filed a petition for state habeas corpus relief under Mo. Sup. Ct. R. 91 on May 2, 2023, in the Missouri Supreme Court (the proper venue for such petitions in capital cases). App. p. 3a. The state responded, adducing its own “affidavit”<sup>2</sup> from the juror stating that although he sometimes says that he cannot read or write, he can actually read “a little bit.” App. 70a. Mr. Tisius filed a reply in support of his petition on May 15, as directed by the court. App. p. 27a.

Interestingly (and contradictorily), although the juror attests in the “affidavit” that he can read, he acknowledges that the state’s “affidavit” was drafted

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<sup>2</sup> Although the state characterizes Juror 28’s third signed statement as an affidavit, the statement fails to comply with numerous required notary components. There is no notary seal and the notary’s commission number is not included. *See* <https://sos.wi.gov/NotaryPublic.htm>. Furthermore, the “affidavit” says that the notary is a “notary public for the State of Missouri.” However, a Missouri notary’s notarization of an affidavit in Wisconsin violates Mo. Rev. Stat. § 486.775(12). Even more perplexing, the notary who allegedly “notarized” the “affidavit” is not documented with the Missouri Secretary of State as a “notary public for the State of Missouri.” Investigation by Mr. Tisius’s defense team indicated that the notary is a Door County, Wisconsin Sheriff’s deputy. The state has made no effort to correct the defective affidavit.

by the state and was read to him before he signed it. App. p. 71a. He also acknowledges further literacy problems, admitting that “[i]t would have been difficult for [him] to write the [“]affidavit[“] on [his] own.” *Id.*

Both of Mr. Tisius’s trial attorneys authored affidavits indicating they would have moved to strike Juror 28 for cause, and if unsuccessful, they would have used peremptory strikes, had they known he was illiterate. App. at 72a (Affidavit of Chris Slusher); App. at 75a (Affidavit of Scott McBride).

Eight days later, on May 23, 2023, the Missouri Supreme Court denied the petition without granting a hearing as requested in the petition and without a written opinion. App. p. 1a. The court also denied Mr. Tisius’s motion for stay of execution. Under Mo. Sup. Ct. R. 84.24(l), no petition for rehearing is permitted from an unexplained denial. The court’s decision is thus final, and this certiorari petition follows.

## **REASONS FOR GRANTING THE WRIT**

Mr. Tisius is under sentence of death. As this Court has repeatedly recognized, “death is different,” and a defendant subject to that sentence is entitled to extra procedural protection. *Zant v. Stephens*, 462 U.S. 862, 884 (1983) (requiring heightened reliability in the decisions made by jury and judge during a capital trial); *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (“Under the Eighth Amendment, the death penalty has been treated differently from all other punishments.”). Mr. Tisius was not afforded the basic protections provided by

Missouri law for all persons tried before juries. Yet, the Missouri Supreme Court has refused to enforce this right and continues to insist that Mr. Tisius should be executed on the basis of an arbitrary and unconstitutional death sentence.

**I. MR. TISIUS'S SENTENCES VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE HE WAS SENTENCED TO DEATH BY A JURY WITH AN UNQUALIFIED MEMBER.**

While specific juror qualifications are established by the state, due process requires that the state enforce its own qualifications. *Hicks v. Oklahoma*, 447 U.S. 343 (1980).<sup>3</sup> In Mr. Tisius's case, that did not happen, and the state continues to refuse to do so. Therefore, this Court should grant certiorari to review Mr. Tisius's right to a qualified jury and to a jury selected without interference by state officials.

In Missouri, “[f]ailure to strike an unfit juror is structural error. . . .” *Dorsey v. State*, 448 S.W.3d 276, 299 (Mo. banc 2014); *see also State v. Strong*, 263 S.W.3d 636, 647 (Mo. banc 2008) (prejudice presumed). A death sentence imposed by an unqualified juror is a structural defect.

Criminal defendants in Missouri are “entitled to a full panel of qualified jurors.” *State v. Wacaser*, 794 S.W.2d 190, 193 (Mo. 1990). To ensure defendants

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<sup>3</sup> The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), guaranteed Mr. Tisius the right to a trial by jury in his capital resentencing trial. *See Ring v. Arizona*, 536 U.S. 534 (2002) (Defendant subject to the death penalty entitled to a jury finding of factual elements required for death sentence.). Mr. Tisius was also entitled to a unanimous finding on these factors. *Ring*, 536 U.S. at 589; *Ramos*, 140 S.Ct. at 1395-97.

receive a qualified panel, the Missouri legislature enacted Mo. Rev. Stat. § 494.425, which sets forth these requirements, mandating:

The following persons ***shall be*** disqualified from serving as a petit or grand juror:

...

(5) Any person unable to ***read***, speak and understand the English language, unless such person's inability is due to a vision or hearing impairment which can be adequately compensated for through the use of auxiliary aids or services. . . .

(emphasis added); *see also Juror Basics*, Missouri Courts,

<https://tinyurl.com/3ze2hfr4> (last visited June 2, 2023) (“A person is eligible for jury service if he or she . . . is able to read, speak, and understand English.”).

State courts must abide by state statutes. It is error to reconstruct or reconstitute a statute to limit or modify its meaning. Amending or adjusting a statute is the prerogative of the legislative branch, not the judicial branch. When a state fails to abide by its own statutes in a manner governed by a constitutional right, that action violates the Fourteenth Amendment. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). The plain language of Mo. Rev. Stat § 494.425 provides clear and unambiguous instruction: any person who is unable to read, speak, and understand English ***shall*** be disqualified from serving on a petit jury or grand jury. The word “shall” is “an imperative command, usually indicating that certain actions are mandatory, and not permissive.” *Shall*, Cornell Law School, Legal Information Institute Wex, <https://www.law.cornell.edu/wex/shall> (last visited May 29, 2023).

Black's Law Dictionary defines "shall" as "[h]as a duty to; more broadly, is required to <the requestor shall send notice> <notice shall be sent>. This is the mandatory sense that drafters typically intend and that courts typically uphold." Black's Law Dictionary (11th ed. 2019). Missouri has adopted the same definition of "shall." *See, e.g., Frye v. Levy*, 440 S.W.3d 405, 408 (Mo. banc 2014) ("'Shall' means 'shall.' It unambiguously indicates a command or mandate."); *Tinnin v. Mo. DOT & Patrol Emples. Ret. Sys.*, 647 S.W.3d 26, 35 (Mo. App. W.D. 2022) ("The correction statutes proved that MPER's 'board shall correct such error,' . . . 'The word "shall" generally prescribes a mandatory duty.' MPER's mandatory duty to correct . . ." (citing *Gross v. Parson*, 624 S.W.3d 877, 889 (Mo. banc 2021))). Thus, the statute is mandatory, requiring that any individual unable to read, speak, and understand English "shall be," or must be, disqualified from petit jury or grand jury service. Mo. Rev. Stat. § 494.425.

Considering the unequivocal language of Mo. Rev. Stat. § 494.425, there is no other reasonable interpretation of the statute. *See Frye*, 440 S.W.3d at 408 ("To suggest any other meaning [for the word "shall"] is to ignore the plain language of the statute."). Juror 28 was plainly ineligible to serve as a juror during Mr. Tisius's resentencing trial. Due to his inability to read English, Juror 28 should have been disqualified from jury service. *Id.* Nevertheless, he was selected to sit on the jury that ultimately sentenced Mr. Tisius to death. And, because a unanimous verdict was required as to the facts supporting a death sentence, that error cannot be harmless.

With Juror No. 28 sitting as an unqualified juror, Mr. Tisius was sentenced to death by a jury whose composition violated Mo. Rev. Stat. § 494.425. A defendant has a “substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.” *Hicks*, 447 U.S. at 347 (internal citations omitted) (citing *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980)). Thus, Mr. Tisius’s death sentence, which was imposed by a jury *not* within the relevant statutory parameters, is an arbitrary deprivation by the state of Mr. Tisius’s constitutional rights. Mr. Tisius’s death sentence is a violation of his Fourteenth Amendment due process rights.

The Missouri Supreme Court was presented with evidence of this violation in Mr. Tisius’s petition for writ of habeas corpus. App. pp. 3a, 24a, 27a. Yet, without granting a hearing or writing an opinion, the Court declined to correct this egregious violation of Mr. Tisius’s rights. Certiorari should be granted to address this violation. *See* U.S. Sup. Ct. R. 10(c) (suggesting consideration of the fact that “a state court. . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.”).

## II. MR. TISIUS'S SENTENCES VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE HE WAS DENIED THE RIGHT TO A QUALIFIED JURY THROUGH STATE ACTION.

The error in Mr. Tisius's case was not an innocent or inadvertent error by the state. Rather, the uncontested evidence is that Juror 28's jury form was filled out for him by a county official after he told her that he could not read. The state's "affidavit," App. p. 70a, claims that Juror 28 can read "a little bit" (although Juror 28 affirmed twice that he cannot read and that he told the county official he could not read), but does not dispute that a county official filled out the form. Considering the AG spoke to Juror 28, personally, it seems highly improbable Juror 28's prior statements regarding Greene County's assistance and coverup were *not* discussed.

While the actual form is not available, the uncontested evidence is that when Juror 28 signed it, he was stating that he met the juror qualifications, including literacy. After falsely signing the form, he then failed to respond to the trial court when asked directly, as part of the jury panel, whether he could read. Sentencing Trial Transcript, p. 92.

It is apparent that the official who assisted Juror 28 did not inform the trial court of this fact; had she done so, the juror would have been found unqualified and removed from the panel. (If the trial judge received this information and chose to ignore it, that in itself would be misconduct in violation of due process.)

This Court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), emphasized the duty of court officials to protect the jury process. While the issue in that case was

the effect of pretrial publicity rather than juror qualifications, the duty of the court is the same—to protect the integrity of the process. This Court held, “Since the state trial judge did not fulfill his duty to . . . control disruptive influences in the courtroom, we must reverse the denial of the habeas petition.” Here, it is clear that Juror 28 was assisted by court personnel to conceal the fact that he was not qualified. Apparently emboldened by that assistance, he failed to tell the court about his disqualification, thus violating the oath he had just taken to be truthful during jury selection. Sentencing Trial Transcript, p. 84. Because of the state’s interference in the seating of a qualified jury, Mr. Tisius was denied due process of law, and this Court should grant certiorari to ensure that any decision to sentence Mr. Tisius to death has the “heightened reliability” required by this Court’s decisions. *Zant*, 462 U.S. at 884.

### **III. THE MISSOURI SUPREME COURT DENIED MR. TISIUS THE OPPORTUNITY TO LITIGATE HIS CLAIM.**

As the procedural discussion above shows, Mr. Tisius was not given the opportunity, in state court, to develop the facts surrounding his claim for relief. Missouri state practice permits the Supreme Court to order fact development, often through the appointment of a special master. It does so regularly. *See, e.g.*, *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330 (Mo. banc 2013) (court-appointed master for fact development under Rule 68.03); *see also* Mo. Sup. Ct. Rules 91.15 and 91.17; Mo. Rev. Stat. § 532.310. Particularly when “heightened reliability” is required, and when state action is alleged, due process requires full

factual development. This Court has emphasized the need for adequate fact-finding processes in a variety of contexts. For example, in *Morrissey v. Brewer*, 408 US 471, 482 (1972), this Court found that a parolee's interest in his continued liberty was sufficient to require procedural due process because "its termination inflicts a 'grievous loss' on the parolee and often on others." It is difficult to imagine a more "grievous loss" than the loss of Mr. Tisius's life. Similarly, in cases involving the deprivation of property rights far less serious than the loss of life, this Court has held that due process entitles the aggrieved person to a hearing. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970) (loss of welfare benefits); *Cleveland Board of Education v. Loudermill*, 479 U.S. 532 (1985) (loss of school employment); *Goss v. Lopez*, 419 U.S. 565 (1975) (school suspension).

Mr. Tisius strongly contends that he has presented sufficient evidence of the violation of his right to a qualified jury. At worst, the competing affidavits of Juror 28 create a dispute of fact that cannot be determined without further development. Furthermore, the lack of dispute regarding Juror 28's statement that a court employee assisted him in concealing his illiteracy, and Ms. Willibey's affidavit regarding her efforts to obtain the juror forms which might have revealed evidence of this assistance bolsters Mr. Tisius's claim.

This Court should grant certiorari and remand the matter to the Supreme Court of Missouri with instructions to conduct a hearing necessary to resolve the disputed facts.

#### IV. THE ERROR PREJUDICED MR. TISIUS

Missouri's rejection is surprising, since its law establishes a *per se* finding of prejudice based on juror nondisclosure. *State v. Mayes*, 63 S.W.3d 615, 625 (Mo. banc 2001) (intentional nondisclosure merits new trial without a showing of prejudice). "Failure to strike an unfit juror is structural error. . . ." *Dorsey v. State*, 448 S.W.3d 276, 299 (Mo. banc 2014); *see also State v. Strong*, 263 S.W.3d 636, 647 (Mo. banc 2008) (prejudice presumed); *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). A death sentence imposed by an unqualified juror is a structural defect.

Juror 28 was asked directly whether he could read English, and he did not respond. Sentencing Trial Tr. 92. A non-response to an unequivocal question is intentional nondisclosure under Missouri law. *Brines v. Harlan v. Cibis*, 882 S.W.2d 138, 139 (Mo. banc 1994). Since Juror 28 was an unqualified juror, and a challenge for cause would have been successful given the straightforward application of Mo. Rev. Stat. § 494.425, it bears noting that "failing to sustain a meritorious challenge for cause" is prejudicial error in Missouri. *Wacaser*, 794 S.W.2d at 193.

Had trial counsel learned of Juror No. 28's illiteracy, there would have been a challenge for cause, and if that had been denied, a peremptory challenge. App. 72a (Affidavit of trial counsel Slusher); App. 75a (Affidavit of trial counsel McBride). Thus, Mr. Tisius's right to assistance of counsel in selecting a jury was violated. *See Wacaser*, 794 S.W.2d at 193 (defendant is entitled to a fully qualified panel of jurors from which his counsel may make peremptory strikes). Since Mr. Tisius has a liberty interest in a fair trial, the Missouri Supreme Court's rejection of this claim violated the Fourteenth Amendment. *Hicks*, 447 U.S. at 347.

Furthermore, Mr. Tisius was prejudiced by illiterate Juror No. 28's participation in the petit jury deliberations. First, as required by Missouri law, the jurors were provided with a copy of the jury instructions which they could consult in the jury room. Sentencing Trial Transcript p. 1220 ("The record will reflect that I am handing the marshal twelve sets of jury instructions."). Juror No. 28 was unable to use this document.

The jury instructions total 3,951 words and would take over 20 minutes to read aloud. Even if a juror was able to understand the instructions as the trial judge read them out loud, memorizing all the instructions in their entirety, including the details and nuances, would be extremely difficult. Remembering them throughout the duration of deliberations would be even more difficult. This is why jurors are provided with copies of the jury instructions—so that they may refer to them later as they consider the evidence and determine whether their verdict fits within the instructions' parameters. But that important aid was useless to Juror 28, since he was unable to read them. Mr. Tisius was thus sentenced to death by a juror who was unable to perform his full duty of imposing a sentence based on the law as contained in the Court's instructions.

Second, both Mr. Tisius's counsel and the state presented numerous written exhibits. Although most of them were read aloud, they were also displayed to the jury.<sup>4</sup> Juror No. 28's inability to read and thus fully

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<sup>4</sup> State's exhibits 34 (Labeled diagram), 45 (Waiver of rights), 47 (Written confession), and 73 (Letter of Janice Page) were all written exhibits. Similarly, Defense exhibits 2 (California Achievement Test Scores), 4 (MMAT Test Scores), 5

comprehend the substance of these exhibits prevented him from considering the full scope of the evidence.

Because Juror 28 was unable to participate fully as a juror in the critical question of Mr. Tisius's life or death, this Court should grant certiorari and reverse his sentences.

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(Defendant's Self-Hate Writings), 7 (Letter written by defendant), 8 (Defendant's Letter to Mother), 9 (Art Award Notice), 10 (MMAT scores), 11 (Defendant's Card to Mother), 12 (Defendant's School Paper), 14 (Comtrea Discharge Summary), 15 (Court evaluation), 16 (Chuck Tisius letter), 17 (Letter from Patty to Chuck) and 18 (Parent intake form) were also written exhibits.

## CONCLUSION

For the foregoing reasons, Mr. Tisius respectfully requests the Court grant the petition for writ of certiorari, and

a) Vacate his sentences of death, and remand with instructions that Mr. Tisius be sentenced to life imprisonment without possibility of parole or be granted a new sentencing hearing, or

b) Remand this matter to the Missouri Supreme Court with instructions to conduct a hearing to determine the factual issues raised in Mr. Tisius's petition for writ of habeas corpus.

Respectfully Submitted,

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