Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL TISIUS, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the Missouri Supreme Court

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

In the Supreme Court of Missouri

May Session, 2023

State ex rel. Michael Tisius,

Petitioner,

No. SC100059 HABEAS CORPUS
Boone County Circuit Court No. 01CR164629
Court of Appeals No. Not Provided

David Vandergriff,

Respondent.

Now at this day, on consideration of the petition for a writ of habeas corpus herein to the said respondent, it is ordered by the Court here that the said petition be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, BETSY AUBUCHON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 2023, and on the 23rd day of May, 2023, in the above-entitled cause.

WITNESS my hand and the Seal of the Supreme Court of Missouri, at my office in the City of Jefferson, this 23rd day of May, 2023.

_______________, Clerk

_______________, Deputy Clerk

SEAL OF THE SUPREME COURT OF MISSOURI

Supreme Court of Missouri

vs.

MANDATE

JUDGMENT

IN THE SUPREME COURT OF MISSOURI

In re MICHAEL ANDREW TISIUS	§	
	§	
Petitioner,	§	
	§	
v.	§	No. _____
	§	
DAVID VANDERGRIFF,	§	THIS IS A CAPITAL CASE
Warden, Potosi Correctional	§	
Center,	§	*Pending Execution Date:*
	§	June 6, 2023 @ 6:00 PM CST
Respondent.	§	

PETITION FOR WRIT OF HABEAS CORPUS AND SUGGESTIONS IN SUPPORT

FACTS

In July 2010, Petitioner Michael Tisius was tried by a jury in the Circuit Court of Boone County selected from a panel provided by Greene County. The sole issue in this proceeding was whether Mr. Tisius should receive death or a sentence other than death.[1] Unbeknownst to Mr. Tisius, one of the jurors did not satisfy the juror qualification requirements of Mo. Rev. Stat. § 494.425 because that juror could not read English.

[1] In 2001, a jury found Mr. Tisius guilty on two counts of first-degree murder and recommended the court sentence him to death on both accounts. During Mr. Tisius's post-conviction proceedings, he received a new sentencing hearing due to prosecutorial misconduct at his initial trial.

The jury was comprised of 12 jurors selected from a venire pool of approximately 100 individuals. *See* Trial-2 Tr. 24, 27, 29.[2] Judge Gary M. Oxenhandler statutorily qualified all 100 venirepersons collectively. *See id.* at 29 ("[I]n my voir dire, besides statutorily qualifying everybody, I will talk about hardships. . . . I would anticipate that with a hundred people, it will take me an hour or so . . .").

As part of his statutory qualification of the 100 venirepersons, Judge Oxenhandler asked:

> THE COURT: I see no hands.
>
> Is there anyone here who does not read, speak and understand English?
>
> (No response.)
>
> THE COURT: I see no hands.

Id. at 92. Thus, Venireperson No. 28[3] did not respond to this question.

During the State's death qualification portion of voir dire, Assistant Attorney General Kevin M. Zoellner questioned Venireperson No. 28:

[2] This and similar references are to the transcript, which is a part of the record on appeal in *State v. Tisius,* SC91209.

[3] To respect Juror No. 28's anonymity, this petition refers to him only by his juror number. *See* Trial-2 Tr. 518. All references to Juror 28's full name in the exhibits have been redacted.

> MR. ZOELLNER: Can you sign the verdict if you're the foreperson?
>
> VENIREPERSON NO. 28: Yeah.
>
> MR. ZOELLNER: Thank you, sir.

Id. at 360-61. Venireperson No. 28 was later selected to serve on the jury as Juror 28. *Id.* at 518.

On April 28, and 29, 2023, members of Mr. Tisius's habeas legal team interviewed Juror No. 28 as part of Mr. Tisius's clemency investigation. During this interview, Juror No. 28 revealed that he is unable to read or write. Exhibit 1 (Signed Statement of Juror No. 28) ("This declaration was read to me . . . because I can not read or write."). He disclosed that when he was summoned for petit jury service, "[s]omeone at the courthouse helped [him] fill out [his] juror questionnaire. It was someone who was a courthouse employee." *Id.* ¶ 7. Juror No. 28 further disclosed that in considering a death sentence for Mr. Tisius, he "believe[d] in an eye for an eye." *Id.* ¶ 6.

ARGUMENT AND AUTHORITIES

I. Mr. Tisius Is Entitled To Habeas Relief Because Juror No. 28 Should Have Been Disqualified From Serving As A Petit Juror During Mr. Tisius's Resentencing Trial Under The Plain Language Of Mo. Rev. Stat. § 494.425 And Because His Improper Inclusion On The Jury Violated Mr. Tisius's Due Process Rights.

The Sixth Amendment guarantees every criminal defendant the right to a trial by an impartial jury. U.S. Const. amend. VI. The Missouri Constitution guarantees criminal defendants the right to a "trial by an impartial jury of the county." Mo. Const. art. I, sec. 18(a).

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 receive a qualified panel, the Missouri legislature enacted Mo. Rev. Stat. § 494.425,[4] which sets forth these requirements, mandating:

> The following persons ***shall be*** disqualified form serving as a petit or grand juror:
> . . .

[4] Mo. Rev. Stat. § 494.425 has been in effect since 2004.

> (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. . . .

Id. (emphasis added); *see also Juror Basics*, Missouri Courts, https://tinyurl.com/3ze2hfr4 (last visited May 1, 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. "It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever possible." *State v. Johnson*, 524 S.W.3d 505, 510 (Mo. banc 2017) (quoting *State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 479 (Mo. banc 2013)). "This Court must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language." *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013). "This Court may not add language to an unambiguous statute." *Johnson*, 524 S.W.3d at 511. This Court is thus obliged to give full effect to the entirety of Missouri statutes; otherwise, this Court violates Separation of Powers principles.

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 1, 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). This Court 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 No. 28 was plainly ineligible to serve as a juror during Mr. Tisius's resentencing trial. Due to his inability to read English, Juror No. 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.

Though Juror No. 28 should have been disqualified almost from the beginning of *voir dire*, an unidentified courthouse employee failed to notify the court that Juror 28 required assistance to complete his jury form. Exhibit 1 ¶ 7[5]. His illiteracy so far unrevealed, Juror No. 28 then proceeded to *voir dire*, where he falsely indicated, by omission, that he could read. Trial-2 Tr. 92. His concealment of his illiteracy ultimately resulted in his improper seating on the jury.

State court personnel may have helped Juror No. 28, a disqualified juror due to his illiteracy, appear qualified by assisting him in filling out the jury questionnaire. Juror No. 28 disclosed that when he was summoned for

[5] By instruction from the clerk, the exhibits to this petition, which include the full name of the juror, have been redacted. Should the Court desire the unredacted version, counsel for Mr. Tisius will be glad to provide the originals to be placed under a higher security level.

petit jury service, "[s]omeone at the courthouse helped [him] fill out [his] juror questionnaire. It was someone who was a courthouse employee." *Id.* ¶ 7. This was not disclosed to trial counsel. Had trial counsel been told of Juror No. 28's illiteracy, there would have been a challenge for cause. Exhibit 2 (Affidavit of trial counsel Slusher); Exhibit 3 (Affidavit of trial counsel McBride).

The State of Missouri failed to disclose the assistance, even though the trial court attempted to ensure compliance with Mo. Rev. Stat. § 494.425 by inquiring in voir dire or the venire panel. Trial-2 Tr. 92. Each of Mr. Tisius's former counsel attest such interference with the voir dire process has never been disclosed. Exhibit 2 (Affidavit of trial counsel Slusher); Exhibit 3 (Affidavit of trial counsel McBride); Exhibit 4 (Affidavit of direct appeal counsel Willibey); Exhibit 5 (Affidavit of post-conviction trial counsel Carter); Exhibit 6 (Affidavit of post-conviction trial counsel Leftwich); Exhibit 7 (Affidavit of post-conviction appellate counsel Swift). The jury questionnaires themselves, which might have revealed the assistance, had already been destroyed when direct appeal counsel requested them only a year later in 2011. Exhibit 4, Attachment (Willibey File Note).

It is unknown if the Assistant Attorney General who was counsel for the state during the resentencing proceeding[6] knew of the assistance provided by court personnel and did not disclose it. If counsel for the state were aware of this issue, this is the second time that prosecutorial misconduct has created reversible error with respect to Mr. Tisius's death sentence.

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 v. Oklahoma*, 447 U.S. 343, 347 (1980) (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, and he is therefore entitled to habeas relief.

[6] *See Tisius v. State,* 183 S.W.3d 307 (Mo. banc 2006).

II. Mr. Tisius Is Also Entitled To Habeas Relief Because Juror No. 28 Failed To Disclose His Illiteracy And Such Disclosure Would Have Provided A Valid Basis For A Challenge For Cause.

In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), the United States Supreme Court considered whether a respondent was entitled to relief based on a juror's failure to disclose. The Court fashioned a two-pronged standard for petitioners like Mr. Tisius. *Id.* at 556. A party challenging a verdict and seeking relief must demonstrate: (1) that a juror failed to answer honestly a material question on *voir dire*; and (2) that a correct response would have provided a valid basis for a challenge for cause. *Id.*

Missouri is more sympathetic than is the federal system to a party seeking to overturn a verdict because of juror nondisclosure. While the U.S. Supreme Court will order a new trial only upon a showing of prejudice, Missouri requires a new trial where intentional nondisclosure is found, regardless of prejudice. *State v. Mayes*, 63 S.W.3d 615, 625 (Mo. banc 2001) ("[B]ias and prejudice will normally be presumed if a juror intentionally withholds material information."); *Heinen v. Healthline Management, Inc.*, 982 S.W.2d 244, 248 (Mo. banc 1998); *Fielder v. Gittings*, 311 S.W.3d 280, 290 (Mo. App. 2010); *Bradford v. BJC Corp. Health Servs.*, 200 S.W.3d 173, 182 (Mo. App. 2006). Under Missouri law, intentional nondisclosure can be

established by a venireperson's silence to an unequivocal question. A venireperson's duty to disclose is triggered when he is presented with an unequivocal question. *Brines By Harlan v. Cibis*, 882 S.W.2d 138, 139 (Mo. banc 1994). The venireperson's silence to an unequivocal question establishes intentional nondisclosure if the answer to the question is known to the juror. *Id.; Heinen*, 982 S.W.2d at 248.

Mr. Tisius demonstrates both *McDonough* prongs regarding Juror No. 28's inclusion on the jury and is thus entitled to habeas relief. Under the first prong, Juror No. 28 failed to honestly answer a material question during *voir dire.* The court expressly asked all 100 venirepersons, "Is there anyone here who does not read, speak and understand English?" Trial-2 Tr. 92. There was no response from any of the venirepersons, including Juror No. 28, even though he did not "read, speak and understand English" *Id.* Moreover, this question was material, as it went to a statutory qualification all potential jurors were required to satisfy. Juror No. 28 failed to answer the question honestly by either raising his hand or telling the court that he was unable to read.

Furthermore, the court's question regarding the venire's literacy was unequivocal. The question, "Is there anyone here who does not read, speak and understand English?" could not have been clearer and could not have been interpreted to be anything other than an inquiry into the venire's

literacy. Thus, Juror 28's failure to respond regarding his own illiteracy, a fact he was obviously aware of, constitutes intentional nondisclosure. *Brines*, 882 S.W.2d at 139; *Heinen*, 982 S.W.2d at 248. Under Missouri law, Juror 28's intentional nondisclosure automatically triggers a new trial for Mr. Tisius. *Mayes*, 63 S.W.3d at 625; *Heinen, Inc.*, 982 S.W.2d at 248; *Fielder*, 311 S.W.3d at 290; *Bradford*, 200 S.W.3d at 182.

Juror 28's intentional disclosure creates a presumption of bias and prejudice, and Mr. Tisius is thus not required to make any further showing of prejudice before being granted relief. *Mayes*, 63 S.W.3d at 625; *Heinen, Inc.*, 982 S.W.2d at 248; *Fielder*, 311 S.W.3d at 290; *Bradford*, 200 S.W.3d at 182. Nevertheless, Mr. Tisius can still satisfy the second prong of *McDonough*: had Juror No. 28 honestly and correctly answered the court's question, a valid basis for a challenge of cause would have been revealed. Under Mo. Rev. Stat. § 494.425, Juror No. 28 was ineligible to serve on the jury due to his inability to read. If he had answered honestly to the court's question, he would have automatically been disqualified. Thus, a valid basis for a challenge of cause existed.

This Court has long held that "failing to sustain a meritorious challenge for cause" is a prejudicial error. *State v. Wacaser*, 794 S.W.2d 190, 193 (Mo. 1990); *see State v. Hirsack*, 465 S.W.2d 543 (Mo. 1971); *State v. Foley*, 46 S.W. 733 (1898); *State v. McCarron*, 51 Mo. 27 (1872). For example,

in *State v. Wacaser*, Juror Beavers stated during *voir dire* that he was unsure he would be able to decide on a verdict based on the evidence presented at trial. *Wacaser*, 794 S.W.2d at 191-93. Despite there being cause to challenge Juror Beavers for having a pre-formed opinion under Mo. Rev. Stat. § 546.150, the lower court overruled the defendant's challenge for cause against Juror Beaver. *Id.* at 192.

This Court held that the defendant thus was deprived of a panel of qualified jurors (namely, one that did not include Juror Beavers) before she was obliged to use her peremptory strikes. *Id.* at 194. This Court remanded the case for a new trial. *Id.* at 191 ("We reverse the conviction and remand for a new trial because of the error in the failure to sustain a challenge to a venireman for cause."); *see also State v. Stewart*, 692 S.W.2d 295, 299 (Mo. banc 1985) (reversing defendant's conviction because a venireperson "never unequivocally stated that she would not draw any inference of guilt from defendant's failure to testify," even though she initially indicated that she would expect him to testify); *State v. Holland*, 719 S.W.3d 453 (Mo. banc 1986) (same).

Likewise in Mr. Tisius's case, there was cause to challenge Juror No. 28's inclusion on the initial panel—under Missouri statute, Juror No. 28 automatically should have been disqualified from petit jury service due to his inability to read English. However, he gave no indication to either party or to

the court that he was unable to read or that such a cause to challenge existed, and the court inaccurately qualified him. *See* Trial-2 Tr. 95. Therefore, the panel Mr. Tisius was provided was not a qualified panel, and under this Court's precedent, this is prejudicial error.

Moreover, Mr. Tisius was indeed prejudiced by Juror No. 28's inclusion on the panel and his subsequent participation in the petit jury. 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. Trial-2 Tr. 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. Second, both Mr. Tisius's counsel and the State presented numerous exhibits. Although most of them were read aloud, they were also displayed to the jury. Juror No. 28's inability to read and thus fully comprehend the substance of these exhibits prevented him from considering the full scope of the evidence.

Furthermore, because Juror No. 28 falsely indicated to the court that he met all the requirements of Mo. Rev. Stat. § 494.425 and was qualified for jury service, the jury included a juror who believed in the philosophy of "an eye for an eye." Exhibit 2 ¶ 6. If Juror No. 28 had raised his hand or told the court that he could not read when the court expressly asked and when Juror No. 28 was under an obligation to do so, he would have been struck from the panel and accordingly, could not have been chosen as a juror. But because

Juror No. 28 failed to respond and hid the fact that he was unable to read from the court, and because the courthouse employee failed to reveal that Juror No. 28 required help to complete his jury questionnaire, Mr. Tisius's jury included a juror who already held a pro-death penalty bias at the commencement of trial.

Mr. Tisius was prejudiced by Juror No. 28's failure to disclose his disqualifying illiteracy and subsequent improper inclusion on the petit jury. Thus, because he meets the *McDonough* standard, Mr. Tisius is entitled to challenge his unconstitutional death sentence and obtain habeas relief. *McDonough*, 464 U.S. at 556.

Timeliness

This petition is timely filed and not subject to rejection for procedural default. Counsel for Mr. Tisius learned on April 28, 2023, that Juror No. 28 could not read and write the English language. On April 29, 2023, Juror No. 28 confirmed this in a written statement. Exhibit 1. Thus, there has been no undue delay in asserting this claim within four (4) days. While a claim that a juror does not meet the statutory qualifications to serve would normally be raised at trial, on direct appeal, or in post-conviction proceedings, the facts underlying the claim were unknown to Mr. Tisius and to the lawyers who represented him in each of those proceedings. *See* Exhibits 2-6, affidavits of

Chris Slusher, Scott McBride, Jeannie Willibey, Val Leftwich, and Pete Carter.

Nor could these facts have reasonably been expected to be known at the time of the earlier proceedings. As the court put it in *State ex rel. Koster v. McElwain,* 340 S.W.3d 221, 254 (Mo. App. 2011), a case dealing with jury misconduct, "Nothing in this record suggests that Dale Helmig was earlier alerted or should have been earlier alerted to the prospect of discovering that the jury had been provided a map that was never introduced into evidence during its deliberations." Juror No. 28, along with the other prospective jurors, was asked whether he could read or write English. Trial-2 Tr. 92. He did not respond. Mr. Tisius's lawyers have all stated that they had no information suggesting that Juror No. 28 had not been truthful with the court. *See* Exhibits 2-7.

Juror No. 28 indicated that a courthouse employee assisted him with his juror questionnaire. Exhibit 1. Of course, trial counsel would only have been aware of this had Juror No. 28, the employee, or the prosecutors revealed it. But they did not. Ms. Willibey, Mr. Tisius's direct appeal lawyer, attempted in 2011 to obtain the juror questionnaires during the direct appeal process. She was unable to do so because by that time, they had been destroyed. *See* Exhibit 8. Thus any evidence that might have been available

to direct appeal or post-conviction counsel was gone as the result of state action.

In *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546 (Mo. banc 2003), this Court held that a petitioner may have an otherwise procedurally defaulted claim considered in a habeas corpus proceeding if he establishes "cause for failing to raise the claim in a timely manner and prejudice from the constitutional error asserted." This basis for overcoming default was characterized by the *Amrine* opinion as a "gateway" cause and prejudice claim. *Id.* The "cause" must be something "not fairly attributable to" Mr. Tisius. *Koster*, 340 S.W.3d at 227.

A. Cause

Mr. Tisius can establish external cause for failing to raise this ground for relief sooner. Not only did the juror fail to disclose the basis for his disqualification in response to a direct question from the voir dire court, but a county employee who was aware of it failed to inform the court. Mr. Tisius's lawyers have all stated under oath that they were unaware of any evidence that should have put them on notice of this problem. And the only evidence that might potentially have alerted them, the jury questionnaire, was unavailable to them because it has been destroyed by the same institution that assisted in evasion of Mo. Rev. Stat. § 494.425.

In *Koster v. McElwain,* the court found that Dale Helmig, the petitioner in the underlying habeas corpus case, had established that he could not have discovered his jury misconduct claim in time to raise it in his post-conviction proceeding. This was because there was no evidence that Mr. Helmig, or his counsel, should have been "earlier alerted" to the misconduct. *Koster*, 340 S.W.3d at 254. Similarly, in *Ferguson v. Dormire*, 413 S.W.3d 40, 58-59 (Mo. App. W.D. 2013), the court held that Mr. Ferguson had shown "cause" for failing to raise a *Brady* claim, holding, "Ferguson 'cannot be faulted for failing to raise the nondisclosure of evidence that he did not know about.'" *Id.* (quoting *Buck v. State*, 70 S.W.3d 440, 445 (Mo. App. E.D. 2000)).

Like Mr. Helmig and Mr. Ferguson, Mr. Tisius had no reason to be aware of this issue before now. Mr. Tisius has established cause.

B. Prejudice

In *State v. Wacaser,* 794 S.W.2d 190, 193 (Mo. 1990), this Court said, "We have consistently held that a defendant is entitled to a full panel of qualified jurors before being required to make peremptory challenges, and that there is prejudicial error in failing to sustain a meritorious challenge for cause." In support of this proposition, the *Wacaser* court cited *State v. Hirsack*, 465 S.W.2d 543 (Mo.1971); *State v. Foley*, 46 S.W. 733 (1898); and *State v. McCarron*, 51 Mo. 27 (1872). *Wacaser*, *Hirsack*, and *Foley* concerned the situation where the trial court erroneously overruled a challenge for

cause. *McCarron* concerned a situation where the trial court required the defense to exercise peremptory challenges even though there were not enough qualified prospective jurors present. In all of these cases, the Court found reversible error. And *Wacaser* makes clear that a defendant need not exercise a peremptory challenge against an unqualified juror to obtain relief. *See Wacaser*, 794 S.W. 2d at 193. Since *Wacaser*, Missouri courts continue to follow this rule without a showing of prejudice beyond the failure to afford the defendant a full panel of qualified jurors. *See, e.g. State v. Schnick*, 819 S.W.2d 330, 333-34 (Mo. banc 1991); *State v. Plummer*, 860 S.W.2d 340, 347-48 (Mo. App. 1993); *State v. Boyd*, 826 S.W.2d 99, 100 (Mo. App. 1992).

Here, not only was Mr. Tisius not afforded a full panel of qualified venirepersons before making peremptory challenges, but an unqualified juror also actually served on his case. There is a reason § 494.425 exists: jurors need to be able to read the jury instructions themselves. Juror No. 28 could not read the jury instructions. Usually, jurors need to read exhibits. Juror 28 could not read the multiple exhibits entered at trial and published via projector. It is a fundamental tenet of Missouri trials—criminal and civil — that jurors must consider and weigh all evidence, not just aural, video, and physical. Juror No. 28 could not weigh the evidence because he could not even consider the evidence due to his illiteracy. The statute provides no wiggle room, nor should this Court. Prejudice is evident and clear.

CONCLUSION

For the foregoing reasons, Mr. Tisius prays the Court to issue a writ of habeas corpus, vacate his sentences of death, and remand with instructions that Mr. Tisius be sentenced to life imprisonment without possibility of parole. To the extent this Court finds it necessary, Mr. Tisius requests a hearing before a special master to present the evidence discussed in this petition and other evidence supporting it.[7]

Respectfully submitted,

/s/ Elizabeth Unger Carlyle
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ATTORNEYS FOR PETITIONER

[7] This Court can order fact-development procedures to afford a habeas applicant an opportunity to present evidence, when the facts, if true, would entitle the applicant to relief. *See*, *e.g.*, *Woodworth v. Denny*, 396 S.W.3d 330 (Mo. banc 2013) (court-appointed master for fact development under Rule 68.03); *see also* Rules 91.15 and 91.17; Mo. Rev. Stat. § 532.310.

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing pleading electronically with the clerk of the court, and that it was served by e-mail upon Asst. Atty. Gen. Andrew Crane, andrew.crane@ago.mo.gov on May 2, 2023.

/s/ Elizabeth Unger Carlyle
Elizabeth Unger Carlyle

IN THE SUPREME COURT OF MISSOURI

In re MICHAEL ANDREW TISIUS	§	
	§	
Petitioner,	§	
	§	
v.	§	No. SC100059
	§	
DAVID VANDERGRIFF,	§	THIS IS A CAPITAL CASE
Warden, Potosi Correctional	§	
Center,	§	*Pending Execution Date:*
	§	June 6, 2023 @ 6:00 PM CST
Respondent.	§	

SUPPLEMENTAL SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

On May 2, 2023, Mr. Tisius filed his petition for writ of habeas corpus and suggestions in support. Attached to the petition was a declaration of Juror No. 28 signed under penalty of perjury, because no notary was available when the statement was obtained. On May 3, 2023, counsel for Mr. Tisius obtained the affidavit of Juror No. 28, which is signed before a notary under oath and also includes additional information. The affidavit is attached as Exhibit A to this pleading.[1]

In particular, the new affidavit explains the circumstances under which Juror No. 28 submitted his jury form. He states that he informed the county official supervising the jury panel that he could not read or write, and was then

[1] Like the exhibits in the original petition, this exhibit is redacted to eliminate the name of the juror. The original affidavits has been made available to opposing counsel and will be submitted to the court at a higher security level upon request.

taken to a private area where the official read him the form and recorded his answers. It is clear that Greene County personnel were aware of Juror 28's illiteracy. The state thus knew that Juror 28 was statutorily disqualified to serve on Mr. Tisius's jury.

Mr. Tisius respectfully refers the Court to his petition and suggestions for a full discussion of the statutory and constitutional error in this case and for the relief requested.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was served on all attorneys of record via this Court's electronic filing system on May 4, 2023.

/s/ Elizabeth Unger Carlyle
Elizabeth Unger Carlyle

IN THE SUPREME COURT OF MISSOURI

In re MICHAEL ANDREW TISIUS	§	
	§	
Petitioner,	§	
	§	
v.	§	**Case No. SC100059**
	§	
DAVID VANDERGRIFF,	§	**THIS IS A CAPITAL CASE**
Warden, Potosi Correctional	§	
Center,	§	***Pending Execution Date:***
	§	**June 6, 2023 @ 6:00 PM CST**
Respondent.	§	

REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Introductory Statement

The state's argument is absurd and distinguishable. The state claims that this Court should disregard a mandatory juror disqualification statute enacted by the Missouri Legislature requiring jurors to be able to read because, despite just four days earlier swearing under penalty of perjury that he cannot read, Juror 28 purportedly now has disavowed both his prior signed statement and his prior sworn affidavit, and stated he can read.[1] However, this statement itself shows that Juror 28 cannot read—the statement *had to be read to him*. Resp. Ex. A, ¶ 15. To the extent that the state nonetheless claims the juror can read, despite having to read the juror's own statement to him, the state has created a material dispute of fact. To

[1] For the reasons expressed below, Mr. Tisius objects to the inconsistent statement as not a properly notarized affidavit.

support its factual dispute, the state has offered an additional affidavit[2] improperly inviting this Court to open and invade a capital jury's sentencing deliberations.

Juror 28's new statement is silent on the facts in the earlier affidavit indicating that he told a Greene County official he "could not read," that the official then "took him to a private room," and that the court personnel privately "read word for word the questionnaire and filled in the answers for me." Supp. Pet. Ex. A, at 2. The state never contests the truth of this statement in the earlier affidavit—in fact the state never even *addresses* this statement. The only logical inference from this omission from the statement must be that Juror 28 reaffirmed the assistance of court personnel. This Court must treat this as an admission and draw an adverse inference against the state.

The state neither contests the mandatory nature of the disqualification statute (Mo. Rev. Stat. § 494.425) nor this Court's statutory construction precedent regarding how to interpret mandatory statutes. Instead, the state requests this Court resolve a credibility dispute and invade the deliberations of the jury to read out of existence the statute, while simultaneously not

[2] For the reasons expressed below, Mr. Tisius objects to this affidavit as invading the province of jury deliberations. *See, e.g., Strong v. State*, 263 S.W.3d 636, 643 (Mo. 2008).

contesting the state involvement in suppressing the basis of disqualification to the court or the parties.

Finally, the state argues that Mr. Tisius cannot show prejudice because he cannot show the bias or partiality of the juror. But Mr. Tisius has shown the failure to provide him with a qualified panel from which peremptory challenges are made, and under those circumstances, prejudice is presumed.

Argument

I. The factual allegations of the petition and response require the appointment of a special master because if true, the facts alleged in the petition require relief.

Members of Mr. Tisius's legal team met with Juror 28 in person on April 28 and 29, and May 3, 2023. On April 28, Juror 28 spontaneously told Mr. Tisius's legal team, just as he did 13 years ago to Greene County court personnel, that he cannot read. Juror 28 then signed a statement on April 29, 2023, in the presence of two members of Mr. Tisius's legal team stating that he is unable to read. Pet. Ex. 1. On May 3, 2023, Juror 28 again endorsed his inability to read, this time in an affidavit, executed in the presence of a member of Mr. Tisius's legal team and a proper Wisconsin notary. Pet. Supp. Ex. A.

Juror 28 made three separate, relevant, and important attestations regarding his inability to read:

[redacted] I signed a statement on April 29, 2023. The statement was read to me by Sarah Topolski. I put my initials next to each paragraph after she read each one to me and signed at the bottom. Everything in there was true.

This affidavit was read to me by Sarah Topolski, because I can not read or write.

[redacted] Someone at the Courthouse helped me fill out my juror questionnaire. It was someone who was a Courthouse employee. I told the Courthouse employee that I could not read. The Courthouse employee took me into a private room. The Courthouse employee read word for word the questionnaire and filled in the answers for me.

Pet. Supp. Ex. A. Juror 28 thus affirmed the accuracy of his earlier signed statement regarding his inability to read **and** swore under the penalty of perjury that he cannot read.

The state brings an "affidavit" obtained through a telephone call on May 7, 2023, stating Juror 28 is able to read, but not very well. Response Ex. A.[3] Juror 28's statements are in direct conflict—first, he told Mr. Tisius's legal team that he is unable to read (a statement he made two separate times on two separate days; the latter affidavit affirmed the earlier statement under proper notarization), then later told the state he is able to read, just

[3] The state's statement indicates that it was read to Juror 28, but not that he read it himself.

"not very well." However, it is telling the state's statement does not indicate that Juror 28 read the statement. Rather, it states that it was read to him. This fact calls into question Juror 28's new statement suggesting that he can read.

As support for its contention that Juror 28 is able to read, the state asserts that Juror 28 "graduated high school, works a full-time job, runs a business, sends and receives text messages, and uses social media[,]" and "obtained a commercial driver's license . . . and runs a business operating a resort." Response at 1, 15-16.[4] These activities do not necessarily establish Juror 28's literacy. While these activities might *usually* involve the ability to read, they do not necessarily *require* literacy. *See generally* The Americans with Disabilities Act (ADA). Missouri Human Rights Act (prohibiting employment discrimination on the basis of disability.)

Thus, there is no dispute that Juror 28 could not read any of his statements in this case nor that he told the court personnel, prior to juror qualification, that he could not read. But because the state nonetheless contends that Juror 28 can read, a genuine issue of material fact regarding Juror 28's ability to read exists. Yet, the state asks this Court to deny Mr. Tisius's petition without further proceedings. Response at 2. In other words,

[4] Juror 28 indicated that he was in "special needs" classes in school. Resp. Ex. A.

the state asks this Court to deny Mr. Tisius's petition simply because Juror 28 stated over the phone to a representative of the state that he is able to read. The state provides no reason why the inconsistent recantation by Juror 28's May 7, 2023, statement should be deemed truthful, as opposed to Juror 28's April 28, April 29, and May 3, 2023, statements to Mr. Tisius's team.

The material allegations supporting Mr. Tisius's petition, if true, entitle Mr. Tisius to relief. However, because the state has now created a factual dispute, this Court should order further factual development. This dispute cannot be resolved through competing affidavits. The evidence before the Court establishes that an unqualified juror was seated. Alternatively, it establishes a material dispute of fact on a controlling issue. Upon full consideration of the facts, this Court should grant the relief Mr. Tisius requests.

II. Mr. Tisius has established that factors external to the defense prevented him from discovering and investigating this claim earlier and that he suffered prejudice of constitutional dimensions.

This Court will excuse a procedural default and grant habeas relief if factors external to the defense prevented the earlier raising of the claim and if prejudice is shown from the denial of relief. *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. banc 2013). Both cause and prejudice have been properly alleged here.

A. Mr. Tisius has alleged facts establishing external factors, thus establishing cause.

Juror 28 told an employee at the Greene County courthouse that he could not read. Pet. at 7-8; Pet. Supp. Ex. A ("I told the Courthouse employee that I could not read."). That employee took Juror 28 into a private room. *Id.* ("The Courthouse employee took me into a private room."). There, the employee read the jury questionnaire "word for word" to Juror 28 and wrote in Juror 28's answers for him. Pet. Supp. Ex. A. This employee failed to notify anyone that Juror 28 stated he could not read, and further, concealed the fact that Juror 28 needed to be disqualified from jury service by filling out his questionnaire for him.

Exacerbating the assistance provided to a potential juror that should have been disqualified from service due to an admitted inability to read, the juror questionnaires are long gone. The jury questionnaires might have indicated that Juror 28 received assistance. Further, examination of the questionnaire would give the Court the ability to see what sort of document Juror 28 was unable to read.

The actual questionnaire used is not currently available because they were destroyed. However, direct appeal counsel's contemporaneous note provides a description of the contents of the destroyed document:

> 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"--the person signs it and appears.

Pet Ex. 4, attachment. Thus, a county official assisted Juror 28 in filling out the document and certifying that he was qualified despite the fact that the same official was helping him fill out the form because he could not read.

Greene County's destruction of the juror qualification forms raises even more questions regarding concealment, as the destruction violated Missouri Court Rules. Mo. Sup. Ct. Op. R. 4.21 mandates, in pertinent part, that:

> Courts **shall maintain** the following records pertaining to grand and petit juries:
>
> . . .
>
> 2) **Questionnaires submitted by prospective jurors**:

Additionally, Mo. Sup. Ct. Op. R. 27.09(b) provides:

> Jury questionnaires maintained by the court in criminal cases shall not be accessible except to the court and the parties. **Upon conclusion of the trial, the questionnaires shall be retained under seal by the court except as required to create the record on appeal or for post-conviction litigation.** . . .

Nothing in these Missouri Court Rules allows destruction of juror questionnaires or qualification forms just *one year* after conclusion of a trial. Under both rules, courts are required to retain questionnaires for direct appeal and collateral proceedings.

This is a mandatory rule. *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. 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 . . .") (quoting *Gross v. Parson*, 624 S.W.3d 877, 889 (Mo. banc 2021))).

The county's destruction of the forms violated Mo. Sup. Ct. Op. R. 4.21 and Mo. Sup. Ct. Op. R. 27.09. Even more egregious is the speed with which the county destroyed the forms. Mr. Tisius's resentencing trial concluded in July 2010. Just a year later in July 2011, direct appeal counsel Ms. Jeannie Willibey contacted the Greene County Circuit Clerks' office to obtain the juror questionnaires, but by then, Greene County had already destroyed them. Pet. Ex. 4. Greene County destroyed the forms *even while Mr. Tisius's appeals were ongoing*. Greene County violated the Missouri Court Rules and interfered with Mr. Tisius's appellate defense counsel's attempt to investigate juror qualifications.

Under Missouri law, a defendant is entitled to relief if "he exercised due diligence in attempting to obtain a complete record and is prejudiced by the incomplete nature of the record." *In re R.R.M. v. Juvenile Officer,* 226 S.W.3d 864, 866 (Mo. App. 2007). *But see Deck v. State*, 381 S.W.3d 339, 358-59 (Mo. banc 2012) (finding that relief was not warranted, even though the trial court had presumably "destroyed the juror questionnaires in violation of Court Operating Rule 4.21 and Rule 27.09(b)," because copies of the

questionnaires had been filed in this Court during the penalty phase trial and stipulated to by both parties). Here, appellate defense counsel attempted to obtain a complete record by requesting the juror qualification forms. Because Greene County had already destroyed them, her investigation into possible juror-related claims was frustrated, and Mr. Tisius was prejudiced because this claim subsequently remained concealed for thirteen years.

Under *In re R.R.M*, relief is warranted. The county's interference with counsel's investigation, documented at Pet. Ex. 1, Pet. Supp. Ex. A, and Pet Ex. 4, prevented counsel from uncovering the factual basis of this claim at an earlier time. *See Woodworth*, 396 S.W.3d at 337.

The state does not contest that "there is a presumption in this court of the regularity of the proceedings of the Circuit Court." *State ex rel. Loving v. Trimble*, 331 Mo. 446, 451 (1932). In this context, the state's attempt to distinguish *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 254-55 (Mo. App. 2011), from the facts at hand fails, largely because the state does not account for all the facts at hand. Response at 8-9.

As the state explains, *McElwain* involved a jury that requested and received improper evidence during deliberations. Response at 9; *McElwain*, 340 S.W.3d at 254. The state is further correct that because this took place during deliberations, the prosecution, defense attorneys, and trial judge did not know that this had occurred, and that the only person who was aware of

what had transpired was an "unidentified third person." Response at 9; *McElwain*, 340 S.W.3d at 254.

The state argues that this case is different because the initial disclosure of Juror 28's illiteracy did not take place during deliberations like in *McElwain*. *See* Response at 9. This is a distinction without a difference. The disclosure here occurred in a similarly concealed manner, and like in *McElwain*, only an "unidentified third person" (who was not the prosecution, defense counsel, or the trial judge) was aware of what Juror 28 had disclosed.

As the state concedes, this Court has found that when "some interference by officials made compliance impracticable," this Court will usually find that cause has been established. Response at 7-8; *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. banc 2013). This Court elaborated:

> To demonstrate cause, the petitioner must show that an effort to comply with the State's procedural rules were hindered by some objective factor external to the defense.' *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. banc 2013). The factual or legal basis for a claim must not have been reasonably available to counsel or some interference by officials must have made compliance impracticable. *Id.* Evidence that has been deliberately concealed by the state is not reasonably available to counsel and constitutes cause for raising otherwise procedurally barred claims in a petition for a writ of habeas corpus. *Amadeo v. Zant*, 486 U.S. 214, 222 (1988).

State ex rel. Clemons v. Larkins, 475 S.W.3d 60, 76-77 (Mo. banc 2015); *see also State ex rel. Schmitt v. Green*, 601 S.W.3d 278, 286-87 (Mo. App. 2020)

("The State acknowledges that when the procedurally defaulted claim raised by a habeas petitioner is a *Brady* violation, the State's improper suppression of information usually qualifies as 'cause' because it is an objective factor external to the defense.") (citation omitted).

As the Eighth Circuit recently noted in *Maryniuk v. Payne*:

> As noted by the Supreme Court, 'the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.' For example, 'a showing that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that "some interference by officials" . . . made compliance impracticable, would constitute cause under this standard.'

39 F.4th 988, 995 (8th Cir. 2022) (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)).

In this respect, U.S. Supreme Court precedent is congruent with the Missouri rule. In *Williams v. Taylor*, 529 U.S. 420 (2000), the Court held that the provision of 28 U.S.C. § 2254(e) forbidding evidentiary hearings where the petitioner has failed to develop a claim in state court, the Court held, "If there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has not "failed to develop" the facts. . . ." *Id.* at 437. The court then held, as to a juror bias claim:

> The trial record contains no evidence which would have put a reasonable attorney on notice that Stinnett's nonresponse was a deliberate omission of material information. State habeas counsel did attempt to investigate petitioner's jury, though prompted by

> concerns about a different juror. . . . if the prisoner has made a reasonable effort to discover the claims to commence or continue state proceedings, § 2254(e)(2) will not bar him from developing them in federal court.

Id. at 443-44.

This analysis is instructive, because, like Mr. Williams, nothing in the court record put Mr. Tisius's counsel on notice of this claim, and counsel made reasonable efforts to investigate jurors. Furthermore, counsel had no reason to know that a public official had assisted an unqualified juror to fill out a questionnaire, and allowed him to certify that he was qualified when he could not read it. As in *Williams* and *Koster*, no evidence put counsel on notice that impropriety had occurred.

Almost exactly as in *McElwain*, no one other than the unidentified courthouse employee and Juror 28 knew of the secretive jury questionnaire process. Thus, Mr. Tisius's defense counsel had no reason to know that something was amiss with the jury's qualifications (or lack thereof) and that they needed to investigate. The courthouse employee's failure to notify anyone of Juror 28's disclosure, as well as the premature destruction of the jury questionnaires, interfered with defense counsel's ability to move to strike Juror 28 during voir dire, and later, to discover, investigate, and present the claim. *See, e.g., Clemons*, 475 S.W.3d at 76-77; *Woodworth*, 396 S.W.3d at 337.

At trial, defense counsel were wholly unaware of the existence of a venireperson who should have automatically been disqualified from jury service. Pet. Ex. 2; Pet. Ex. 3. During voir dire, Juror 28 failed to respond when Judge Oxenhandler asked whether any juror could not read. Pet. at 2. There was nothing to indicate in the slightest to defense counsel that there was a potential claim to be had and that they needed to investigate. The combination of the courthouse employee's failure to notify anyone else of Juror 28's disclosure as well as Juror 28's failure to respond to Judge Oxenhandler's question prevented defense counsel from discovering the factual basis of the claim. *See, e.g., Larkins*, 475 S.W.3d at 76-77; *Woodworth*, 396 S.W.3d at 337. Thus, there was no reason for trial counsel to, as the state suggests, "further investigate the qualifications of the sentencing jurors or the accuracy of their voir dire answer." Response at 9; *see* Pet. Exs. 2-6.

Nevertheless, Mr. Tisius's direct appeal counsel *did* initiate further investigation, another fact the state fails to mention. Ms. Jeannie Willibey represented Mr. Tisius during his direct appeal to the Missouri Supreme Court from 2010 to 2012. Pet. Ex. 4. Despite being unaware that Juror 28 was illiterate, *id.* ("I did not know [Juror 28] is illiterate. There was no information in the transcript that [Juror 28] was illiterate. . . . Nothing in the file indicated court personnel assisted [Juror 28] in completing his juror

questionnaire."), Ms. Willibey in July 2011 still attempted to examine the sentencing jurors' qualifications. *Id.* ("When I received the record for purposes of my direct appeal representation, I reached out to both Boone County and Greene County Circuit Clerks in an effort to obtain the juror questionnaires.").

Greene County told her that the jury qualification forms the county used at the time of Mr. Tisius's resentencing had already been destroyed. *Id.* In short, defense counsel attempted to initiate an investigation into the jurors' qualifications, but their efforts were impeded by Greene County's untimely destruction of the forms less than a year after resentencing.

Mr. Tisius's failure to raise this claim earlier was clearly attributable to factors external to his defense. *See Woodworth*, 396 S.W.3d at 337; *State ex rel. Strong v. Griffith*, 462 S.W.3d 732, 733 (Mo. 2015); *Schmitt*, 601 S.W.3d at 286-87. "Cause" for the default has been established.

B. Mr. Tisius was prejudiced *per se* or prejudice is presumed when he was deprived of a full panel of qualified jurors as guaranteed by the Missouri Constitution.

The seating of a disqualified juror is per se error. The simple fact that a statutorily disqualified juror was allowed to participate as a member of the jury, regardless of whatever influence they may have brought to bear during deliberations, is the error mandating reversal.

Under this Court's precedent, including *Ess*, so long as Mr. Tisius can show that Juror 28 was disqualified by statute, prejudice is presumed. *See Ess*, 453 S.W.3d at 205; *State v. Mayes*, 63 S.W.3d 615, 625 (Mo. banc 2001); *Heinen v. Healthline Management, Inc.,* 982 S.W.2d 244, 248 (Mo. banc 1998); *Fielder v. Gittings*, 311 S.W.3d 280, 290 (Mo. App. 2010); *Bradford v. BJC Corp. Health Servs.*, 200 S.W.3d 173, 182 (Mo. App. 2006); *see also* Pet. at 10. The state has not overcome that presumption.

In claiming Mr. Tisius was not prejudiced by Juror 28's inclusion on the resentencing jury, the state argues that the record shows that Juror 28 was an unbiased juror. Response at 10-11. But the issue is not Juror 28's bias.[5] Nor at issue is Juror 28's ability to "understand[] the testimony" or whether he "had any difficulty communicating during voir dire or during deliberations." *Id.* at 10. Rather, the issue is Juror 28's ***statutory qualifications***—Juror 28's inability to read the multiple exhibits and 24 pages of jury instructions for himself is what prejudiced Mr. Tisius. Pet. at 19.

The Missouri Legislature made a principled legislative decision that as a matter of law, a juror's inability to read disqualifies him from juror service. § 494.425. This principled decision cannot be subverted by the state's attempt

[5] Mr. Tisius notes Juror 28 implied bias in his April 29, 2023 signed statement and May 3, 2023 affidavit when he affirmed that he believes in "an eye for an eye." Pet. Ex. 1; Pet. Supp. Ex. A.

to conflate the statutory disqualifications with the right to an unbiased jury. Pursuant to the plain language of § 494.425, Juror 28 should not have been seated.

The state improperly attempts to misappropriate a run-of-the-mill plain error application from *State v. Brandolese*, 601 S.W.3d 519 (Mo. banc 2020) to argue that this Court will reverse a conviction for jury qualification errors only on a showing of plain error. Response at 10-11. While it is not unusual for plain error to apply in some procedural circumstances, it is not true in Mr. Tisius's current circumstances. The malfeasance of a state actor and the intentionally misleading answer in voir dire present an entirely different scenario.

In *Brandolese*, a contested 4-3 decision of this Court, a juror should have been statutorily disqualified under § 491.470.1 (which provides that "no person who is kin to . . . a prosecuting or circuit attorney in a criminal case within the fourth degree of consanguinity or affinity shall be sworn as a juror in the same cause") because she was the sister of one of the charging prosecutors on the case. *Brandolese*, 601 S.W.3d at 525-26; *see* Response at 10. This Court acknowledged, "To be sure, a juror who cannot be fair and impartial should be stricken for cause to ensure a fair and just trial," *Brandolese*, 601 S.W.3d at 526-27 (citing *State v. Clark-Ramsey*, 88 S.W.3d 484, 488-89 (Mo. App. 2002)), but declined to reverse Brandolese's conviction

because he did not allege nor show that the juror was "unfair or partial" or "biased or partisan due to her relationship with her brother." *Id.* at 527.

First, because the plain error standard does not apply to this case, Mr. Tisius does not have to establish manifest injustice. Second, what unfolded in *Brandolese* is drastically different from what unfolded in Mr. Tisius's case. As this Court affirmed, the purpose of § 491.470.1 is to ensure that a biased or partial juror does not sit on a jury. *Id.* at 526-27. Although, as the state concedes, the *Brandolese* juror might have "technically violated § 491.470.1," there was nothing in the record to indicate that the harm § 491.470.1 was meant to guard against actually occurred. *Id.* at 527; *see* Response at 10.

Unlike § 491.470.1, the purpose of § 494.425 has nothing to do with juror bias. Instead, the literacy requirement of § 494.425 is meant to ensure that jurors read, fully consider, and weigh the written evidence and jury instructions for themselves. The requirement of literacy for jury service is common among states. *See, e.g.*, Tex. Code Crim. Proc. Ann. art. 35.16(a)(11); *State v. Davila*, 252 S.W.3d 846 (Tex. App. 2008) (upholding the striking over defense objection of a prospective juror who was unable to express himself in writing); La. Code Crim. Pro. Art. 401; *State v. Woodfork*, 232 So.2d 290 (La. 1970) (holding that the literacy requirement is constitutional); Ala. Code § 12-16-60; *Smith v. State*, 482 So.2d 1312 (Ala. Crim. App. 1985) (same);

SDCL 16–13–10 (South Dakota); 10 Del.C. § 4509(b)(4) (Delaware); 17 PS §1252(c) (Pennsylvania).

Second, the harm § 494.425 was designed to prevent did in fact occur: a juror who could not fully read and consider any written evidence or instructions for himself sat on the jury and returned a verdict. Thus, because Mr. Tisius was sentenced by a juror who did not, and could not, fully consider and weigh the full scope of the evidence. Thus, per se prejudice exists, prejudice is presumed or Mr. Tisius has established prejudice.[6]

As a matter of law, Mr. Tisius was prejudiced because he was deprived of a full panel of qualified venirepersons as required by this Court in *State v. Wacaser*, 794 S.W.2d 190, 193 (Mo. banc 1990) ("We have consistently held that a defendant is ***entitled*** to a full panel of qualified jurors before being required to make peremptory challenges, and that there is prejudicial error in failing to sustain a meritorious challenge for cause.") (emphasis added), and subsequently, was deprived of a "fair and impartial jury, composed of ***twelve qualified*** jurors," *Williams By and Through Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 36 (Mo. banc 1987) (emphasis added) (citing Mo. Const. art. I, sec. 22(a); *Beggs v. Universal C.I.T. Credit Corp.,* 387 S.W.2d 400, 503 (Mo. banc 1965)).

[6] To the extent this fact is contested, further factual development is required.

Despite the mandatory language of *Wacaser*, (which the state does not distinguish or even mention), the state contends that in claims where a juror intentionally withheld information during voir dire, prejudice is presumed only where the information is material, and that in regard to jury selection, "material information is information that is relevant to determining whether the juror is fair and impartial." Response at 11. The state attempts to add a materiality component to the statutory qualifications, which is not warranted by the language of the statute.

The state's reliance on *State v. Ess*, 453 S.W.3d 196 (Mo. 2015) is also misplaced. *Ess*, like *Brandolese*, involved an issue of juror bias. *Ess*, 453 S.W.3d at 203-06. The *Ess* juror during a break in voir dire made a statement outside the courtroom heavily suggesting he had made up his mind and thus could not be a fair and impartial juror. *Id.* at 205. However, the juror had failed to respond to the judge's "unequivocal" question whether the venirepersons could be unbiased. *Id.* at 204-05. This Court stated that it "presumes bias and prejudice occurred if a juror intentionally withholds material information." *Id.* at 205. This Court then found that the juror's opinion that he had already made up his mind and failure to disclose this opinion went to a material issue—a juror's ability to be impartial in considering evidence. *Id.* at 205-06. So, because the juror "formed and expressed an opinion concerning the facts at issue during voir dire and

intentionally failed to disclose this material information," this Court presumed bias and prejudice. *Id.* at 206.

The state's contention that *Ess* stands for the proposition that "[i]n the context of jury selection, material information is information that is relevant to determining whether the juror is fair and impartial" is incorrect. Response at 11. *Ess* stands for the proposition that information related to determining whether a juror is fair and impartial is material information. The issue in *Ess* was that information indicating that a juror was biased had come to light, and this Court then found that information to be material. *Ess,* 453 S.W.3d at 205 ("Whether Juror No. 3 favored the state or the defendant is inconsequential because a predisposition toward *either* side [is] material." (citing § 494.470.1)). The reverse, that material information is **only** that which goes to a juror's fairness and impartiality, is not necessarily true. While *Ess* does hold that information relevant to determining bias is material, it does not hold that **only** such information is material. *Ess* does not catalog the universe of undisclosed information requiring reversal.

Juror 28's inclusion on the jury "infect[ed] [Mr. Tisius's] trial with error of constitutional dimensions" in that it deprived him of the panel of twelve qualified jurors guaranteed to him by the Missouri Constitution and this Court. *See State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215 (2001); Mo. Const. art. I, sec. 22(a); *Wacaser*, 794 S.W.2d at 193; *Williams*, 736 S.W.2d at

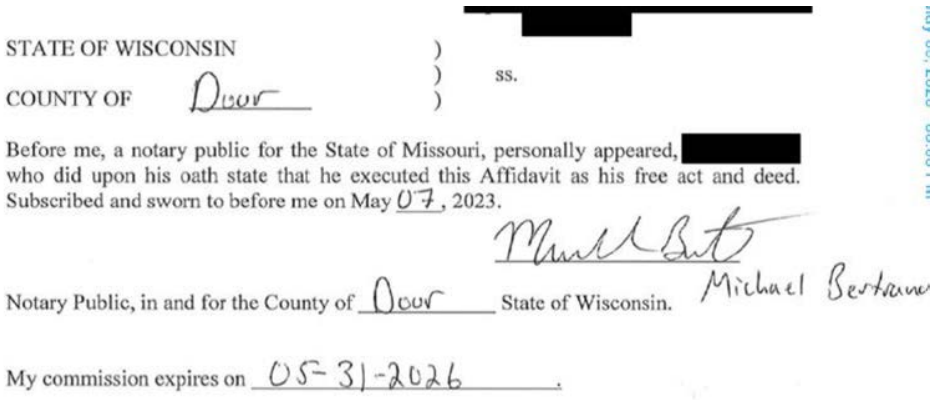
36. In short, a juror who under Missouri statute should have been automatically disqualified from jury service and who could not read the full scope of the evidence or the jury instructions, and thus could not consider and weigh **all** the evidence in the context of the complete jury instructions, sat on Mr. Tisius's resentencing jury. Prejudice is presumed.[7]

Mr. Tisius has thus satisfied the cause and prejudice standard to overcome the procedural default.

III. The questions of whether Juror 28 intentionally withheld information during jury selection and whether he met the literacy requirement for jury qualification warrant further factual development.

Before turning to the dispute of fact, Mr. Tisius objects to the newer "affidavit" from the state (Resp. Ex. A) in its entirety. It fails to comply with numerous required notary components. The notary portion of the affidavit reads as follows:

[7] The state relies on voir dire to suggest Juror 28 was otherwise qualified to serve. However, Juror 28's own statements to Mr. Tisius's team strongly suggest that in addition to being statutorily unqualified for jury service, he was biased toward the death penalty even during jury selection. Juror 28 told Mr. Tisius's legal team on two separate occasions that he believed in "an eye for an eye." Pet. Ex. 1; Pet. Supp. Ex. A.



STATE OF WISCONSIN)
) ss.
COUNTY OF Door)

Before me, a notary public for the State of Missouri, personally appeared, [redacted] who did upon his oath state that he executed this Affidavit as his free act and deed. Subscribed and sworn to before me on May 07, 2023.

Notary Public, in and for the County of Door State of Wisconsin. Michael Bertrand

My commission expires on 05-31-2026.

There is no seal. There is no commission number. Both requirements of Wisconsin (*see* https://sos.wi.gov/NotaryPublic.htm) and Missouri law are missing. Further, according to the affidavit, 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 Missouri Secretary of State does not document a Mr. Michael Bertrand being a "notary public for the State of Missouri."[8]

Apart from the infirmities in the notarization, the state's argument based on its "affidavit" must fail. The state argues that Juror 28 can read but not very well, which is why he did not respond to Judge Oxenhandler's question about literacy. The state suggests Juror 28 was being truthful when he remained silent, and any objection to his qualification would have been overruled. Response at 15-16, 18. Juror 28 also denied intentionally

[8] Investigation by the defense team indicates that Mr. Bertrand, the notary, is a Door County, Wisconsin Sheriff's deputy.

withholding any information during voir dire. Response Ex. A. However, this is inconsistent with the information regarding Juror 28's signing a statement that he was qualified for jury service after the questionnaire was read to him. *See* Pet. Supp. Ex. A.

These suggestions are also inconsistent with Juror 28's "affidavit" itself. The state cannot claim Juror 28 was unable to understand the question, *see* Response at 17, and Juror 28 cannot deny that he withheld information when he also attests:

- "8. I have never had any problems talking to people or understanding what other people say."
- "10. During Michael Tisius's trial, I never had any difficulty understanding the testimony, evidence or jury instructions."

"Never" is a long time and a stark term to use in a statement. Assuming he means what, he says, Juror 28 "never" misunderstood what was asked by Judge Oxenhandler. The state also relies on his alleged total lack of misunderstandings ("never had any problems;" "never had any difficulty understanding"), which belies a lack of intentionality.

Further undermining the state's argument that Juror 28 can read, the state apparently had so little confidence in this alleged fact of Juror 28's literacy that they read to Juror 28 his affidavit. Response Ex. A, ¶ 15. If Juror 28 can read, why did they have to read the affidavit to him—why did

they not just send it to him, have him read it, and sign it? They did not do that because he would not have been able to read it, just as he was not able to read (and complete) the juror qualification form without the secret assistance of Greene County court personnel.[9]

The state claims that Juror 28 "did not have any difficulty understanding the testimony, evidence or jury instructions" and "did not have any difficulty communicating with other jurors or deliberating about the evidence," even though Juror 28 "cannot read or write very well" and has a reading ability limited to a "third or fourth grade level."[10] Response at 15-16;

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[9] In Response footnote 1, the state implies that the defense team attempted to obtain false information from Juror 28. Defense counsel deny this assertion. It is significant that in the affidavit Juror 28 signed for the state, he makes no such suggestion.

[10] Mr. Tisius intends to present evidence that the 24 pages of instructions read and provided to the jury far exceed a third or fourth grade level. According to WordRake, the instructions read at the following levels: Instructions 1, 2, 3, 5, and 10: 10th-12th grade; Instructions 4, 7, 9, 11, 13, 15 and 17: high school or college; Instructions 6, 8, and 14: college or higher; Instructions 12, 16, 18 and 19: 8th-9th grade. 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 Judge Oxenhandler 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. Because Juror 28, by his own admission, reads only at a third or fourth grade level, he was unable to actually read and comprehend a majority of the written jury instructions, all of which read at a much higher reading level.

Response Ex. A. The state argues that under *Johnson v. Bowersox*, 2016 WL 8609887 (E.D. Mo. Dec. 12, 2016), there is no advanced reading requirement.[11]

In *Johnson*, the court explained that although the jurors could read only "a little bit," they could understand and speak English and "responded appropriately and communicated clearly with the judge." *Id.* at *15. While it may be true that if Juror 28 had explained the extent of his reading ability to the Court, a challenge for cause could have been overruled and the ruling sustained on appeal, that did not happen. Instead, he appears to have signed a statement that he was qualified, thus preventing any examination of his reading ability. Further, trial counsel have indicated that if they had known that Juror 28 could not read, and a challenge for cause was overruled, they would have exercised a peremptory challenge. Pet. Ex. 2, 3. But because they did not have this critical information, they could not do so.

Johnson is otherwise distinguishable. First, the court found that counsel had a strategic reason not to strike—that is not the case here. Second, because the juror could read a little bit, the state court found that a challenge for cause would not have been sustained. But here, no record evidence indicates that the Juror 28 could read "a little bit." The state

[11] *Johnson,* an unpublished United States district court case, has no precedential value.

contends that he can, but that assertion is undermined by the fact the Juror 28 told court personnel he could not read nor fill out the qualification form, and the fact Juror 28 could not read any of his signed statements and had to have them read to him, demonstrates Juror 28 could not read. This Court cannot with any confidence find Juror 28 to satisfies the statutory requirement without further factual development.

Juror 4's affidavit (Resp. Ex. B) states that there was no indication during deliberations that any juror had difficulty understanding the proceedings. Response at 16. But as the state admitted, juror testimony about deliberations is generally inadmissible. Response at 9 (citing *Strong v. State*, 263 S.W.3d 636, 643 (Mo. 2008)); *see, e.g., Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 87 (Mo. banc 2010) ("[J]uror testimony is improper if it merely alleges that jurors acted on improper motives, reasoning, beliefs, or mental operations, also known as 'matters inherent in the verdict.'") (quoting *Neighbors v. Wolfson*, 926 S.W.2d 35, 37 (Mo. App. 1996)); *Williams Carver Co. v. Poos Bros., Inc.*, 778 S.W.2d 684, 688 (Mo. App. 1989) ("Jury deliberation must be guarded to bring finality to the litigation process. . . .,"). Because testimony about jury deliberations is not admissible in evidence, Mr. Tisius objects to Response Ex. B in its entirety. For the same reason, he objects to Response Ex. A ¶ 11. *See Baumle v. Smith*, 420 S.W.2d 341, 348 (Mo. 1967) ("No one is competent to impeach a verdict by the making of an

affidavit as to matters inherent in the verdict, such as that the juror did not understand the law as contained in the court's instruction, or that he did not join in the verdict, or that he voted a certain way due to a misconception of the evince, or misunderstood the statements of a witness, or was mistaken in his calculations, or other matters 'resting alone in the juror's breast.'")

Since the seating of an unqualified juror is error without a further showing of prejudice as discussed above, this inadmissible evidence is also irrelevant. To the extent this Court opens the door to the deliberations and to consider the full scope of these issues, this Court should order further fact development procedures. This Court should not rely on self-serving affidavits not subject to adversarial testing.

Finally, the state argues that Judge Oxenhandler's question to the venire regarding literacy was "syntactically vague." Response at 17. The state's arguments in this regard strain credulity and ignore the realities of Missouri trials.

The state attempts to argue that the question, "Is there anyone here who does not read, speak, and understand English?" could have two possible meanings. Response at 17. The first possible meaning the state puts forth—that the court asked whether any venireperson could not do all of the three activities (read English, speak English, and understand English)—is the reasonable meaning, as it tracks exactly with the precise language of the

question. The state's second speculated meaning—that the court asked whether any venireperson was unable to do just one of the three (i.e. could not either read English, speak English, or understand English)—is simply illogical. If the question was meant to convey the latter "meaning," the court would have phrased it as such and used the word "or" instead of "and." This Court has held the ordinary meaning of "and" is "'along with or together with' or words of comparable meaning." *Stiers v. Dir. of Revenue*, 477 S.W.3d 611, 615 (Mo. banc 2016).

Stated another way, for example: do you have arms, legs and a head? The answer is yes if you possess all three. If you are missing any of the three, the answer is no. If you are missing 2 of the 3 and 3 of the 3, the answer is also no. Or to consider it in the negative context: are you unable to kneel, sit and lie prostrate? The answer is a no response if you can do all three. If you are unable to do any of the three, the answer is yes. If you are missing 2 of 3 and 3 of 3, the answer is also yes. And as noted by Juror 28, according to the statement prepared by the state, he "never misunderstood" anything during the resentencing so he could not have misunderstood the question, as theorized by the state.

Moreover, if, as the state contends, this question is vague, ambiguous, or confusing, at the time of Mr. Tisius's resentencing, the state should have

objected to the question. The state lodged no such object. Thus, the state has waived its opportunity to challenge this question.

The court's question mirrors the exact language of § 494.425—under the statute, "[a]ny person unable to **read, speak and understand** the English language" is disqualified from jury service. Since the court's question presumably stems directly from § 494.425, which governs disqualifications for all petit and grand juries, this question has been utilized in a majority, if not all, proceedings involving a petit or grand jury since1991, when the statute took effect. This phrasing the state now claims is vague has been upheld for almost 32 years and is used to qualify grand and petit juries on a regular basis all across Missouri. The state's suggestion that Missouri courts have been doing it wrong for three decades, and apparently continues to do it wrong even now, is absurd and should be rejected out of hand.

Juror 28's ability to read, as well as about his related ability to understand the evidence and jury instructions, cannot be resolved by simply examining Juror 28's statements. This Court should appoint a special master to conduct fact-development procedures. *See State v. Williams,* SC83934, Order vacating warrant of execution, January 22,2015, Attachment A; State *ex rel. Williams v. Steele*, Case No. SC94720, Order vacating execution warrant, January 22, 2015, Attachment B; State *ex rel. Williams v. Steele*, Case No. SC94720, May 26, 2015 Order Appointing Special Master,

Attachment C. In *Williams*, this Court permitted further proceedings when the state offered competing evidence creating a material dispute of fact. Upon consideration of the full facts, this Court should then grant the relief Mr. Tisius requests. *Woodworth*, 396 S.W.2d at 337.

CONCLUSION

The material facts supporting Mr. Tisius's petition if true, entitle Mr. Tisius to relief. However, because the state disputes whether these facts are true, this Court should order fact-development procedures. *See, e.g., Woodworth v. Denney*, 396 S.W.3d 330 (Mo. banc 2013) (appointing a special master for fact development under Rule 68.03); *see also* Rules 91.15 and 91.17; Mo. Rev. Stat. § 532.310. Upon full consideration of the facts, this Court should issue a writ of habeas corpus, vacate Mr. Tisius's sentences of death, and remand with instructions that Mr. Tisius be sentenced to life imprisonment without possibility of parole.

Respectfully submitted,

/s/ Elizabeth Unger Carlyle
ELIZABETH UNGER CARLYLE
Carlyle Parish LLC
6320 Brookside Plaza #516
Kansas City, Missouri 64113
(816) 525-6540
elizabeth@carlyleparishlaw.com
Missouri Bar No. 41930

/s/ Keith O'Connor
KEITH O'CONNOR
Keith O'Connor, LLC
PO Box 22728
Kansas City, MO 64113
(816) 225-7771
Keith@keithoc.com

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing pleading electronically with the clerk of the court, and that it was served by e-mail upon Asst. Atty. Gen. Andrew Crane, andrew.crane@ago.mo.gov on May 15, 2023.

/s/ Elizabeth Unger Carlyle
Elizabeth Unger Carlyle

AFFIDAVIT OF JEANNIE WILLIBEY

Jeannie Willibey states under oath as follows:

My name is Jeannie Willibey, I am over the age of 18 years and fully competent to make this affidavit. I am a member in good standing with the Missouri Bar, number 40997. I swear that the information in my sworn statement is true and correct to the best of my knowledge and understanding.

From 2010 until 2012, I represented Michael Tisius during the direct appeal to the Missouri Supreme Court following imposition of a death sentence following his capital resentencing trial.

I am fully aware that a person is disqualified from jury service under Mo. Rev. Stat. § 494.425 if they cannot read the English language. [redacted]'s signed statement contains his admission that he can neither read nor write English.

Based on my review of [redacted]'s signed statement, I would have sought a new trial for Mr. Tisius. The discovery of new evidence while a direct appeal is pending could be raised as an issue within the direct appeal itself as well as being brought with a motion to remand the case to the circuit court for an evidentiary claim on the discovery of new evidence.

I did not know [redacted] is illiterate. I had no idea until Michael Tisius's current counsel provided me [redacted]'s signed statement. There was no information in the transcript that [redacted] was illiterate. I reviewed the transcript and on page 92, he did not respond when the Court asked the entire panel if anyone

Initials: JW 1 Date: 5/1/23

could not read, speak and understand English. The lack of a response raised the obvious inference that everyone could read, speak and understand English.

Nothing in the file indicated court personnel assisted [redacted] in completing his juror questionnaire. This should have been disclosed. Neither the attorney general nor any other agent of the state informed me of the assistance provided [redacted].

I presumed that everything proceeded in a normal, regular fashion. Nothing occurred to suggest [redacted] was not qualified for jury service, because he cannot read or write the English language, nor that court personnel assisted him in completing his juror form.

When I received the record for purposes of my direct appeal representation, I reached out to both Boone County and Greene County Circuit Clerks in an effort to obtain the juror questionnaires. I made an internal memo regarding the phone calls from both Boone and Greene County. Attachment A. My internal memo indicates Boone County told me that Greene County possessed the jury questionnaires. My internal memo indicates that Greene County informed me that they do not have prospective jurors fill out questionnaires, rather, they have a very simple qualification form that lists the reasons why a potential juror would not qualify, which then asked the potential jurors to check a box marking themselves as qualified to serve. Greene County also informed me that the jury qualification forms in Michael Tisius's capital resentencing trial were destroyed.

Initials: [signature] Date: 5/1/23

I commonly created internal memos of my records requests while working on cases, because I was trained to do so by the Missouri State Public Defender. The purpose of internal memos are two-fold: (1) they help memorialize the work you have done, so you, as the attorney, can verify what steps you have taken and (2) they help memorialize the file for future use. After reviewing my internal memo, I can state that these were steps I would take in the regular course of work as an appellate lawyer. That is my internal memo that I personally authored.

I swear that the information in my sworn statement is true and correct to the best of my knowledge and understanding. I declare this under penalty of perjury.

Jeannie Willibey

Initials:_____ 3 Date:_____

State of Missouri)
)
) SS:
)
County of Jackson)

On this 1st day of May 2023, before me, the undersigned notary, personally appeared Jeanie Willibey, known to me to be the person who signed the proceeding document in my presence and swore or affirmed to me that the contents of the document are truthful and accurate to the best of his or her knowledge and belief.

Julie Maree Kuchar
NOTARY PUBLIC

JULIE MAREE KUCHAR
Notary Public - Notary Seal
STATE OF MISSOURI
Comm. Number 18382417
Jackson County
My Commission Expires: Apr. 8, 2026

Initials: _____ 4 Date: 5/1/23

ATTACHMENT A

MEMO TO CASE FILE

Cause No.: SC 91209 **Defendant/Movant:** Michael A. Tisius **Date:** 07/21/2011

Subject: jury questionnaires/qualification forms, added
From: jw
Comments:

7/20/11---Boone County Circuit Clerk, Michelle----called after my letter requesting certain items, including jury questionnaires/qualification forms. One that would have been recd before trial, I need to check w/ Greene County jury office. Ones that may have been sent by bailiffs after (regarding how was your stay, the food, etc), she will check w/ bailiffs and get back w/ me next week.
7/21/11, Greene County Jury Office returned my call, Anthony, they do not send questionnaires (have not done so for years) that ask marital status, employment, etc. Rather, they send out a very simple jury qualification form that only: 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"----the person signs it and appears. There is no info on the qualification form, and the qualification forms from July 2010 have been destroyed.

Added: sequested jury questionnaires (asking about how their accomodations were) recd and put in separate file.

END

DECLARATION OF [redacted]

1. I AM OVER 18 YEARS OLD AND OF SOUND MIND.
2. I SERVED ON A JURY THAT SENTENCED MICHAEL TISIUS TO DEATH.
3. I WAS A PART OF A JURY DECIDING LIFE OR DEATH
4. I DO NOT BELIEVE I WOULD CHANGED MY MIND, BUT I WOULD HAVED LIKED TO HEAR FROM MICHAEL TISIUS AND ROY VANCE.
5. I DO NOT FEEL MICHEAL'S ATTORNEYS TRIED TO DEFEND HIM.
6. I BELIEVE IN AN EYE FOR AN EYE.
7. SOME ONE AT THE COURT HOUSE HELPED ME FILL OUT MY JUROR QUESTIONNAIRE. IT WAS SOMEONE WHO WAS A COURT HOUSE EMPLOYEE.

THIS DECLARATION WAS READ TO ME BY SARAH TOPOLSKI BECAUSE I CAN NOT READ OR WRITE.

[redacted]
SIGNATURE

4-29-23
DATE

Sarah K. Topolski
WITNESS

4/29/23
DATE

AFFIDAVIT OF [redacted]

Initials

[redacted] I, [redacted], after being duly sworn, declare under penalty of perjury, the following to be true and correct to the best of my knowledge and belief:

[redacted] I am over 18 years old and of sound mind.

[redacted] I signed a statement on April 29, 2023. The statement was read to me by Sarah Topolski. I put my initials next to each paragraph after she read each one to me and signed at the bottom. Everything in there was true.

[redacted] I served on a jury that sentenced Michael Tisius to death.

[redacted] I was a part of a jury deciding life or death.

[redacted] I do not believe I would change my mind, but I would have liked to hear from Michael Tisius and Roy Vance.

[redacted] I do not feel Michael's attorneys tried to defend him.

[redacted] I believe in an eye for an eye.

Exhibit A

[redacted]

Someone at the Courthouse helped me fill out my juror questionnaire. It was someone who was a Courthouse employee. I told the Courthouse employee that I could not read. The Courthouse employee took me into a private room. The Courthouse employee read word for word the questionnaire and filled in the answers for me.

This affidavit was read to me by Sarah Topolski, because I can not read or write.

I hereby certify that the facts set forth above are to be true and correct to the best of my knowledge and belief, subject to the penalty of perjury. This 3 day of May, 2023.

[redacted]

State of Wisconsin)
)
) SS:
)
County of Brown)

On this 3 day of May, 2023, before me, the undersigned notary, personally appeared [redacted], personally known to me, to be the person who signed the proceeding document in my presence and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of his knowledge and belief.

JAMES H. HOFFMAN NOTARY # 213645 PUBLIC STATE OF WISCONSIN

Notary Public: James H Hoffman

My Commission Expires: 2-6-24
Commission # 213645

Affidavit of [redacted]

I, [redacted], having been duly sworn under penalty of perjury, do hereby state the following to the best of my knowledge and belief:

1. I am over 18 years old and of sound mind.

2. I was on the jury that sentenced Michael Tisius to death.

3. I have recently signed two other statements at the request of Michael Tisius's lawyers.

4. I sometimes say that I cannot read or write, but it is more accurate to say that I cannot read or write very well.

5. I graduated from high school in 1990. I was in special needs classes during my time in school.

6. I read at a third or fourth grade level. I can read, but long or complicated words are harder.

7. I send and receive text messages, and I use social media. I sometimes use technology to assist me in reading and writing or have others read things to me if there is a word I don't understand.

8. I have never had any problems talking to people or understanding what other people say.

9. I have a commercial driver's license, and I work a full-time job. I am also a part-owner and operator of a resort that has been in my family for 170 years.

10. During Michael Tisius's trial, I never had any difficulty understanding the testimony, evidence, or jury instructions.

11. I did not have any difficulty communicating with the other jurors or deliberating about the evidence.

12. I did not lie or hide information during jury selection. I answered questions honestly to the best of my ability and understanding.

13. I came into the trial with an open mind and voted based on the evidence presented.

14. With my permission, attorneys for the State of Missouri wrote this affidavit for me after I talked to them on the phone. It would have been difficult for me to write the affidavit on my own.

15. The State's attorneys read this affidavit to me over the phone and made sure that I agreed with all of the statements in the affidavit. I signed the affidavit because all of the statements are true.

FURTHER AFFIANT SAYETH NOT.

[redacted]

STATE OF WISCONSIN)
) ss.
COUNTY OF Door)

Before me, a notary public for the State of Missouri, personally appeared, [redacted] who did upon his oath state that he executed this Affidavit as his free act and deed. Subscribed and sworn to before me on May 07, 2023.

Michael Bertrand

Notary Public, in and for the County of Door State of Wisconsin.

My commission expires on 05-31-2026.

AFFIDAVIT OF CHRIS SLUSHER

Chris Slusher states under oath as follows:

My name is Chris Slusher, I am over the age of 18 years and fully competent to make this affidavit. I am a member in good standing with the Missouri Bar, number 39321. I swear that the information in my sworn statement is true and correct to the best of my knowledge and understanding.

In July of 2010, I represented Michael Tisius during his capital resentencing trial.

I am fully aware that a person is disqualified from jury service under Mo. Rev. Stat. § 494.425 if they cannot read the English language. The signed statement of [redacted] contains his admission that he can neither read nor write English.

Based on my review of the [redacted]'s signed statement, I would have objected to his jury service on Michael Tisius's jury because he is not qualified to serve under Missouri law. Had the Court not disqualified him upon notification from me, my co-counsel Scott McBride or the state, we would have moved to strike [redacted] for cause. If that motion to strike for cause was overruled, we would have used a peremptory strike on [redacted].

I did not know [redacted] is illiterate. I had no idea until Michael Tisius's current counsel provided me [redacted]'s signed statement. There was no information provided to us during trial that [redacted] was illiterate. He did not inform the Court or counsel during voir dire that he was illiterate. I reviewed the

transcript and on page 92, he did not respond when the Court asked the entire panel if anyone could not read, speak and understand English. The lack of a response raised the obvious inference that everyone could read, speak and understand English.

Thirteen years later, I do not have an independent memory of reviewing [redacted]'s jury questionnaire and qualification form. However, it is my standard of practice when trying a case to review all of the panelist's questionnaire and qualification forms in preparation for the voir dire process. If a juror admitted they were not qualified for service, I would have brought this to the Court's attention, including using a strike for cause and a peremptory strike, if necessary.

No court personnel informed me they assisted [redacted] in completing his juror questionnaire. This should have been disclosed. Neither the prosecutor nor any other agent of the state informed me of the assistance provided [redacted] at any time.

I presumed that everything proceeded in a normal, regular fashion. Nothing occurred to suggest [redacted] was not qualified for jury service, because he cannot read or write the English language, nor that court personnel assisted him in completing his juror form.

I swear that the information in my sworn statement is true and correct to the best of my knowledge and understanding. I declare this under penalty of perjury.

Chris Slusher

State of Missouri)
)
) SS:
)
County of Boone)

On this 1st day of May 2023, before me, the undersigned notary, personally appeared Chris Slusher, known to me to be the person who signed the proceeding document in my presence and swore or affirmed to me that the contents of the document are truthful and accurate to the best of his or her knowledge and belief.

TAMMATHA RUTH GRIMES
Notary Public - Notary Seal
State of Missouri
County of Boone
My Commission Expires: July 21, 2023
Commission # 19824509

Tammatha Ruth Grimes
NOTARY PUBLIC

Initials: CSl

Date: 5/1/2023

AFFIDAVIT OF SCOTT MCBRIDE

Scott McBride states under oath as follows:

My name is Scott McBride, I am over the age of 18 years and fully competent to make this affidavit. I am a member in good standing with the Missouri Bar, number 41995. I swear that the information in my sworn statement is true and correct to the best of my knowledge and understanding.

In July of 2010, I represented Michael Tisius during his capital resentencing trial.

I am fully aware that a person is disqualified from jury service under Mo. Rev. Stat. § 494.425 if they cannot read the English language. The signed statement of [redacted] contains his admission that he can neither read nor write English.

Based on my review of the [redacted]s signed statement, I would have objected to his jury service on Michael Tisius's jury because he is not qualified to serve under Missouri law. Had the Court not disqualified him upon notification from me, my co-counsel Chris Slusher or the state, we would have moved to strike [redacted] for cause. If that motion to strike for cause was overruled, we would have used a peremptory strike on [redacted]

I did not know [redacted] is illiterate. I had no idea until Michael Tisius's current counsel provided me [redacted]'s signed statement. There was no information provided to us during trial that [redacted] was illiterate. He did not inform the Court or counsel during voir dire that he was illiterate. I reviewed the

transcript and on page 92, he did not respond when the Court asked the entire panel if anyone could not read, speak and understand English. The lack of a response raised the obvious inference that everyone could read, speak and understand English.

Thirteen years later, I do not have an independent memory of reviewing [redacted]'s jury questionnaire and qualification form. However, it is my standard of practice when trying a case to review all of the panelist's questionnaire and qualification forms in preparation for the voir dire process. If a juror admitted they were not qualified for service, I would have brought this to the Court's attention, including using a strike for cause and a peremptory strike, if necessary.

No court personnel informed me they assisted [redacted] in completing his juror questionnaire. This should have been disclosed. Neither the prosecutor nor any other agent of the state informed me of the assistance provided [redacted] at any time.

I presumed that everything proceeded in a normal, regular fashion. Nothing occurred to suggest [redacted] was not qualified for jury service, because he cannot read or write the English language, nor that court personnel assisted him in completing his juror form.

Initials: SM

Date: 5-1-23

I swear that the information in my sworn statement is true and correct to the best of my knowledge and understanding. I declare this under penalty of perjury.

Scott McBride

State of Missouri)
)
) SS:
)
County of Phelps)

On this 1st day of May 2023, before me, the undersigned notary, personally appeared Scott McBride, known to me to be the person who signed the proceeding document in my presence and swore or affirmed to me that the contents of the document are truthful and accurate to the best of his or her knowledge and belief.

Carrie L Bellue
NOTARY PUBLIC

CARRIE L. BELLUE
NOTARY PUBLIC - NOTARY SEAL
STATE OF MISSOURI
MY COMMISSION EXPIRES FEBRUARY 24, 2025
PHELPS COUNTY
COMMISSION #17172634

Initials: JM

Date: 5.1.23