Nos. 22-7699, 22A1045

IN THE SUPREME COURT OF THE UNITED STATES

Michael Tisius,
Petitioner,

v.

David Vandergriff,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Missouri and Response Opposing Motion to Stay Execution

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ANDREW BAILEY
Missouri Attorney General

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

Attorneys for Respondent

Capital Case

Question Presented

1. Does the Constitution require the Missouri Supreme Court to invalidate a state prisoner's death sentence because, thirteen years after the sentencing, the prisoner alleges that one of the sentencing jurors did not meet a technical state-law juror requirement even though there is no doubt that the prisoner is guilty and the sentencing was fair?

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Statement of the Case

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

[1] Federal courts, including this Court, have previously rejected Tisius's challenges to his convictions and sentences during Tisius's federal habeas proceedings. The Warden will cite to documents from the district court docket in *Tisius v. Griffith,* 4:17-CV-00426-SRB (W.D. Mo.).

Just after midnight on June 22, 2000, Tisius and Bulington entered the Randolph County jail under the pretense of bringing cigarettes for Vance. Dist. Dkt. 46-2 at 797–99, 835, 842, 891. Deputies Acton and Egley were working in the jail that night. Dist. Dkt. 46-2 at 613–14. Tisius chatted amicably with Deputy Acton for about 10 minutes, thanking him for helping Tisius in the past when Tisius had been an inmate at the jail. Dist. Dkt. 46-2 at 835–36, 842–43, 882, 891–92. Both Deputies Acton and Egley were unarmed. Dist. Dkt. 46-2 at 666, 754. Bulington turned to leave because she had cold feet about the jailbreak, but Tisius raised his concealed gun and shot Deputy Acton in the head, killing him. Dist. Dkt. 46-1 at 579–80, 592; Dist. Dkt. 46-2 at 836, 838–39, 843, 854, 875–77, 882–83, 886, 891–892. Deputy Egley charged around the counter trying to stop Tisius, but Tisius shot Deputy Egley in the head. Dist. Dkt. 46-1 at 606; Dist. Dkt. 46-2 at 799, 836, 839, 843, 854, 883, 886, 892.

Tisius tried to unlock the cell doors in the jail, but could not find the right keys. Dist. Dkt. 46-2 at 800–01, 805, 836, 843, 854, 883, 892–93. Deputy Egley was still alive, and he crawled toward Bulington, trying to grab her leg. Dist. Dkt. 46-2 at 801, 836–37, 843, 854, 883–84, 887, 893. Then Tisius returned and shot Deputy Egley several more times in the forehead, cheek, and shoulder. Dist. Dkt. 46-2 at 801, 836–37, 843, 854, 883–84, 887, 893. Tisius and Bulington fled the scene, disposed of the murder weapon, and crossed into Kansas in an attempt to evade police. Dist. Dkt. 46-2 at 837–38, 843, 864, 884–

85, 893. Bulington's car broke down, so the two continued on foot and were arrested the day after the murders. Dist. Dkt. 46-2 at 837, 885–86. Tisius agreed to speak with police and confessed to the murders in oral and written statements. App. 89a.

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

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

After Tisius's convictions and sentences were upheld by Missouri's courts, Tisius petitioned for federal habeas corpus relief in the district court. Dist. Dkt. 29, 38. Tisius's initial petition was filed on June 26, 2018. Dist. Dkt. 29. On October 30, 2020, the district court denied Tisius's petition without a

certificate of appealability. The United States Court of Appeals for the Eighth Circuit likewise declined to grant Tisius a certificate of appealability, *Tisius v. Blair,* 21-1682, and, on October 3, 2022, this Court denied Tisius's request for certiorari review. *Tisius v. Blair,* 21-8153.

This Court's review of a state conviction is informed by AEDPA, which limits federal review to the evidence presented in state court and presumes that the facts found by state courts are correct. 28 U.S.C. § 2254(e); *Shinn v. Ramirez,* 142 S. Ct. 1718, 1732 (2022); *Cullen v. Pinholster,* 563 U.S. 170, 180 (2011). Tisius's statement of the case fails to recount the facts of his crime and culpability as they were found by the jury, so this Court should rely on Respondent's statement instead. *See* Rule 15.2.

Reasons for Denying the Petition

I. This Court lacks jurisdiction because the Missouri Supreme Court's order below is supported by adequate and independent state-law procedural grounds.

Tisius's certiorari question fails to properly invoke this Court's jurisdiction because the record gives no reason to believe that the Missouri Supreme Court finally decided a federal question. Indeed, Tisius did not present any federal-law claims below and has alleged only violations of state law in this Court. The record below shows that the Missouri Supreme Court denied Tisius's petition for adequate and independent state-law reasons.

This Court should deny Tisius's petition under the "well-established principle of federalism" that state-court decisions resting on state law principles are "immune from review in the federal courts." *Wainwright v. Sykes,* 433 U.S. 72, 81 (1977). This rule applies "whether the state law ground is substantive or procedural." *Coleman v. Thompson,* 501 U.S. 722, 729 (1991) (citing *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935)).

A. This Court should presume the Missouri Supreme Court's summary denial was based on procedural grounds.

Tisius wrongly assumes that the Missouri Supreme Court's summary denial must be viewed as a decision on the merits of his claims. While this Court can generally presume that summary denials were on the merits, *Harrington v. Richter,* 562 U.S. 86, 99 (2002), that presumption only applies

"*in the absence of any indication or state-law procedural principles to the contrary." Harrington,* 562 U.S. at 86 (emphasis added). Missouri's procedural rules prohibit belated post-conviction challenges that could have been raised earlier as well as "duplicative and unending challenges to the finality of a judgment[.]" *State ex rel. Strong v. Griffith,* 462 S.W.3d 732, 733–34 (2015) (quotations omitted).

The Eighth Circuit recognizes that Missouri's procedural rules normally require summary denial of defaulted post-conviction claims, so a summary denial does not "fairly appear to rest primarily on federal law, or to be interwoven with federal law." *Byrd v. Delo,* 942 F.2d 1226, 1231 (8th Cir. 1991) (alteration and ellipsis omitted); *accord Preston v. Delo,* 100 F.3d 596, 600 (8th Cir. 1996). The Eighth Circuit has consistently followed the rule of *Byrd* and assumed unexplained Missouri state habeas denials were denied on procedural grounds. *Preston,* 100 F.3d at 600 (citing *Reese v. Delo,* 94 F.3d 1177, 1181 (8th Cir. 1996); *Charron v. Gammon,* 69 F.3d 851, 857 (8th Cir. 1995), *cert. denied,* 518 U.S. 1009, 116 S. Ct. 2533, (1996); *Anderson v. White,* 32 F.3d 320, 321 n. 2 (8th Cir. 1994); *Battle v. Delo,* 19 F.3d 1547, 1561 (8th Cir. 1994) (subsequent history omitted); *Blair v. Armontrout,* 976 F.2d 1130, 1136 (8th Cir. 1992), *cert. denied,* 508 U.S. 916, 113 S. Ct. 2357 (1993)).

The same is true here. Tisius's petition below failed on both substantive and procedural grounds. Because adequate and independent state-law grounds

support the Missouri Supreme Court's order below, this Court has "no power to review" the order and "resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman,* 501 U.S. at 729.

B. Tisius's claims were procedurally defaulted under state law.

Missouri's procedural rules require litigants to raise claims "at each step of the judicial process in order to avoid default." *Arnold v. Dormire,* 675 F.3d 1082, 1087 (8th Cir. 2012) (quotations and citations omitted). Claims of constitutional error are waived if not made "at the first opportunity with citation to specific constitutional sections." *State v. Driskill,* 459 S.W.3d 412, 426 (Mo. 2015). Tisius's convictions were affirmed after state court review, and generated four published opinions. *State v. Tisius,* 92 S.W.3d 751 (Mo. 2002) (*Tisius I*); *Tisius v. State,* 183 S.W.3d 207 (Mo. 2006) (*Tisius II*); *State v. Tisius,* 362 S.W.3d 398 (Mo. 2012) (*Tisius III)*; and *Tisius v. State,* 519 S.W.3d 413 (Mo. 2017) (*Tisius IV).*

During jury selection, Tisius did not object to Juror 28 being seated or move to strike him for cause or by using a peremptory challenge. In Tisius's direct appeal following his resentencing, he did not raise a claim challenging Juror 28's qualifications. *Tisius III,* 362 S.W.3d at 398. Nor did he raise such a claim during State post-conviction review or on post-conviction appeal. *Tisius*

IV, 519 S.W.3d at 413. Tisius's state habeas petition below "[did] not raise a cognizable basis for habeas relief" because "habeas review of a conviction is not appropriate where a defendant could have raised claims at trial, on direct appeal, or during postconviction relief proceedings according to the state's procedural rules but did not do so for reasons internal to the defense." *Strong,* 462 S.W.3d at 733.

C. There is no cause and prejudice to excuse the default.

Tisius may argue that the state court should have reviewed his procedurally defaulted claim under the cause and prejudice exception, but there is no indication in the record that the Missouri Supreme Court did so. With some exceptions not relevant here, Missouri's doctrine of procedural default is nearly identical to its federal counterpart. *See State ex rel. Nixon v. Jaynes,* 63 S.W.3d 210, 215–16 (Mo. 2001) (adopting federal cause-and-prejudice standards); *but see Barton v. State,* 486 S.W.3d 332, 336 (Mo. 2016) (declining to adopt an exception similar to *Martinez v. Ryan,* 566 U.S. 1 (2012)).

1. Tisius has no good cause for failing to timely investigate his claims.

There is no good cause to excuse the default of Tisius's claim about Juror 28 because "the new claim could have been timely investigated by counsel and raised in early habeas proceedings but was not." *Tisius v. Vandergriff,* 23-2314 (8th Cir. June 2, 2023). Tisius readily admits he made no effort to interview

the jurors after his trial to investigate claims related to the jurors' answers in voir dire. Dist. Dkt. 132 at 15; App. at 60a–65a, 72a–77a.

Tisius's claims concern the selection of Juror 28 during voir dire, which was transcribed and available to both parties. Counsel could have interviewed the jurors about their answers in voir dire at any time after the case was over. In Missouri, juror testimony about deliberations is not generally admissible to impeach the jury's verdict, but there is no similar evidentiary prohibition on juror testimony about voir dire. *See Strong v. State,* 263 S.W.3d 636, 643 (Mo. 2008). Tisius's exhibits admit that his lawyers made strategic decisions to rely on the jurors' testimony in voir dire and not to interview the jurors about their qualifications or the accuracy of their voir dire answers. App. at 60a–65a, 72a–77a.

Even if it is true that an unidentified court staff member assisted Juror 28 with his juror questionnaire but did not tell the judge or the lawyers involved, Tisius still could have discovered the same information about his claim that he has now by interviewing the jurors at any time. At bottom, Tisius could have investigated a juror non-disclosure claim at any time, but he decided not to do so for reasons internal to the defense. App. at 60a–65a, 72a–77a.

2. Tisius has failed to allege facts that could show that he was prejudiced.

In state court, Tisius did not try to show that Juror 28's reading level prejudiced him. Tisius did not allege that Juror 28 had any difficulty understanding the testimony, evidence, or instructions during the sentencing trial. Nor did he allege that Juror 28 had any difficulty communicating during voir dire or during deliberations. To the extent that Tisius now tries to add allegations of prejudice that he failed to present in state court, Pet. at 12–14, he cannot attack the Missouri Supreme Court's decision with arguments that he failed to make in that Court.[2]

Besides, the record refutes any claim that Tisius was prejudiced. Tisius's own exhibits contain no indication that Juror 28 had any difficulty understanding the evidence, deliberations, or jury instructions. And Juror 28 has clarified that he can read and that he "never had difficulty understanding the testimony, evidence, or jury instructions" and "did not have any difficulty communicating with the other jurors or deliberating about the evidence." App. at 70a. Another juror submitted an affidavit confirming that there was "no indication that any member of the jury had difficulty reading or understanding

[2] Even to the extent that Tisius argues that he presented allegations that he was prejudiced for the first time in his state-court reply, the Missouri Supreme Court was under no obligation to consider those allegations because arguments made for the first time in a reply pleading are not properly presented for review. *Berry v. State,* 908 S.W.2d 682, 684 (Mo. 1995).

the English language" and that "[e]veryone was able to communicate and express their views during deliberation." Dist. Dkt. 134-1.

Further, Juror 28's answers during jury selection give no reason to doubt his fairness or impartiality. Juror 28 affirmed that he could give meaningful consideration to both death and life sentences "no matter how horrible the crime might be." Dist. Dkt. 46-18 at 360. He affirmed that he would "wait until [he] hear[d] all the evidence, all the mitigating evidence" before making his decision. Dist. Dkt. 46-18 at 361. He also gave answers that showed he was willing to consider Tisius's primary mitigating defense, based on Tisius's young age at the time of the crime. Dist. Dkt. 46-18 at 376–77. Juror 28 noted that mental health is "all situational" and that some nineteen-year-olds might be immature and others might be mature. Dist. Dkt. 46-18 at 376–77. Juror 28 said that he would want to consider Tisius's age as well as his mental health history and family history in making the sentencing decision. Dist. Dkt. 46-18 at 377–78.

Tisius's arguments that he was prejudiced mistake the evidentiary burden here. Tisius complains that there is a dispute as to Juror 28's reading level given Juror 28's statements that he cannot read combined with his later clarification that he "sometimes say[s] that [he] cannot read or write, but it is more accurate to say that [he] cannot read or write very well." App. at 70a. But under both state and federal default rules, Tisius "must shoulder the burden

of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady,* 456 U.S. 152, 170 (1982). So Tisius must show more than the possibility that Juror 28's reading level caused him difficulty understanding evidence that would be favorable to Tisius—he must allege facts that could show Juror 28 *actually* had difficulty understanding evidence that was favorable to Tisius in a way that could have caused a different verdict. *Id.* The record below contains no allegation or evidence—disputed or otherwise—that could carry that burden.

Because Tisius's state habeas claims were procedurally defaulted under Missouri law, there is no basis to find that the Missouri Supreme Court decided a federal issue below. As a result, adequate and independent state-law grounds foreclose this Court's review. *Coleman,* 501 U.S. at 729.

II. This Court's should deny certiorari to respect our system of dual sovereignty.

Even presuming the Missouri Supreme Court's order below can be read to pass on a federal question, this Court should not grant certiorari review of state post-conviction claims because federal habeas proceedings provide a more appropriate avenue to consider federal constitutional claims. *Lawrence v.*

Florida, 549 U.S. 327, 328 (2007); *Kyles v. Whitley,* 498 U.S. 931, 932 (1990) (Stevens, J., concurring in the denial of certiorari).

"To respect our system of dual sovereignty," this Court and Congress have "narrowly circumscribed" federal habeas review of state convictions. *Shinn,* 142 S. Ct. at 1730 (citations omitted). The States are primarily responsible for enforcing criminal law and for "adjudicating constitutional challenges to state convictions." *Id.* at 1730–31 (quotations and citations omitted). Federal intervention intrudes on state sovereignty, imposes significant costs on state criminal justice systems, and "inflict[s] a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* at 1731 (quotations and citations omitted).

To avoid the harms of unnecessary federal intrusion, "Congress and federal habeas courts have set out strict rules" requiring prisoners to present their claims in state court and requiring deference to state-court decisions on constitutional claims. *Id.* at 1731–32; 28 U.S.C. § 2254(d), (e). Tisius petitioned for federal habeas review, his claims were denied, and that denial was affirmed by the United States Court of Appeals for the Eighth Circuit and this Court. In that petition, Tisius did not raise a claim about Juror 28's qualifications.

There is no basis for this Court to afford Tisius successive federal habeas review by granting certiorari here. AEDPA prohibits successive review of the

new claim unless Tisius can show that the claim "relies on a new rule of constitutional law" that applies retroactively or that "the factual predicate of the claim could not have been discovered previously through the exercise of due diligence" and that the claim shows "by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Tisius] guilty of the underlying offense." 28 U.S.C. § 2244(b). Tisius cannot make either showing. Indeed, Tisius has already tried to file a successive habeas petition on this issue without seeking authorization from the United States Court of Appeals for the Eighth Circuit. Dist. Dkt. 133. The Court of Appeals ordered the district court to dismiss the successive petition because "the district court lacked jurisdiction to consider the petition or enter an order staying [Tisius's] execution." *Tisius v. Vandergriff,* 23-2314 (8th Cir. June 2, 2023). The court of appeals also found there was "no statutory basis to authorize the filing of [Tisius's] second or successive petition" because Tisius could not meet the standard contained in § 2244(b). Congress has decided that Tisius's claims do not warrant federal-court review, so this Court should deny the petition.

Even if Tisius's claims could properly be presented in a new federal habeas petition, they would not warrant relief. As discussed in point I, there are adequate and independent state law grounds that require denial of the claims. And if, as Tisius argues, the Missouri Supreme Court denied his claims

on the merits and not on procedural grounds, then federal habeas relief would be precluded under § 2254(d)(1). While Tisius cites inapplicable federal cases, his claims really just allege errors under state law. AEDPA prohibits granting federal habeas relief for state-law errors, 28 U.S.C. § 2254(a); *Estelle v. McGuire,* 502 U.S. 62, 67–68 (1991), or on the basis that the state court failed to extend this Court's precedents. 28 U.S.C. § 2254(d)(1); *White v. Woodall*, 572 U.S. 415, 426 (2014) (state courts need not extend this Court's precedent in adjudicating constitutional claims).

Tisius's convictions and sentences have been exhaustively reviewed and affirmed in state and federal court. A grant of certiorari now would allow Tisius an end-run around the rules that Congress and federal courts have crafted to maintain our federalist system of government. To respect "Our Federalism," *Younger v. Harris,* 401 U.S. 37, 44 (1971), and "finality, comity, and the orderly administration of justice," this Court should enforce the limits on federal review of state convictions and deny Tisius's petition. *Shinn,* 142 S. Ct. at 1733 (quoting *Dretke v. Haley,* 541 U.S. 386, 388 (2004)).

III. No federal law required the Missouri Supreme Court to grant Tisius's state habeas petition.

Tisius's petition fails to present any federal-law issue for this Court's review. In his question presented, Tisius argues that Juror 28 was not "qualified to serve [as a juror] under *Missouri law*." Pet. at i; *See* Mo. Rev. Stat.

§ 494.425(5). Tisius claims that Juror 28 cannot read and therefore incorrectly answered a question in voir dire aimed at determining whether jurors met all state-law qualifications. While those unproven allegations are doubtful in light of Juror 28's clarification that he can read, App. at 70a, this Court can be sure that Tisius's claims fail to implicate any Constitutional provision or federal law.

A. The Constitution does not impose or forbid qualification requirements for state-court jurors.

While the Sixth Amendment guarantees the right to trial "by an impartial jury[,]" Tisius has not claimed—in state court or this Court—that Juror 28 or any other member of the jury was unfair or biased. Pet. at 12–15. The Sixth Amendment does not contain juror qualifications for citizenship, "age and educational attainment . . . good intelligence, sound judgment [or] fair character." *Carter v. Jury Commission of Greene County,* 396 U.S. 320, 335 (1970). Instead, the "States remain free" to impose those kinds of qualifications and federal courts should not "impose on states [their] conception of the proper source of jury lists." *Id.* There is no constitutional provision, federal statute, or decision of this Court that requires States to impose a literacy requirement on jurors—much less any authority that imposes a specific remedy for violations of such a requirement. Because Tisius's claims fail to present any federal issue for review, this Court should deny the petition.

B. Tisius cannot show a due process violation.

Tisius repeatedly cites to *Hicks v. Oklahoma,* 447 U.S. 343 (1980), but that case does not support his arguments. *Hicks,* decided before AEDPA was enacted, represents "a rather narrow rule" about the application of due process in state sentencing procedures. *Chambers v. Bowersox,* 157 F.3d 560, 565 (8th Cir. 1998). Federal courts have rejected "the notion that every trial error, even every trial error occurring during the sentencing phase of a capital case, gives rise to a claim under the Due Process Clause of the Fourteenth Amendment." *Id.* Tisius's entire theory of relief is based on that roundly rejected notion. *Id.*; *See Smith v. Lockhart,* 882 F.2d 331, 334–335 (8th Cir. 1989); *see also Aycox v. Lytle*, 196 F.3d 1174, 1180 (10th Cir. 1999); *Dickson v. Franklin*, 130 F. App'x 259, 263–64 (10th Cir. 2005); *Mendiola v. Estelle*, 635 F.2d 487, 489 n.1 (5th Cir. 1981).

Since *Hicks,* this Court has emphasized that "it is not the province of a federal habeas court to reexamine state-court decisions on state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). When a prisoner seeks federal relief for state-court errors, the only question is whether the alleged error, "by itself so infected the entire trial that the resulting conviction violates due process." *Id.* at 72 (citing *Cupp v. Naughten,* 414 U.S. 141, 147 (1973)). To show a due process violation, Tisius must show that Juror 28's participation on the jury rendered the entire trial "fundamentally unfair."

Payne v. Tennessee, 501 U.S. 808, 809 (1991); *Anderson v. Goeke,* 44 F.3d 675, 679 (8th Cir. 1995). Tisius does not come close to meeting that standard.

Even by its own terms, *Hicks* does not help Tisius. *Hicks* is about state courts recognizing errors but arbitrarily declining to grant relief. The Missouri Supreme Court did not find any reversible error. The established rule under Missouri law is that where a juror's qualifications are not challenged in the trial court, reversal is only appropriate on a showing of plain error. *State v. Brandolese,* 601 S.W.3d 519, 530 n. 9 (2020). Missouri has a "long list of disqualifications for prospective jurors," and not all of them directly relate to a jurors ability to be fair. *Id.* "Absent evidence to the contrary, manifest injustice does not automatically result if a statutorily disqualified juror sits on the jury." *Id.*

Tisius brought a late-arriving, technical challenge to the state-law qualification of one of the jurors from his 2010 resentencing. He made no allegation that Juror 28 was biased or any other allegation that could call the result of his trial into doubt. There is nothing arbitrary about the Missouri Supreme Court's decision to deny relief. Quite the contrary—it would be absurd to delay justice for the families of Tisius's victims in order to determine how well Juror 28 can read. Tisius has failed to present any issue of federal law that could justify certiorari review, so this Court should deny the petition. *See* Rule 10.

Reasons to Deny Tisius's Request for a Stay

For many of the same reasons above, the Court should deny Tisius's motion to stay his execution. A stay of execution is an equitable remedy that is not available as a matter of right. *Hill v. McDonough,* 547 U.S. 573, 584 (2006). Tisius's request for a stay must meet the standard required for all other stay applications, including a showing of significant possibility of success on the merits. *Id.* In considering Tisius's request, this Court must apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* (citing *Nelson v. Campbell,* 541 U.S. 637, 650 (2004)). The "last-minute nature of an application" may be reason enough to deny a stay. *Id.* Tisius's request fails on all four traditional stay factors.

Tisius cannot meet any of the traditional factors required for stay of execution. Tisius has little possibility of success because, as discussed above, Tisius's claims here do not warrant further review. This Court has no jurisdiction because the decision below rests on state-law procedural grounds, this Court should decline certiorari in the interests of comity and federalism, and Tisius's claims fail to present an issue for federal habeas review.

Tisius will not be injured without a stay. Tisius murdered Deputies Acton and Egley in 2000, and has had ample time to seek review of his convictions in state and federal court. As this Court knows, "the long delays

that now typically occur between the time an offender is sentenced to death and his execution are excessive." *Bucklew v. Precythe,* 139 S. Ct. 1112, 1134 (2019). This Court's role is to ensure that Tisius's challenges to his sentence are decided "fairly and expeditiously," so he has no interest in further delay while the Court considers his petition. *Id.* Tisius's last-minute complaints about the technical requirements of state law cast no doubt on his guilt or the appropriateness of his sentence. Tisius has failed to present any federal-law issue for this Court's review, and he has no legitimate interest in delaying the lawful execution of his sentence.

A stay would also irreparably harm both the State and Tisius's victims. This Court has repeatedly recognized the States' important interests in enforcing lawful criminal judgments without federal interference. "The power to convict and punish criminals lies at the heart of the States' 'residuary and inviolable sovereignty.'" *Shinn,* 142 S. Ct. at 1730 (quoting The Federalist No. 39, p. 245 (J. Madison) (Clinton Rossiter ed. 1961)); *see also Gamble v. United States*, 139 S. Ct. 1960, 1968–1969 (2019). "Thus, [t]he States possess primary authority for defining and enforcing the criminal law and for adjudicating constitutional challenges to state convictions." *Id.* (quotations and citations omitted). Federal intervention "disturbs the State's significant interest in repose for concluded litigation" and it "undermines the States' investment in their criminal trials." *Id.* (quotations and citations omitted). "Only with real

finality can the victims of crime move forward knowing the moral judgment will be carried out." *Id.* (quoting *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Id.* (quoting *Calderon*, 523 U.S. at 556).

Tisius has exhausted his opportunities for federal review and his convictions and sentences have been repeatedly upheld. There is no basis to delay justice. The surviving victims of Tisius's crimes have waited long enough for justice, and every day longer that they must wait is a day they are denied the chance to finally make peace with their loss. *Id.* This Court should deny Tisius's stay application.

Conclusion

This Court should deny the petition for writ of certiorari and the application for a stay of execution.

Respectfully submitted,

ANDREW BAILEY
Attorney General

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

Attorneys for Respondent