Case No. _____

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

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MICHAEL TISIUS, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

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# PETITION FOR WRIT OF CERTIORARI

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

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

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## CAPITAL CASE

## QUESTION PRESENTED

An individual who was not qualified to serve under Missouri law sentenced Michael Tisius to death. This juror was, and is still, illiterate. His participation as a juror violated Mo. Rev. Stat. § 494.425, which automatically disqualifies individuals who cannot "read" from jury service. The juror concealed his illiteracy from the sentencing court by remaining silent to a direct question posed in voir dire regarding literacy. Furthermore, the state assisted the juror in concealing his illiteracy and disqualification by reading him the juror qualification form and filling in the juror's answers for him. In violation of state law, the state improperly destroyed those forms. The state concealed the fact that the juror had disclosed he could not read until the juror finally disclosed the state action 13 years later. After Mr. Tisius raised this issue in state habeas, and then in federal court, the district court granted a stay, but the Eighth Circuit Court of Appeals vacated it and dismissed the petition.

The case presents the following question:

> Whether a federal petition raising a *Hicks v. Oklahoma*, 447 U.S. 343 (1980) claim is "second or successive" under 28 U.S.C. § 2244(b)(2) when (i) an illiterate juror served and rendered a death verdict in violation of law; (ii) the state helped qualify an illiterate juror knowing his statutorily disqualifying status and concealed the assistance; (iii) the juror failed to honestly answer a question on that factor during voir dire and failed to disclose his inability to read to the petitioner until after the conclusion of the petitioner's initial habeas proceedings in the district court, and (iv) the petitioner's subsequent state and federal proceedings were his first fair opportunity to present his claim?

## LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

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

David Vandergriff, Warden of Potosi Correctional Center, was the appellee in the case below. He was represented in the court below by Assistant Missouri Attorney General Andrew Crane.

Pursuant to Rule 29.6, no parties are corporations.

## RELATED PROCEEDINGS

United States Supreme Court:

Michael Tisius v. State of Missouri, No. 11-10906 (Oct. 1, 2012) (cert denied)

Michael Tisius v. Paul Blair, No. 21-8153 (Oct. 3, 2022) (cert denied)

Michael Tisius v. David Vandergriff, No. 22-7398 (pending)

Michael Tisius v. David Vandergriff, No. 22-7625 (pending)

United States Court of Appeals for the Eighth Circuit:

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

Michael Tisius v. David Vandergriff, No. 22-3175 (December 19, 2022) (state' appeal)

United States District Court for the Western District of Missouri:

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

Supreme Court of Missouri:

Michael Tisius v. David Vandergriff, No. SC 99938 (state habeas proceeding) (March 1, 2023)

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

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

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

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

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

Circuit Court of Boone County, Missouri:

State of Missouri v. Michael Tisius, No. 01CR-164629 (trial) (Oct. 1, 2001)

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

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

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

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## INDEX TO APPENDIX[1]



[1] The Appendix includes exhibits redacted to remove the identity of the juror whose qualifications are at issue in this case. Unredacted versions of these documents were filed under seal in the Missouri Supreme Court.

## TABLE OF AUTHORITIES

### Cases

**Statutes**



**Other Authorities**

## PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Tisius respectfully requests that a writ of certiorari issue to review the order and judgment of the Eighth Circuit Court of Appeals, which vacated the district court's order staying the proceedings so that it could consider factual issues relevant to the determination of whether Mr. Tisius had a fair opportunity to present the instant claim in his initial federal habeas proceedings and found that the claim was presented in an unauthorized "second or successive" application. Appendix (hereinafter "App.") p. 1a.

## OPINIONS BELOW

The Eighth Circuit Court of Appeals' June 2, 2023 order denying Mr. Tisius's supplemental petition for habeas corpus is published and appears in the Appendix at p. 1a.

## JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Eighth Circuit dismissed Mr. Tisius's petition for habeas corpus on June 2, 2023. App. p. 1a. This petition is timely under Rule 13.1.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

Section 2244(b) of the U.S. Code provides in pertinent part:

> (a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.
>
> (b)
>
> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)
> >
> > (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

## STATEMENT OF THE CASE

Mr. Tisius's final sentencing hearing occurred in 2010. To avoid the effects of pretrial publicity, jurors were selected in Greene County, Missouri. The jurors were then bused to Boone County, Missouri for the trial.

Mo. Rev. Stat. § 494.425 provides that "persons **shall be disqualified from serving** [if they are] unable to read. . . ." In Greene County, venire members were provided a form to complete before jury selection. In 2010, Juror 28 told court personnel he could not read or write. In response to this disclosure regarding his illiteracy and in violation of Missouri law, a clerk "took [him] into a private room," read the form "word for word" to [him], and then filled out the answers for him.

App. 16a. The state never disclosed the secretive process and assistance provided the juror.

During jury selection, the court asked the venire panel (with no objection from the state), "Is there anyone here who does not read, speak and understand English?" No one responded. Sentencing Trial Transcript, p. 92. No one in the courtroom indicated to the trial court that Juror 28 could not read.

The jury forms completed by the venire could have contained evidence of the reading problem. But they were not available because the state interfered again. According to a Greene County clerk who spoke with Mr. Tisius's direct appeal attorney, Jeannie Willibey, in 2011, the forms were destroyed while appeal proceedings were pending. The official told Ms. Willibey that the form "lists the reasons you would not be qualified (under 21, not a resident, etc.) and then has the person check a box 'I am qualified and will appear on—whatever date—' or 'I am not qualified.'" App. p. 13a.[2] During the trial, numerous written exhibits were presented to the jury, and a copy of the jury instructions was provided to each juror.

On April 28, 2023, members of Mr. Tisius's defense team interviewed Juror 28 at his home in Wisconsin. During the interview, which was focused on the juror's views regarding clemency since Mr. Tisius has a June 6, 2023, execution date, the juror volunteered that he could not read or write. He then signed a statement—under penalty of perjury—which included the fact that a Greene County official

[2] Mo. Rev. Stat. § 494.425 is a juror qualification statute, which besides disqualifying illiterate jurors, also excludes under twenty-one-year-olds, non-citizens, non-residents, judges, and felons.

assisted him in filling out his juror form. App. p. 14a. Three days later (but after Mr. Tisius initiated state court processes), Juror 28 signed an affidavit containing the same information and provided more details about the secretive assistance provided by the state. App. p. 15a.

Both of Mr. Tisius's trial attorneys submitted affidavits indicating that had they known that Juror 28 could not read, they would have moved to strike him for cause, and if unsuccessful, they would have used peremptory strikes. App. p. 20a (Affidavit of Chris Slusher); App. p. 23a (Affidavit of Scott McBride).

Within days of discovery, Mr. Tisius filed a petition for state habeas corpus relief under Mo. Sup. Ct. R. 91 on May 2, 2023, in the Missouri Supreme Court. He also filed a related motion for a stay of execution. The state responded, adducing its own "affidavit"[3] from the juror stating that although he sometimes says that he cannot read or write, he can actually read "a little bit." App. p. 18a.

Interestingly (and contradictorily), although the juror attests in the state's "affidavit" that he can read, he acknowledges that the state's drafted and read to him the "affidavit" before he signed it. App. p. 19a. He acknowledges further

[3] The state's statement fails to comply with numerous required notary requirements. There is no notary seal and the notary's commission number is not included. *See* https://sos.wi/gov/NotaryPublic.htm. Furthermore, the "affidavit" says that the notary is a "notary public for the State of Missouri." However, a Missouri notary's notarization of an affidavit in Wisconsin violates Mo. Rev. Stat. § 486.775(12). Even more perplexing, the notary who allegedly "notarized" the "affidavit" is not documented with the Missouri Secretary of State as a "notary public for the State of Missouri." The state has made no effort to correct the defective affidavit.

literacy problems, admitting that "[i]t would have been difficult for [him] to write the ["]affidavit["] on [his] own." *Id.*

Eight days later, on May 23, 2023, the Missouri Supreme Court denied the petition without granting a hearing as requested in the petition and without a written opinion. App. p. 7a. The court also denied Mr. Tisius's motion for stay of execution, even though the state never responded to it.[4]

On May 25, 2023, Mr. Tisius promptly filed a supplemental habeas petition based on a *Hicks v. Oklahoma,* 447 U.S. 343, 346 (1980), violation, along with a motion to stay the execution, in the United States District Court for the Western District of Missouri. Doc. Nos. 132, 133. Six days later, following an expedited briefing schedule, the district court granted the stay motion and ordered an evidentiary hearing to elucidate facts to assist it in determining whether it had jurisdiction and whether Mr. Tisius had a fair opportunity to present this claim in his initial habeas proceedings.[5] App. p. 3a.

The state almost immediately appealed to the Eighth Circuit Court of Appeals, moved to vacate the stay, and asked that the supplemental petition be deemed a "second or successive" petition and dismissed. On June 2, 2023, the Eighth Circuit vacated the stay and ordered the district court to dismiss the

[4] On May 3, 2023, the Missouri Supreme Court ordered the state to respond to Mr. Tisius's stay motion by May 9, 2023. The state never responded, but the Missouri Supreme Court denied Mr. Tisius's stay motion anyway.

[5] The factual questions included (1) whether Juror 28 could read at the time he was selected as a juror in 2010; (2) whether a Courthouse employee improperly assisted Juror 28 in filling out his questionnaire; and (3) whether a Courthouse employee improperly failed to disclose that assistance.

petition as a "second or successive" petition. App. 1a. This petition for writ of certiorari follows.

## REASONS FOR GRANTING THE WRIT

### I. This Court should settle whether abuse-of-the-writ principles dictate the determination of whether a petition challenging an undisturbed state-court judgment is "second or successive."

Mr. Tisius was not afforded the basic protections expressly provided by Missouri law for all persons tried before juries. Yet, the Missouri Supreme Court refused to enforce this right.

The district court determined that due to the factual disputes in the record, the court did not have enough information to decide whether Mr. Tisius had a fair opportunity to raise his claim in his initial petition. The court found that an evidentiary hearing was necessary to make that determination, and, due to (1) Mr. Tisius's likelihood of success on the merits, (2) the relative harm to the parties, and (3) the extent to which the Mr. Tisius had not unnecessarily delayed his claims, a stay was proper.

The Eighth Circuit vacated the stay. It determined that the federal district court could not review the claim without authorization from the Eighth Circuit because the habeas petition including the claim was a second or successive petition within the meaning of § 2244(b), and Mr. Tisius could not meet the statutory requirements for filing a successive petition to raise this claim. This decision conflicts with relevant decisions of this Court.

This Court has long upheld petitioners' right to be afforded an fair opportunity to present their claims. *See, e.g., Magwood v. Patterson,* 561 U.S. 320 (2010); *Panetti v. Quarterman,* 551 U.S. 930 (2007). At the crux of this right is federal courts' power to protect and enforce this opportunity in an exercise of the courts' equitable discretion. *McCleskey v. Zant*, 499 U.S. 467, 490 (1991).

The Eighth Circuit's decision conflicts with this Court's jurisprudence establishing that whether the petitioner had a fair opportunity to raise the claim in the prior application governs whether a new application is second or successive. Here, after knowing Juror 28 did not meet Missouri's statutory criteria for qualification of jurors because he could not read, the state assisted in qualifying the juror by completing his juror qualification form for him. Then, when Juror 28 was asked about his ability to read in voir dire, he failed to disclose that he could not read. Less than a year later, the state destroyed the juror qualification forms. The state *has never disclosed* the identity of the clerk who helped Juror 28 complete his qualification form. However, after the conclusion of Mr. Tisius's initial habeas proceedings, Juror 28 finally disclosed his inability to read to Mr. Tisius's legal team. Mr. Tisius promptly presented his claim in state and federal court.

The Eighth Circuit's failure to assess whether Mr. Tisius had a fair opportunity to raise the claim in the prior application and its treatment of this claim as second or successive conflicts with *Magwood* and *Panetti*. This Court should recognize that Mr. Tisius did not have a fair opportunity to present this claim earlier and grant him the opportunity to present it now.

### A. Mr. Tisius's *Hicks* claim did not become ripe until the Missouri Supreme Court refused to apply Missouri law.

When a state fails to abide by its own statutes in a manner governed by a constitutional right, that action violates the Fourteenth Amendment. *Hicks*, 447 U.S. at 346. Mr. Tisius's *Hicks* claim only became ripe upon the Missouri Supreme Court's refusal to apply Missouri law.

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, which sets forth these requirements, mandating:

> The following persons ***shall be*** disqualified from serving as a petit or grand juror:
>
> . . .
>
> (5) Any person unable to ***read***, speak and understand the English language, unless such person's inability is due to a vision or hearing impairment which can be adequately compensated for through the use of auxiliary aids or services. . . .

(emphasis added); *see also Juror Basics*, Missouri Courts, https://tinyurl.com/3ze2hfr4 (last visited June 4, 2023) ("A person is eligible for jury service if he or she . . . is able to read, speak, and understand English.").

"Failure to strike an unfit juror is structural error. . . ." *Dorsey v. State*, 448 S.W.3d 276, 299 (Mo. banc 2014); *see also State v. Strong*, 263 S.W.3d 636, 647 (Mo. banc 2008) (prejudice presumed); *State v. Mayes*, 63 S.W.3d 615, 625 (Mo. banc 2001) (intentional nondisclosure merits new trial without a showing of prejudice);

*Gray v. Mississippi*, 481 U.S. 648, 668 (1987). As these cases show, a death sentence imposed by an unqualified juror is a structural defect.

Though Juror 28 could not read at the time of voir dire (and still cannot read) and thus did not meet Missouri's juror qualification requirements, the state never disclosed their assistance provided Juror 28, assistance provided because he could not read. Juror 28 did not disclose his inability to read to Mr. Tisius until well after the conclusion of Mr. Tisius's initial federal habeas proceedings. When he did finally disclose it, Mr. Tisius promptly presented his due process claim to the state court using the required state procedure for the presentation of claims arising after the conclusion of direct appeal and post-conviction proceedings. *See State ex rel. Winfield v. Roper*, 292 S.W.3d 909, 910 (Mo. banc 2009) (appointing a special master to consider juror misconduct claim uncovered after the conclusion of the petitioner's federal habeas proceedings).

The Missouri Supreme Court summarily denied the claim without explanation. Prior to that ruling, there was no *Hicks* claim to present. *See Clemons v. Mississippi*, 494 U.S. 738, 746-47 (1990) ("Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause, and we have recognized that when state law creates for a defendant a liberty interest in having a jury make particular findings, speculative appellate findings will not suffice to protect that entitlement for due process purposes." (first citing *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion), then citing *Hicks*, 447 U.S. 343); *see also Thompson v. Missouri Bd. Of Parole*, 929 F.2d 396, 401 n.10 (8th Cir. 1991) ("This contention

was raised before the district court as point 3 in Thompson's pleading entitled 'Supplemental Support for Issuance of Writ of Habeas Corpus.' Although this claim is based on state law, a state's failure to abide by its own laws that results in a deprivation of liberty constitutes a violation of the due process clause of the Fourteenth Amendment." (citing *Hicks*, 447 U.S. at 346)); *cf. Ross v. Oklahoma*, 487 U.S. 81, 88-89 (1988) ("[T]he 'right' to peremptory challenges is 'denied or impaired' only if the defendant does not receive that which state law provides."). Furthermore, because the state has never disclosed the identity of the clerk who completed Juror 28's qualification form or the identity of the person who destroyed the forms; in spite of a direct question in voir dire, Juror 28 did not disclose his inability to read; and Juror 28 did not disclose his inability to read to Mr. Tisius until after the conclusion of his federal habeas proceedings, Mr. Tisius did not have a fair opportunity to present the claim in his first federal habeas petition. *See*, *e.g.*, *Jimerson v. Payne*, 957 F.3d 916, 927 (8th Cir. 2020) ("[D]ue diligence does not require a defendant to root out information that the State kept hidden."); *Julian v. Hanna*, 732 F.3d 842, 849 (7th Cir. 2013) (Posner, J.) (finding petitioner's "*Brady* claim was ripe" no earlier than when "[t]he exculpatory evidence had been revealed"); *cf. McDonough v. Smith*, 139 S. Ct. 2149, 2159 (2019) (holding time to bring 42 U.S.C. § 1983 malicious-prosecution claim based on fabricated evidence accrues not from earliest date plaintiff becomes aware of fabricated evidence, but from later date of favorable termination of proceedings against him).

This Court has repeatedly held habeas petitioners are entitled to "'presume that public officials have properly discharged their official duties[,]'" *Banks v. Dretke*, 540 U.S. 668, 698 (2004) (quoting *Bracy v. Gramley*, 520 U.S. 899, 909 (1997)), and would not, for example, assist a juror in concealing the fact that he was disqualified from jury service. This Court further recognizes a "presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Accordingly, a petitioner is not at fault for failing to bring a juror misconduct case earlier when "[t]he trial record contains no evidence which would have put a reasonable attorney on notice that [a juror's] nonresponse was a deliberate omission of material information." *Williams v. Taylor*, 529 U.S. 420, 442 (2000).

Here, Mr. Tisius is certainly not at fault for failing to bring his claim earlier. At his resentencing, he relied on the presumption that all the officials involved, including courthouse employees, properly conducted themselves. *Banks*, 540 U.S. at 698. He trusted that no courthouse employee would, upon being told that a juror was unable to read and could not fill out his qualification form, secret that juror into a private room, read him the form word for word, fill in the juror's answers for him, then have the juror sign it. It is absurd to find, as the Eighth Circuit implicitly did, that Mr. Tisius should have regarded every official with suspicion. It is equally absurd to find that Mr. Tisius should have investigated any and every possibility of juror misconduct when there was nothing in the record to suggest that there any such juror misconduct even existed due to concealment by both a courthouse employee and the juror himself. *Williams*, 529

U.S. at 442. Assuming that his resentencing proceeding was being carried out normally and that those involved were performing their duties properly and honestly, Mr. Tisius and his defense team were provided no inkling that something was amiss with Juror 28.

Juror 28 did not disclose his inability to read to Mr. Tisius until after the conclusion of his federal habeas proceedings. Mr. Tisius's *Hicks* claim did not become ripe, or even exist, until the Missouri Supreme Court refused to follow its own law regarding the automatic prejudice resulting from the petit jury service of an unqualified juror. Mr. Tisius did not have a fair opportunity to raise this claim in his initial habeas corpus proceedings.

### B. Whether a petitioner has had a fair opportunity to raise his claim earlier governs the determination of whether a claim is "second or successive."

#### 1. This Court historically has focused on whether a petitioner has had a fair opportunity to present his claim.

When a habeas petition presents a claim that did not become ripe for review until after the conclusion of the petitioner's federal habeas proceedings, this Court has determined that the habeas petition in question is not a second or successive petition within the meaning of § 2244(b). *Magwood*, 561 U.S. 320; *Panetti*, 551 U.S. 930; *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1999). These cases center on ripeness. *Nooner v. Norris*, 499 F.3d 831, 834-35 (8th Cir. 2007) (Nooner's supplemental habeas application raising a claim that the state was violating his right of access to the courts was filed when his claim first ripened, and was not

subject to the statutory bar set out in § 2244(b)); *Crouch v. Norris*, 251 F.3d 720, 723-25 (8th Cir. 2010) (Crouch's second habeas petition raising a claim stemming from the state's refusal to grant him parole was not a "second or successive" petition under § 2244(b) because the alleged violation occurred after the denial of his first petition); *Morgan v. Javois*, 744 F.3d 525, 527 (8th Cir. 2013) (petition challenging continued confinement after finding of not guilty by reason of insanity was not subject to § 2244(h) because it did not become ripe until the state court ruled on the continued confinement). Because the *Hicks* allegations in the supplemental petition just recently became ripe for review, the supplemental petition is not a second or successive petition within the meaning of § 2244(b), and the lower court opinion conflicts with relevant decisions of this Court.

The term "second or successive" in § 2244(b) is "a term of art" that is "not self-defining." *Panetti*, 551 U.S. at 943-44. Instead, the term "takes its full meaning" from Supreme Court case law, including pre-AEDPA cases. *Id* at 944; *see also Slack v. McDaniel*, 529 U.S. 473, 486 (2000) ("The phrase 'second or successive petition' is a term of art given substance in our prior habeas corpus cases."). In *Felker v. Turpin*, 518 U.S. 651 (1996), the Court found § 2244(b) is "within the compass" of "what is called in habeas corpus practice 'abuse of the writ,'" a doctrine that is "'a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.'" 518 U.S. at 664 (quoting *McCleskey*, 499 U.S. at 489).

Applying that doctrine "[i]n the usual case, a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's 'second or

successive' bar. There are, however, exceptions." *Panetti*, 551 U.S. at 947.

*Panetti* considered one such exception, a claim that the petitioner was incompetent for execution and the state court did not afford him the hearing on that claim that due process required under *Ford v. Wainwright*, 477 U.S. 399 (1986).[6] Although the signs of Panetti's mental illness were a matter of record from at least the time of trial, 551 U.S. at 936-38, federal courts are not "able to resolve a prisoner's *Ford* claim before execution is imminent." *Id.* at 946.

Under those circumstances, this Court held the "statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe." *Id.* at 947. In reaching that conclusion, this Court relied upon three factors: (1) the practical effects or perverse implications for habeas practice by reading 'second or successive' literally for a specific class of claims, (2) whether allowing such claims would be consistent with AEDPA's purposes, including promoting comity, finality, and federalism, and (3) the history of habeas jurisprudence, including the common law abuse-of-the-writ doctrine. *See Panetti*, 551 U.S. at 942-45; *see also United States v. Lopez*, 577 F.3d 1053, 1056 (9th Cir. 2009) (distilling *Panetti*'s test).

Three years later, in *Magwood*, the Court decided that a "fair-warning claim" that was available to the petitioner at the time of his first petition, was not barred as "second or successive" because, between the filing of the first and second petition,

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[6] *Panetti* answered a question left open in another the case of another second-in-time petition raising a *Ford* claim, *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). *Panetti*, 551 U.S. at 943.

the state court had entered a new judgment. 561 U.S. at 342. The Court clarified that this additional exception "neither purports to alter nor does alter our holding in *Panetti*." *Id.* at 343 (Breyer, J., concurring); *id.* at 335 n.11.

Three concurring Justices agreed with the four-Justice dissent that "if Magwood were challenging an undisturbed state-court judgment for the second time, abuse-of-the-writ principles would apply, including *Panetti*'s holding that an 'application' containing a 'claim' that 'the petitioner had no fair opportunity to raise' in his first habeas petition is not a 'second or successive' application." *Id.* at 343 (quoting *id.* at 345 (Kennedy, J., dissenting)). That is, under *Panetti*, "a court must look to the substance of the claim the application raises and decide whether the petitioner had a full and fair opportunity to raise the claim in the prior application." *Id.* at 345 (Kennedy, J., dissenting).

The *Magwood* Justices' distillation of a "fair opportunity" rule from *Panetti* is not a new gloss.[7] One month after this Court first articulated the abuse-of-writ doctrine in *Salinger v. Loisel*, 265 U.S. 224 (1924), the Court held that a petitioner must have had "full opportunity to offer proof" of a claim in a first habeas proceeding to trigger an abuse of the writ with a second petition. *Wong Doo v. United States*, 265 U.S. 239, 241 (1924). And this interpretation of § 2244(b) is in line with prior cases from this Court which analyzed the very nature and purpose of the writ

[7] *Cf. Boumediene v. Bush*, 553 U.S. 723, 774 (2008) ("The provisions at issue in *Felker*, however, did not constitute a substantial departure from common-law habeas procedures. The provisions, for the most part, codified the longstanding abuse-of-the-writ doctrine.").

itself. *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938) ("To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice.").

That rule, this Court held in *Panetti*, "is confirmed" by considering AEDPA's "design . . . to 'further the principles of comity, finality, and federalism.'" *Panetti*, 551 U.S. at 945 (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 337 (2003)). It also avoids unwanted "practical effects" such as petitioners "'forever losing their opportunity for any federal review of their unexhausted claims.'" *Id.* at 945-46 (quoting *Rhines v. Weber*, 544 U.S. 269, 275 (2005)).

This Court's incorporation of abuse-of-the-writ principles into the "second or successive" determination[8] also is consistent with other cases that found AEDPA did not "'displace courts' traditional equitable authority.'" *McQuiggin v. Perkins*, 569 U.S. 383, 397 (2013) (quoting *Holland v. Florida*, 560 U.S. 631, 646 (2010)). "A federal habeas court's power to excuse these types of defaulted claims [i.e., those not presented in a first federal petition] derives from the court's equitable discretion." *McCleskey*, 499 U.S. at 490.

In short, this Court has directed that § 2244(b) must be interpreted in light of the "purposes" of AEDPA and "the practical effects of [this Court's] holdings." *Panetti*, 551 U.S. at 945-46. These principles dictate that because the *Hicks*

[8] *Magwood*, 561 U.S. at 341 (Kennedy, J., dissenting) (§ 2244(b) "incorporates the pre-AEDPA abuse-of-the-writ doctrine").

allegations in the supplemental petition just recently became ripe for review, Mr. Tisius did not have a fair opportunity to present them earlier.

### 2. The Eighth Circuit's decision is inconsistent with § 2244(b)'s principles of finality and federalism.

Section 2244(b)(2) furthers principles of finality by narrowing the circumstances in which a previously unavailable claim may be raised in a "second or successive" petition. But recognizing a narrow exception to § 2244(b)'s application for Mr. Tisius's previously unavailable claim does not offend principles of finality. In fact, exempting claims which attack the fundamental fairness of a criminal trial from finality rules was the express intention of the authors of the doctrines Congress codified in § 2244(b)(2). A claim related to due process and juror misconduct that became available only after an initial petition is such a claim.

Congress's decision to allow consideration of successive petitions raising previously unavailable retroactive rules, § 2244(b)(2)(A), and constitutional violations bearing on innocence, § 2244(b)(2)(B), tracks the views of the jurists who crafted the anti-retroactivity doctrine and the innocence gateway, including Judge Henry Friendly. Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151 (1970). Significantly, Judge Friendly exempted a previously unavailable claim of judicial bias from the ambit of their now operative rules.

Judge Friendly maintained that an innocence requirement should not apply in cases where "the criminal process itself has broken down; the defendant has not had the kind of trial the Constitution guarantees."; *see also id.* at 151-152 (arguing

that another structural error, racial discrimination in jury selection, should not be subject to innocence requirement). Like the claims excluded by Judge Friendly, Mr. Tisius's unqualified juror claim concerns "the very basis of the criminal process," such that collateral attack would be appropriate "regardless of the defendant's guilt." *Id.* at 152.

Contrary to AEDPA's purposes and this Court's decisions, the Eighth Circuit failed to apply an abuse-of-writ analysis to Mr. Tisius's *Hicks* claim, including whether he had a fair opportunity to raise his claim in his initial petition. As shown above, due to the court and juror's concealment of the juror's inability to read until after the conclusion of Mr. Tisius's federal habeas proceedings, Mr. Tisius did not have a fair opportunity to present his claim at an earlier time. A long line of cases from this Court hold harmless habeas petitioners whose delay in presenting, or fully developing, claims was attributable to the failure of a public official to act properly. *See Banks*, 540 U.S. at 693-94; *Strickler v. Greene*, 527 U.S. 263, 283 (1999); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988); *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *cf. Williams*, 529 U.S. at 440-43 (holding petitioner did not "fail[] to develop the factual basis for his claim in state court," 28 U.S.C. § 2254(e)(2), because "underdevelopment" of factual basis was "attributable to [juror] and [prosecutor], if anyone"). Like the defendants in *Banks* and *Strickler* who relied upon the presumption that their prosecutors were telling the truth about meeting their discovery obligations, Mr. Tisius relied upon the "presumption of honesty and integrity in those serving as adjudicators[,]" *Withrow*, 421 U.S. at 47, such as Juror

28, and Mr. Tisius had no reason to know that court officials assisted Juror 28 in concealing his inability to read.

Under the appropriate abuse-of-the-writ analysis, Mr. Tisius did not have a fair opportunity to present his claim earlier. The Eighth Circuit opinion is conflicts with these principles and decisions of this Court requiring their application in this case.

### C. Barring Mr. Tisius's claim would be inconsistent with AEDPA's purposes and would produce absurd results.

There is no question that the "[f]ailure to strike an unfit juror is structural error. . . ." *Dorsey*, 448 S.W.3d at 299; *see also Strong*, 263 S.W.3d at 647; *Mayes*, 63 S.W.3d at 625; *Gray*, 481 U.S. at 668. The petit jury service of an unqualified juror affected the "entire conduct of the trial from beginning to end," *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991), and "cause[d] fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017). Such claims require "automatic reversal." *Id.* at 1912. However, until the Missouri Supreme Court failed to follow its own law regarding juror qualifications and the automatic prejudice resulting from the service of an unqualified juror, there was no claim to present. *See*, *e.g.*, *Clemons*, 494 U.S. at 746-47; *Thompson v*, 929 F.2d at 401 n.10; *cf. Ross*, 487 U.S. at 88-89.

Treating claims like Mr. Tisius's as "second or successive" leads to illogical results which are certainly not in line with this Court's precedent or AEDPA's

purpose in providing a full and fair opportunity to be heard. It would force defense counsel to investigate every possible issue with every possible juror before there even arises any indication there might be a juror issue. *See Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1985). To reserve their full and fair opportunity to present a potential claim, petitioners would have to bring juror misconduct allegations in their initial habeas petition even though the factual basis for such claims would be "factually unsupported"—at that point, such a claim would be a "mere formality, to the benefit of no party." *Panetti*, 551 U.S. at 947. To find that Mr. Tisius should have earlier brought a claim that Juror 28 could not read when he had no reason to believe that Juror 28 was illiterate, and when the illiteracy was actively concealed from him, is nonsensical.

Furthermore, even though Mr. Tisius had no reason to know that Juror 28 could not read and that the jury was improperly composed, Mr. Tisius's appellate defense counsel *did* attempt to initiate an investigation into the juror's qualifications. App. p. 13a (Attachment, Jeannie Willibey Affidavit). But counsel's investigation was thwarted, once again, by the state. Even though less than a year had passed since the conclusion of Mr. Tisius's resentencing proceeding and even though Mr. Tisius's appeals were still ongoing, the county clerk's office had already destroyed the juror forms. *Id.* Thus, Mr. Tisius's attempts certainly constituted due diligence. *See, e.g., Jimerson*, 957 F.3d at 927:

> While evidence is 'new' if it was not available at the time of trial through the exercise of due diligence, due diligence does not require a defendant to root out information that the State kept hidden. The State cannot play 'hide and seek' with information it was required to disclose and then accuse defense counsel of lacking due diligence. Due

> diligence does not require defense counsel to possess psychic abilities and discover potentially favorable evidence during trial that the State chose to conceal, particularly when defense counsel specifically requested disclosure of the evidence now at issue."
>
> (internal citations omitted)).

*See also Jefferson v. United States*, 730 F.3d 537, 544 (6th Cir. 2013) ("We do not fault Jefferson for failing to scavenge for evidence of undisclosed promises when he already repeatedly asked for disclosure and the evidence was unconstitutionally withheld by the government."); *Aron v. United States*, (291 F.3d 708, 712 (11th Cir. 2002) ("[D]ue diligence . . . does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts.").

Although the district court recognized that Mr. Tisius was raising a new claim, in deciding whether this new claim was presented in a second or successive application, that court did not have enough information to decide whether Mr. Tisius had a fair opportunity to raise his claim in his initial petition. Rather, the court found that an evidentiary hearing was necessary to make that determination because of a factual dispute, and, due to (1) Mr. Tisius's likelihood of success on the merits; (2) the relative harm to the parties; and (3) the extent to which the Mr. Tisius had not unnecessarily delayed his claims, the court stayed the execution. The Eighth Circuit, on the other hand, resolved the factual dispute without evidence and simply determined that the petition was a second or successive application. As part of this determination, the court found that "the new claim could have been timely

investigated by counsel and raised in earlier habeas proceedings but was not." (App. p. 2a). The court did not state any basis for this conclusion. There is none.

Under *Panetti* and *Magwood,* a court must look to the substance of the claim the application raises and decide whether the petitioner had a fair opportunity to raise the claim in the prior application. As shown above, factors external to Mr. Tisius's defense obstructed his earlier investigations into the facts underlying the claim. Mr. Tisius's counsel was diligent, and because of that diligence, any failure to present evidence that had been concealed from them should not be held against Mr. Tisius. The Eighth Circuit's failure to consider whether Mr. Tisius had a fair opportunity to raise the claim in a prior application, and its determination that the claim could have been raised earlier and is governed by the restrictions in § 2244(b), conflicts with relevant decisions of this Court.

Mr. Tisius's case is rife with due process violations. The seating of Juror 28 on the jury and Juror 28's participation in sentencing Mr. Tisius to death deprived Mr. Tisius of not only the qualified jury Missouri statute guarantees, but also "[the] fair trial in a fair tribunal" due process of law requires. *In re Murchison*, 349 U.S. 133, 136 (1955). The Missouri Supreme Court refused to follow its own law and to enforce the rights it guaranteed to Mr. Tisius, creating yet further due process violations. And now the Eighth Circuit Court of Appeals has completely denied Mr. Tisius the opportunity to have his claim heard. Mr. Tisius has been deprived the fair opportunity to present his claim that AEDPA and this Court require.

## II. The district court correctly found that factual development is needed.

The state court record that was before the court below reflected a factual dispute about whether the juror was in fact illiterate and whether state action concealed the fact. 28 U.S.C. § 2254(e) does not bar an evidentiary hearing in district court. *Williams*, 529 U.S. at 440-43; *Williams v. Norris*, 612 F.3d 941, 959 (8th Cir. 2010) (recognizing that under *Williams*, "28 U.S.C. § 2254(e)(2) [does] not prevent the petitioner from developing his claim of juror misconduct in federal court."); *Simpson v. Norris*, 490 F.3d 1029, 1035 (8th Cir. 2007) (discussing *Williams* and finding that "the district court incorrectly required Mr. Simpson to meet the requirements of § 2254(e)(2) before holding an evidentiary hearing" because counsel did not lack diligence in developing the factual basis in state court). The Eighth Circuit ignored that a court always has jurisdiction to determine its jurisdiction, which was the basis for the district court order. "[F]ederal courts have 'jurisdiction to determine jurisdiction,' that is, 'power to interpret the language of the jurisdictional instrument and its application to an issue by the court.'" *Kansas City S. Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir. 1980) (*quoting Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938); *see also Smith v. Armontrout*, 604 F. Supp. 840, 843 (W.D. Mo. 1984) ("It is well-settled that federal courts always have jurisdiction to determine jurisdiction.") Thus, this Court should grant

certiorari, reverse the decision of the Eighth Circuit, and remand to the district court for factual development.[9]

[9] Also pending before this Court is *Tisius v. Vandergriff*, No. 22-7699. This petition concerns the failure of the Missouri Supreme Court to either grant relief or allow factual development. Both petitions were filed because Mr. Tisius, who will otherwise shortly lose his life, is entitled to have this important issue considered in at least one forum.

## CONCLUSION

This Court should grant certiorari to resolve this important question.

Respectfully Submitted,

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