

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

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

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

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MICHAEL TISIUS, Petitioner,

v.

DAVID VANDERGRIFF,  
Warden, Potosi Correctional Center, Respondent.

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On Petition for Writ of Certiorari  
to the Supreme Court of Missouri

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**APPLICATION FOR STAY OF EXECUTION**

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**ELIZABETH UNGER CARLYLE\***  
Carlyle Parish LLC  
6320 Brookside Plaza #516  
Kansas City, Missouri 64113  
(816) 525-6540  
elizabeth@carlyleparishlaw.com

**KEITH O'CONNOR**  
Keith O'Connor, LLC  
PO Box 22728  
Kansas City, MO 64113  
Mo Bar No. 63134  
Phone: 816-225-7771  
Keith@keithoc.com

**LAURENCE E. KOMP**  
Capital Habeas Unit, Chief  
Federal Public Defender,  
Western District of Missouri  
1000 Walnut St., Ste. 600  
Kansas City, MO 64106  
(816) 471-8282  
laurence\_komp@fd.org

\*Counsel of Record, Member of the Bar of the Supreme Court  
**COUNSEL FOR PETITIONER**

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and the Circuit Justice for the Eighth Circuit:

The State of Missouri has scheduled the execution of Michael Tisius for June 6, 2023, at 6:00 P.M., Central Time. Mr. Tisius respectfully requests a stay of execution pending consideration and disposition of the petition for a writ of certiorari, filed on June 2, 2023.

### **PROCEDURAL BACKGROUND**

Mr. Tisius respectfully requests that this Court stay his execution, pursuant to Supreme Court Rule 23. On May 2, 2023, Mr. Tisius filed a petition for writ of habeas corpus in the Supreme Court of Missouri raising the recently discovered claim that his 2010 resentencing jury violated Mo. Rev. Stat. § 494.425 because a statutorily unqualified juror was seated. *State ex rel. Tisius v. Vandergriff*, Case No. SC 100059.App. p. 3a. The Supreme Court of Missouri denied the petition in its entirety on May 23, 2023, without a hearing, without full briefing and argument, and without a written opinion. App. p. 1a.

On May 2, 2023, Mr. Tisius also moved for stay of execution based on the filing of the petition for writ of habeas corpus related to the disqualified juror in the Missouri Supreme Court. *State v. Tisius*, Case No. SC91209. The Missouri Supreme Court ordered the state to file its suggestions in opposition by a date and time certain. *State v. Tisius*, Case No. SC91209 (May 3, 2023 Order). Even though it was invited to do so by the Missouri Supreme Court, the state chose to not oppose Mr.

Tisius's motion for stay. The Missouri Supreme Court denied the motion for stay anyway. *State v. Tisius*, Case No. SC91209 (May 23, 2023 Order).<sup>1</sup>

### REASONS FOR GRANTING THE STAY

A stay of execution is warranted where there is a “presence of substantial grounds upon which relief might be granted.” *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). To decide whether a stay of execution is warranted, the federal courts consider: 1) the petitioner's likelihood of success on the merits; 2) the relative harm to the parties; and 3) the extent to which the prisoner has delayed his or her claims. *See, e.g., Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). All three factors weigh in favor of staying Mr. Tisius's execution pending disposition of his supplemental petition for habeas corpus relief in this Court.

#### I. Mr. Tisius Is Likely To Succeed On The Merits Of His Due Process Claim.

The petition for writ of certiorari has a substantial likelihood of success. Mr. Tisius has established both that Missouri's juror disqualifications statute, Mo. Rev. Stat. § 494.425, unequivocally disqualifies individuals who cannot read the English language from jury service and Juror 28 was seated on Mr. Tisius's 2010 resentencing jury despite his illiteracy (and thus in violation of Mo. Rev. Stat. § 494.425). Mr. Tisius has also established, by unequivocal evidence, that county officials assisted the juror in concealing his illiteracy and then destroyed written evidence. Missouri's refusal to heed its own statute to instead plow ahead and

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<sup>1</sup> For the Court's convenience the order is attached to this pleading.

execute Mr. Tisius based on a verdict from a statutorily unqualified jury is an undeniable violation of *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

Under Mo. Rev. Stat. § 494.425, individuals who are unable to “read, speak and understand the English language” “*shall be* disqualified from serving as a petit or grand juror.” *Id.* (emphasis added).

For over a century, this Court has required “that a court should give effect, if possible, to every clause or word of a statute.” *Moskal v. United States*, 498 U.S. 103, 109-10 (1990) (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). This Court has also consistently reiterated that courts must abide by the plain language of a statute in the absence of a compelling reason why the plain language does not accurately reflect the legislative purpose. *See, e.g., Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017) (“We thus begin and end our inquiry with the text, giving each word its ‘ordinary, contemporary, common meaning.’”) (citing *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207 (1997)); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) (“The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.”); *Shaw v. Delta Air Lines*, 463 U.S. 85, 97 (1983) (“We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.”).

Interpreting Mo. Rev. Stat. § 494.425 is a matter of simple, straightforward statutory construction. 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 crucial word in the statute, “shall,” is “an imperative command, usually indicating that certain actions are mandatory, and not permissive.” *Shall*, Cornell Law School, Legal Information Institute Wex, <https://law.cornell.edu/wex/shall> (last visited May 29, 2023). Black’s Law Dictionary defines “shall” as “[h]as a duty to; more broadly, is required to <the requestor shall send notice> <notice shall be sent>.” This is the mandatory sense that drafters typically intend and that courts typically uphold.” Black’s Law Dictionary (11th ed. 2019). Thus, the statute provides no wiggle room: any individual who cannot read English is prohibited from jury service. Under the statute’s plain language and this Court’s precedent on statutory interpretation, there is no other reasonable interpretation. Juror 28, by his own numerous admissions, cannot read English. Mo. Rev. Stat. § 494.425 should therefore have disqualified him from serving on a jury.

Yet, despite Juror 28’s statutory disqualification, he ultimately sat on Mr. Tisius’s jury and was one of the 12 jurors who decided to sentence Mr. Tisius to death. With Juror 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 like Mr. Tisius 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) (citing *Vitek v. Jones*, 445 U.S. 480, 488-49 (1980)). In other words, under the Fourteenth Amendment, Mr. Tisius had a right to a jury whose composition complied with Mo. Rev. Stat. § 494.425’s guarantees regarding juror qualifications. Missouri’s refusal to comply with Mo. Rev. Stat. § 494.425—its own statute—amounts to a federal due process violation. *See Skinner v. Switzer*, 562 U.S. 521, 530 (2011); *Bowie v. City of Columbia*, 378 U.S. 347, 356 (1964). A state cannot provide a statutory guarantee that defendants will have a qualified jury composed of literate jurors and then arbitrarily cast that qualification requirement aside and refuse to follow its own statute when faced with uncontroverted evidence of a juror’s illiteracy.

It is an uncontroverted proposition that this Court may enter a stay of a reasonable time to permit consideration of a writ of certiorari. Congress provides for the same in 28 U.S.C § 2101(f). An alternative basis exists in the All Writs Act 28 U.S.C. § 1651(a), which provides that courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions.”

This Court recently has intervened and entered a stay to consider a petition for writ of certiorari. *Glossip v. Oklahoma*, No. 22A941, 2023 U.S. LEXIS 1887 (May 5, 2023) (entering a stay to permit consideration of writs of certiorari). Mr. Tisius’s case is as compelling as *Glossip*. To put it bluntly, the state is poised to execute Mr. Tisius solely based on a verdict issued by an unqualified jury—a jury that included a juror who, in “deciding” that the state’s evidence demonstrated Mr. Tisius deserved death, did not actually consider the full scope of the evidence. The state

seeks to execute Mr. Tisius based on an arbitrary verdict. This is as troubling as the prosecutorial misconduct and subsequent unreliable conviction in *Glossip*. This Court should now again in Mr. Tisius's case take the eminently reasonable approach it recently adopted in *Glossip*.

In considering this petition, this Court is not bound by the constraints of 28 U.S.C. § 2554 because this petition is filed to review the denial of an original Missouri writ. Mr. Tisius is thus likely to succeed on the merits of his petition for certiorari.

## II. Relative Harm To The Parties

### A. Mr. Tisius has an interest in having this Court determine the issue of his arbitrary death sentence at the hand of an unqualified juror.

Mr. Tisius, of course, has a strong interest in not being executed on a death verdict derived from a jury that included an unqualified juror. A stay preserves the status quo to permit the issue of his arbitrary death sentence to be heard.

Allowing the state to execute Mr. Tisius while his petition for writ of certiorari is pending risks “effectively depriving this Court of jurisdiction to consider petition for writ of certiorari.” *Garrison v. Hudson*, 469 U.S. 1301, 1302 (Burger, C.J., in chambers). Because “the normal course of appellate review might otherwise cause the case to become moot,’ . . . issuance of a stay is warranted.” *Id.* at 1032 (quoting *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)); see also *Chafin v. Chafin*, 568 U.S. 165, 178 (2013) (suggesting that the threat of mootness warrants “stays as a matter of course.”). If the stay is not granted, Mr. Tisius will be

dead without the opportunity to have this Court consider whether the seating of unqualified Juror No. 28 deprived Mr. Tisius of a fair jury and due process.

**B. The state has a strong interest in ensuring that Missouri juries are constructed in accordance with Missouri's own statutes.**

There is no tangible harm to the state. A simple delay to accurately determine the merits of this supplemental petition ensures constitutional compliance. The state cannot claim having to follow the law as a harm. *See, e.g., In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003) (noting that “contrary to the State’s contention that its interest in executing Holladay outweighs his interest in further proceedings, we perceive no substantial harm that will flow to the State of Alabama or its citizens from postponing petitioner’s execution to determine whether that execution would violate the Eighth Amendment.”).

Moreover, the state does have an interest in having this Court grant a stay to consider the issue of statutory juror qualifications. First, the state has an obvious interest in ensuring its laws are followed. *See, e.g., Cameron v. EMW Women’s Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022); *Maine v. Taylor*, 477 U.S. 131, 137 (1986). The Missouri legislature enacted Mo. Rev. Stat. §494.425 to address juror qualifications; presumably, the legislature listed characteristics and factors that would disqualify an individual to ensure Missouri juries will properly consider the full scope of the presented evidence. The state has a specific interest in enforcing Mo. Rev. Stat. § 494.425 so that jury verdicts and judgments are fair.

As a party to the litigation, the state also has a particular interest in ensuring juries are fully statutorily qualified. In criminal cases, the prosecution represents



the interests of the state. The prosecution has an equal interest in ensuring jurors are statutorily qualified—it is not only the defendant who bears the risk that an unqualified jury might not properly consider his evidence. If the jury is statutorily unqualified, the state risks that the jury cannot or will not properly and fully weight the state’s evidence too.

On a broader level, while the state has an interest in the enforcement of its criminal judgments and punishments, it “also has an interest in its punishments being carried out in accordance with the Constitution of the United States.”

*Harrison v. Vazquez*, 901 F.2d 724, 727 (9th Cir. 1990). The problem here in Mr. Tisius’s case is straightforward—an individual who, under Missouri law, was not supposed to sit as a juror did in fact sit as a juror and had a hand in arbitrarily sentencing Mr. Tisius to death.

Despite the Missouri legislature’s purported guarantee that juries will be fully qualified, Missouri now refuses to enforce that guarantee or to follow the law by which it is bound. Missouri’s insistence on enforcing Mr. Tisius’s arbitrary death sentence instead of enforcing its own law violates the Fourteenth Amendment. Thus, if the state is allowed to carry out Mr. Tisius’s execution, it will also be wholly in violation of the Fourteenth Amendment. Adherence to the U.S. Constitution is one of the most fundamental duties of the state, and a stay would allow the state time to ensure it does exactly that.

Finally, the state has unclean hands here. First, in 2010, the state participated in a secretive process to qualify a juror that confessed to court

personnel a statutorily disqualifying factor. Prior to the start of *voir dire*, Juror 28 informed a courthouse employee that he could not read and could not complete his juror questionnaire on his own. Cert. Petition, p. 2. The employee secreted Juror 28 into a private room, read the questionnaire to Juror 28 “word for word,” then filled in Juror 28’s answers for him. *Id.* That employee, who remains unidentified, apparently did not notify either anybody else of Juror 28’s disclosure or of his disqualification from jury service. Then, within a year and in violation of at least two specific Missouri rule requirements, state actors destroyed evidence related to the composition of Mr. Tisius’s jury.<sup>2</sup> Moreover, this destruction occurred *while Mr. Tisius’s appeal was still ongoing*. What is more, the state tellingly now does not dispute the occurrence of this earlier state misconduct and interference by state officials. Cert. Petition, pp. 3-4.. The state’s silence can only mean one thing—that Juror 28 has confirmed the courthouse employee’s conduct and that the state’s interference between 2010 and 2011 played out exactly as Mr. Tisius has alleged. The state’s initial assistance and later concealment of the impropriety should not be rewarded with the denial of a stay and an immediate execution.

**C. Public interest supports a stay.**

The public’s interest would be served by a stay of execution to allow Mr. Tisius a meaningful opportunity to present his claims to this Court regarding the violation of his due process rights. Accuracy and fairness are the hallmarks of a system that works—and the public has an interest in accuracy and fairness when

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<sup>2</sup> Mo. Sup. Ct. Op. R. 4.21; Mo. Sup. Ct. Op. R. 27.09(b).

an execution is done in their name. When an execution is carried out, it is not the state's Attorney General or the Missouri Supreme Court who kills—the killing is done by and for the people of the state. The people have an interest in ensuring such a killing is done in a fair, meaningful, and accurate manner. “[T]he public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional right.” *In re Ohio Execution Protocol Litigation*, 840 F. Supp. 2d 1044, 1059 (S.D. Ohio 2012).

Mr. Tisius brings a meritorious claim in his supplemental petition for habeas relief that impending execution, imposed by an improperly composed jury that included an unqualified juror, is a serious due process violation and an arbitrary deprivation of his life. Due process is a right every member of the public enjoys, and the fact that one of Missouri's most vulnerable citizens will suffer the ultimate irreparable punishment without due process is a concern for all.

More specifically, the public also has an interest in ensuring that juries are qualified, as their duly elected Assembly enacted in Mo. Rev. Stat. § 494.425 as the people's representative. The public has a constitutional right to a fair and impartial jury. It is in the interest of the greater public that their constitutionally guaranteed juries comport with Missouri's statutory guarantees and with federal due process.

### **III. Mr. Tisius Has Not Delayed The Assertion Of Any Remedies.**

At no point has Mr. Tisius “delayed unnecessarily in bringing [his] claim.” *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). Mr. Tisius discovered Juror 28's illiteracy on April 28, 2023, and he acquired Juror 28's signed statement the next

day on April 29, 2023. Cert. Petition, p. 2. Just three days later on May 2, 2023, Mr. Tisius presented his petition for writ of habeas corpus in the Supreme Court of Missouri. App. p. 3a. Two days later after filing his petition, Mr. Tisius filed a supplement to the petition for writ of habeas corpus in the Supreme Court of Missouri in *State ex rel. Tisius v. Vandergriff*, Case NO. SC100059, which included, Juror 28's affidavit. App., pp. 24a, 67a. Mr. Tisius brought this claim before the Missouri Supreme Court almost as soon as he was aware it existed. He did not delay assertion of this remedy.

Additionally, the Missouri Supreme Court denied Mr. Tisius's petition for writ of habeas corpus just days ago on May 23, 2023 App. p. 1a. Mr. Tisius acted promptly in then presenting his petition for writ of certiorari in this Court and in bringing this application for a stay of execution, and thus, Mr. Tisius has not delayed the assertion of this remedy either.

## CONCLUSION

For the foregoing reasons, Mr. Tisius prays the Court to stay his execution pending disposition of the petition for writ of certiorari.

Respectfully submitted,

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

KEITH O'CONNOR  
Keith O'Connor, LLC  
PO Box 22728  
Kansas City, MO 64113  
Mo Bar No. 63134  
Phone: 816-225-7771  
Keith@keithoc.com

LAURENCE E. KOMP  
Capital Habeas Unit, Chief  
Federal Public Defender  
Western District of Missouri  
1000 Walnut St., Ste. 600  
Kansas City, MO 64106  
COUNSEL FOR (816) 471-8282  
laurence\_komp@fd.org

\*Counsel of Record, Member of the Bar of the Supreme Court



Supreme Court of Missouri  
en banc

SC91209

State of Missouri, Respondent,  
vs.  
Michael Andrew Tisius, Appellant.

- Sustained
- Overruled
- Denied
- Taken with Case
- Sustained Until
- Other

Order issued: Appellant's motion for stay of execution overruled.

By:   
Chief Justice

May 23, 2023  
Date