Case Nos. 22-7699, 22A1045

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL TISIUS, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND MOTION FOR STAY OF EXECUTION

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

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QUESTION PRESENTED

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

The case presents the following question:

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

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The state suggests several reasons why this Court should not review whether the Missouri Supreme Court's refusal to comply with its own juror qualifications statute violated Mr. Tisius's right to due process of law. None of them are persuasive.

A state's arbitrary refusal to enforce the rights it has guaranteed to its citizens is a serious concern, and the issue of whether this amounts to a due process violation under the U.S. Constitution is an important and urgent question worthy of this Court's review. This Court should reject each of the state's contentions, grant certiorari, and in line with its past cases, including *Hicks v. Oklahoma*, 447 U.S. 343 (1980), hold that the Missouri Supreme Court's failure to enforce Missouri's mandatory exclusion of illiterate jurors violated Mr. Tisius's federal due process rights.

I. This Court has jurisdiction to hear Mr. Tisius's claims because they implicate federal due process concerns.

From the outset, the state misunderstands, misstates, and mischaracterizes Mr. Tisius's claim. The state argues that Mr. Tisius has not presented any federal-law claims and has only alleged violations of state law. BIO, p. 10. This is false. Even an initial, surface reading demonstrates that Mr. Tisius has brought a claim implicating federal law—namely, a violation of his right to due process of law under the Fourteenth Amendment. App. p. 11a. In this Court, Mr. Tisius has also alleged a violation of *Hicks v. Oklahoma*, 447 U.S. 343 (1980). As an alleged violation of one

of this Court's precedential decisions construing the Fourteenth Amendment, that claim too is a federal constitutional claim.

In short, Mr. Tisius's petition in this Court does not implicate federalism concerns. However, the Missouri Supreme Court's denial of his state habeas petition has implicated federal due process concerns and is thus not "immune from review in the federal courts." *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977).

A. The Missouri Supreme Court denied relief on the merits.

The state concedes that under *Harrington v. Richter*, 562 U.S. 86, 99 (2002) "this Court can generally presume that summary denials were on the merits." BIO, p. 10. The state's subsequent assertion that this presumption does not apply in this case lacks merit.

The state attempts to distinguish *Harrington* on the ground that Mr. Tisius's filing in the Missouri Supreme Court was procedurally barred. However, the state ignores that Missouri does not by default procedurally bar claims of juror misconduct that potentially could have presented in earlier proceedings.

For example, in *State ex rel. Winfield v. Roper*, 292 S.W.3d 909 (Mo. banc 2009), the petitioner—like Mr. Tisius—brought a state habeas claim under Mo. Sup. Ct. R. 91. This claim was uncovered by clemency counsel; it had not been raised on direct appeal or in the petitioner's original postconviction relief proceedings. *Id.* at 909-10. Despite any potential procedural bar, the Missouri Supreme Court "appointed a master to make findings of fact and conclusions of law as to Winfield's factual allegations." *Id.* at 910 (footnote omitted). If Missouri prohibits all claims of

juror misconduct that potentially could have been raised earlier, as the state now alleges, then there would have been no reason for the court to appoint a special master in *Winfield*.

The state relies primarily on *Byrd v. Delo*, 942 F.2d 1226, 1231 (8th Cir. 1991). But *Byrd* is distinguishable and completely undermines the state's attempted argument. There, the Missouri Supreme Court did initially issue an unexplained decision, but it then later issued a second order clarifying that the decision was procedural. *Id.* at 1227.

This Court requires a "plain statement" from the state court indicating clearly that its decision was based on adequate and independent state court grounds. *Harris v. Reed*, 489 U.S. 255 (1989). In *Byrd*, the Missouri Supreme Court's second order explained that its earlier decision was based on state procedural grounds, and thus, *Harris*'s "plain statement" requirement was satisfied. The state fails to mention any of this because the Missouri Supreme Court in Mr. Tisius's case did not issue the requisite "plain statement." The court did not issue a statement at all in its checkbox denial, which under *Harrington* results in a presumption that the denial was a ruling on the merits. Additionally, to the extent that the state argues that various Eighth Circuit cases "assume unexplained Missouri state habeas denials were denied on procedural grounds" (BIO p. 11), that argument bears little weight.

The cited cases all date from the 1990s. However, the Missouri Supreme Court has significantly expanded its exercise of habeas jurisdiction since then. *See*,

e.g. State ex rel. Winfield v. Roper, 292 S.W.3d 909 (Mo. banc 2009); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003); *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 254 (Mo. App. 2011). Further, the cited cases predate *Harrington.* These cases, along with *Harrington*, are now the controlling precedent.

Aside from the case law, the state now tries to dispute this issue opportunistically. Just seven months ago in November 2022, in this Court in *Johnson v. Vandergriff*, No. 22-5947, BIO, p. 10-11, 14-19, the state argued, as it does here, that the unexplained Missouri Supreme Court decision in Mr. Johnson's case was not a merits ruling. But then in responding to Mr. Tisius's initial state habeas petition in the Missouri Supreme Court, the state argued that the Missouri Supreme Court's decision in *Johnson* **was** a merits ruling and asked the court to follow it for that reason. Response in Opposition, *State ex rel. Tisius v. Vandergriff*, SC99938, p. 21. This shameless about-face came in January 2023, just two months after the state argued the Missouri Supreme Court's *Johnson* decision was not a merits ruling. *See id.* The state's history of ping-ponging between diametrically opposed positions establishes two things. First, the state has expressly affirmed unexplained Missouri Supreme Court decisions carry a presumption of a merits ruling. Second, the state's argument here is disingenuous—its argument fluctuates depending on the forum and case. The state's willingness to change its tune depending on the result it wishes to achieve alone should persuade this Court that there is no "plain statement" of default here. The state insists that the Missouri Supreme Court's decision on Mr. Tisius's petition was based on procedural default

merely because that is its most convenient argument now—not because it is accurate or the truth. *See Winfield*, 292 S.W.3d at 910. Mr. Tisius's position on this issue has remained consistent, regardless of forum and claim.

B. Mr. Tisius has demonstrated cause and prejudice to overcome procedural default under Missouri law.

Because the state concedes that under *Harrington v. Richter*, 562 U.S. 86, 99 (2002) "this Court can generally presume that summary denials were on the merits[,]" BIO at 10, and the state has not offered provided any valid reason to overcome that presumption, it is not necessary for this Court to examine whether Mr. Tisius has satisfied Missouri's cause and prejudice exception to avoid procedural default. However, because the state erroneously contends that Mr. Tisius has not demonstrated cause and prejudice, Mr. Tisius must address this error.

Missouri law allows Mr. Tisius's claim. *See Winfield*, 292 S.W.3d at 909-10. With respect to cause for not bringing a claim earlier, the Missouri Supreme Court has determined that when a petitioner presents a claim of which he had no previous, timely notice, he has established cause. *Id.* For example, in *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 254 (Mo. App. 2011), a case dealing with jury misconduct, the court found that cause existed when "Nothing in this record suggests that [the prisoner] was earlier alerted or should have been earlier alerted to the prospect of discovering that the jury had been provided a map that was never introduced into evidence during its deliberations."

McElwain relied on *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). There, the Missouri Supreme Court held that a petitioner may have an otherwise procedurally defaulted claim considered in a habeas corpus proceeding if he establishes "cause for failing to raise the claim in a timely manner and prejudice from the constitutional error asserted." *Amrine*, 102 S.W.3d at 546. This basis for overcoming default was characterized by the *Amrine* opinion as a "gateway" cause and prejudice claim. *Id.* Mr. Tisius has alleged facts that satisfy both the cause and prejudice standards and thus overcomes procedural default.

1. **Factors external to Mr. Tisius's defense, including interference by state officials, resulted in the factual basis of this claim being concealed for 13 years, establishing good cause for not bringing this claim earlier.**

Under Missouri Supreme Court precedent, when "some interference by officials made compliance impracticable," the Missouri Supreme Court will usually find that cause has been established. *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. banc 2013). The court elaborated:

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

State ex rel. Clemons v. Larkins, 475 S W.3d 60, 76-77 (Mo. banc 2015); *see also State ex rel. Schmitt v. Green,* 601 S.W.3d 278, 286-87 (Mo. App. 2020) ("The State acknowledges that when the procedurally defaulted claim raised by a habeas

petitioner is a *Brady* violation, the State's improper suppression of information usually qualifies as 'cause' because it is an objective factor external to the defense.") (citation omitted); *McElwain*, 340 S.W.3d at 254 (finding cause when nothing in the record established that the petitioner was alerted earlier or should have been alerted to the impropriety).

The Eighth Circuit's approach mirrors the Missouri Supreme Court's. As the Eighth Circuit recently noted in *Marcyniuk v. Payne*:

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

39 F.4th 988, 995 (8th Cir. 2022) (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)). Just as in *Coleman*, Mr. Tisius has multiple occasions of interference by officials.

This Court's precedent is congruent with both Missouri's and the Eighth Circuit's rules regarding cause. In *Williams v. Taylor,* 529 U.S. 420 (2000), this Court held in regard to the provision of 28 U.S.C. § 2254(e) forbidding evidentiary hearings where the petitioner has failed to develop a claim, "If there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has not 'failed to develop' the facts. . . ." *Id.* at 437. As to a juror bias claim, this court then held:

> The trial record contains no evidence which would have put a reasonable attorney on notice that Stinnett's nonresponse was a

> deliberate omission of material information. State habeas counsel did attempt to investigate petitioner's jury, though prompted by concerns about a different juror. . . . if the prisoner has made a reasonable effort to discover the claims to commence or continue state proceedings, § 2254(e)(2) will not bar him from developing them in federal court.

Id. at 443-44.

In Mr. Tisius's case, nothing in the court record put Mr. Tisius on notice of the existence of this claim. Juror 28 did not respond when the court asked the venire panel whether they could read. Sentencing Tr. at 92. Critically, on two separate occasions and a year apart, the state concealed Juror 28's illiteracy. To reiterate, before jury selection began, Juror 28 informed a county employee at the courthouse that he could not read and thus could not complete his juror form. App. p. 68a. That employee, the identity of whom the state has failed to reveal, secreted Juror 28 into a private room, read the form to him, filled in his answers for him, then had Juror 28 sign the form. *Id.* The employee told no one of what had transpired and Juror 28 sat on the venire panel, and then on the jury. This was the first time the state interfered with Mr. Tisius's ability to unearth the factual basis of the claim.

Less than a year later, Mr. Tisius's direct appeal counsel contacted the Greene County Clerk's office to obtain the juror forms from his resentencing. App. p. 65a. The clerk's office told her that the forms had already been destroyed, although less than a year had passed since the conclusion of Mr. Tisius's resentencing proceeding and *his appeals were still ongoing*. This was a violation of Mo. Sup. Ct. Op. R. 27.09(b), which states:

> (b) Jury questionnaires maintained by the court in criminal cases shall not be accessible except to the court and the parties. Upon conclusion of the trial, the questionnaires shall be retained under seal by the court except as required to create the record on appeal or for post-conviction litigation. Information so collected is confidential and shall not be disclosed except on application to the trial court and a showing of good cause.

So, even though nothing at trial provided Mr. Tisius or his defense counsel with any inkling that something was amiss with Juror 28, direct appeal counsel did attempt to initiate an investigation into the jurors. Her investigative efforts were thwarted, yet again, by the interference of state officials.

Mr. Tisius's failure to raise this claim at an earlier time clearly was attributable to a factor external to his defense, which Missouri law recognizes as sufficient to satisfy "cause" for the default. *See Woodworth*, 396 S.W.3d at 337; *State ex rel. Strong v. Griffith*, 462 S.W.3d 732, 733 (Mo. 2015); *Schmitt*, 601 S.W.3d at 286-87; *Winfield*, 292 S.W.3d at 909-10; *McElwain*, 340 S.W.3d at 254; *see also Williams*, 529 U.S at 443-44; *Coleman* 501 U.S. at 573.

The state also suggests that counsel could have interviewed the jurors about voir dire any time after the case was over. BIO, p. 14. The state also points out that Mr. Tisius admits that his attorneys made strategic decisions to rely on the jurors' voir dire testimony in lieu of interviewing the jurors about their statutory qualifications or the accuracy of their voir dire answers. *Id.* The state neglects to mention that Mr. Tisius is entitled to do this. In *Banks v. Dretke*, this Court held that habeas petitioners are entitled "presume that public officials have properly discharged their official duties." 540 U.S. 668, 698 (2004) (quoting *Bracy v.*

Gramley, 520 U.S. 899, 909 (1997)). This Court has also recognized 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*, 529 U.S. at 442. And. as in *Coleman*, Mr. Tisius should be allowed to presume no interference by officials.

Mr. Tisius's counsel were entitled to assume that courthouse employees would not assist an illiterate juror in concealing the fact that he was disqualified from jury service. They were also entitled to assume that jurors would not lie about their qualifications in response to a direct, explicit question from the judge, while the jurors were under oath. The state's suggestion that Mr. Tisius's counsel should have interviewed jurors about their qualifications earlier and somehow also found out about the county employee's misconduct is nonsensical.

The state suggests a rule that reverses the presumption. Jurors are presumed liars. Court personnel are presumed to act contrary to law. It is absurd to suggest that Mr. Tisius should have regarded every juror, official or courthouse employee with suspicion and sought information about all possible ways they might have conducted their duties improperly. Mr. Tisius is not at fault for failing to bring this claim earlier, when the lack of this information was due to concealment by both the county employee and the juror himself.

2. Mr. Tisius was prejudiced *per se* or prejudice is presumed when he was deprived of a full panel of qualified jurors.

The state makes several arguments insisting that there is a lack of prejudice. BIO, pp. 15-17. Their contentions are premised upon a misunderstanding of the federal claim before this Court. The *Hicks* claim is that the Missouri Supreme Court did not apply Missouri statutes and law—which requires a *per se* reversal when an unqualified juror sits or prejudice is presumed. *See*, *e.g.*, *Dorsey v. State*, 448 S.W.3d 276, 299 (Mo. banc 2014) ("Failure to strike an unfit juror is structural error. . . ."; *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); *State v. Wacaser*, 794 S.W.2d 190 (Mo. banc 1990); *see also Gray v. Mississippi*, 481 U.S. 648, 668 (1987). The state is silent on that authority.

The state also relies on Juror 28's statements that he did not have "any difficulty understanding the evidence, deliberations, or jury instructions." BIO, p. 15. Of course, this is almost completely speculative, and a clear example of the Dunning-Kruger effect: Juror 28 literally "doesn't know what he doesn't know." His inability to read, expressed consistently for 13 years, demonstrates that he would not now be aware of things he missed at trial because he was unable to read them.

Mr. Tisius can satisfy the standard with which Missouri refused to comply. Under Missouri law, that is all the prejudice that is required to be shown. *Wacaser*, 794 S.W.2d 190. Juror 28's honest answer to the question about his ability to ready would have led to a sustained challenge for cause. App. at 72a (Affidavit of Chris

Slusher); App. at 75a (Affidavit of Scott McBride). There is no reason to believe the trial court would have refused to enforce the very statute its question mirrored. Mo. Rev. Stat. § 494.425. And in the unlikely even the court had overruled the challenge for cause, a peremptory challenge would have been used. *Id.*

II. This Court should consider Mr. Tisius's state court habeas petition.

The state suggests that as a matter of policy, this Court should confine itself to reviewing state court criminal law decisions only in the context of federal habeas because that policy would better "respect our system of dual sovereignty." BIO, p. 18 (quoting *Shinn v. Ramirez*, 142 S. Ct. 1718, 1730 (2022)). Of course, this Court retains jurisdiction over final judgments of state courts in constitutional matters like that here, and has regularly exercised it since *Lawrence v. Florida*, 549 U.S. 327, 335 (2007), contravening the state's suggestion that this Court rarely does so. See generally Z. Payvand Ahdouf, *Direct Collateral Review*, 121 Colum. L. Rev. 159 (2021). This exercise of jurisdiction has only increased in recent years. *See, e.g., id.* at 163-64; *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1903 (2016); *Foster v. Chatman*, 136 S.Ct. 1737, 1742 (2016); *Wearry v. Cain*, 136 S. Ct. 1002, 1002 (2016) (per curiam); *Montgomery v. Louisiana*, 136 S. Ct. 718, 726–27 (2016); *Maryland v. Kulbicki*, 577 U.S. 1, 3-4 (2015) (per curiam); *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1906–07 (2017); *Moore v. Texas*, 137 S.Ct. 1039, 1044 (2017); *Rippo v. Baker*, 137 S. Ct. 905, 906 (2017) (per curiam). *Turner v. United States*, 137 S. Ct. 1885, 1891 (2017) (Collateral review from a District of Columbia criminal proceeding.)

Setting aside that Congress permits the review, the state acts with dissonance with making such an argument. They have vociferously closed the federal courthouse door. So to assert Mr. Tisius should go to federal court is to engage in a litigation shell-game. Given the Kafkaesque limitations on federal habeas, this constitutional violation might only be corrected is if this Court reviews it based on a state court ruling.[1] This is consonant with the approach recognized by Justice Sotomayor in *Halprin v. Davis*, 140 S. Ct. 1200, 1201 (2020), where she voted to deny certiorari because "state court proceedings are underway to address [Halprin's claim.]" (Sotomayor, J, concurring in the denial of certiorari).

Mr. Tisius has filed state court proceedings, and they were unavailing. It is understandable that the state would like to eliminate any opportunity for this Court to make new law in criminal cases, but this Court's Constitutional obligation to apply and construe the application of the Constitution cannot be so easily jettisoned abandoned. *Marbury v. Madison*, 5 U.S. 137 (1803). Further, Congress provides and empowers this review.

III. Mr. Tisius's claim implicates the Due Process Clause of the Fourteenth Amendment.

The state confuses the underlying facts of the claim with the claim itself. That an unqualified juror sat on the jury in violation of Missouri law is the factual

[1] Also pending before this Court is *Tisius v. Vandergriff*, No. 22-7700, concerning the Eighth Circuit's reversal of the district court's grant of an evidentiary hearing to develop the facts related to whether Mr. Tisius had a fair opportunity to present this claim earlier. 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.

basis. The claim is that the Missouri Supreme Court's refusal to enforce or remedy this violation is in turn a violation of the Fourteenth Amendment and *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

The state also argues that *Hicks* does not help Mr. Tisius and that the federal habeas court cannot examine state-court decisions on state law questions. BIO, p. 23. Of course, this is direct review of the Missouri Supreme Court, not habeas review, so the state's framing is flawed. Regardless, this Court's language from *Hicks*, 447 U.S. at 346, obliterates the state's suggestions that this is not a federal concern: "it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law." Everyone has an interest in the process that a state proves—and a claim develops when the state deprives those rights from an individual. Even the Eighth Circuit applies *Hicks* in the context of state court decisions on state law questions. *See Toney v. Gammon*, 79 F.3d 693 (8th Cir. 1996); *Carter v. Bowersox*, 265 F.3d 705 (8th Cir. 2001).

Thus, this Court should reject the state's incorrect assertion that no federal basis exists for Mr. Tisius's claim. Mr. Tisius's death sentence was imposed by a jury not composed within the relevant statutory parameters, and that is an arbitrary deprivation by the state of Mr. Tisius's Fourteenth Amendment due process rights. *See Gray*, 481 U.S. at 668; *District Attorney's Office for Third Judicial Dist. V. Osborne*, 557 U.S. 52, 69 (2009); *Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974); *Skinner v. Switzer*, 562 U.S. 521, 530 (2011); *Bouie v. City of Columbia*, 378 U.S. 347, 356 (1964).

IV. Mr. Tisius is entitled to a stay of execution.

If this Court is unable to resolve this claim by 6:00 PM, CST on June 6, Mr. Tisius has established a basis for a stay. He relies on his pending motion for stay, but to summarize, he has shown a reasonable likelihood of success, the balance of harms favors a stay, and he has not delayed presenting his claim. *See, e.g., Hill v. McDonough*, 547 U.S. 573, 584 (2006).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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