

May 22, 2023

The Honorable Michael Parson  
Governor of Missouri  
Capitol Building Room 216  
Jefferson City, MO 65101

*Transmitted electronically*

**Re: June 6, 2023, Scheduled Execution of Michael Tisius**

Dear Governor Parson,

I am writing today on behalf of the American Bar Association (ABA) concerning Missouri death-row prisoner Michael Tisius, who is scheduled to be executed on June 6, 2023.

While the ABA does not take a position for or against the death penalty *per se*, it has a longstanding position that states should administer the death penalty only when performed in accordance with the constitutional principles of fairness and proportionality that limit the death penalty to the “worst of the worst” offenders. In particular, the ABA opposes the death penalty for certain categories of individuals who have unique vulnerabilities that make them less culpable than the average offender.

Specifically, the ABA has called for capital jurisdictions to prohibit the execution of any individual who was 21 years old or younger at the time of their offense because of a late adolescent’s ongoing neurological development and capacity for change. We urge you to exercise your authority under the Missouri Constitution to commute the sentence of Michael Tisius, who was only 19 years old at the time of the crime, to life without the possibility of release.

Since 1983, the ABA has recognized the diminished culpability of juvenile and late-adolescent offenders.<sup>1</sup> In 2018, the ABA passed a resolution urging capital jurisdictions to prohibit the

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<sup>1</sup> The ABA has a robust history of advocating in favor of increased protections for juveniles and late adolescents. In 1983, the ABA became one of the first organizations to call for an end to the use of the death penalty as a punishment for individuals under the age of 18, twenty-two years before the U.S. Supreme Court held the practice unconstitutional in *Roper v. Simmons*. In 1997, the ABA called for a suspension of executions until jurisdictions improved several aspects of their administration of capital punishment, including removing juveniles from death eligibility. The ABA has filed amicus briefs with the U.S. Supreme Court in numerous cases concerning juveniles and harsh punishments, including *Roper v. Simmons*, 543 U.S. 551 (2005), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Mathena v. Malvo*, No. 18-217 (U.S. Aug. 27, 2019).

imposition of a death sentence on or the execution of any individual who was 21 years old or younger at the time of the offense.<sup>2</sup> With the understanding that the death penalty should be reserved for the most blameworthy defendants who have committed the worst crimes in our society, the ABA adopted the resolution out of concern that the execution of defendants who committed their offenses between the ages of 18 and 21 would not serve a valid penological purpose.<sup>3</sup> Specifically, the ABA was concerned that such executions would not serve a retributive purpose or have a deterrent effect due to late adolescents' (1) lack of maturity and underdeveloped sense of responsibility; (2) increased susceptibility to negative influences, emotional states, and social pressures; and (3) underdeveloped and highly fluid character.<sup>4</sup>

### *Why a Commutation is Warranted for Michael Tisius*

Clemency is about the individual. Both the Supreme Court's decision in *Roper v. Simmons* and the ABA's late-adolescent resolution speak in general terms about the development of adolescents based on the latest developments in brain science. In clemency, on the other hand, there is the opportunity to apply those broad principles to a specific person. When looking at Michael Tisius's life and the circumstances leading up to his crime, along with his growth into adulthood since his incarceration, it is evident that he falls squarely within the group of children and late adolescents who have lessened culpability due to their age at the time of their crimes and for whom "[c]apital punishment does not effectively or fairly advance the goal of retribution."<sup>5</sup>

Michael committed two murders when he was an immature 19-year-old whose underlying brain defects and dysfunction caused him to behave like a much younger individual.<sup>6</sup> While serving a 30-day sentence for misdemeanor theft, Michael met 27-year-old Roy Vance, who had recently escaped from another jail.<sup>7</sup> Witnesses reported that Vance showered Michael with attention and direction and began "grooming" Michael.<sup>8</sup> Vance, who had a history of recruiting vulnerable people into his criminal schemes, came up with a plan to manipulate Michael into helping him escape after Michael was released.

After Michael was released from jail, Vance directed Michael to meet with Vance's girlfriend, Tracie Bulington, and to make multiple visits back to the jail to plan Vance's escape. Bulington, who was also 27 years old, provided Michael with a gun for the planned escape to scare the deputies.<sup>9</sup> During the fraught escape attempt, Michael panicked and killed Sheriff's Deputies Jason Acton and Leon Egley.

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<sup>2</sup> ABA House of Delegates Resolution 111, (adopted Feb. 2018), available at [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/2018\\_my\\_111.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2018_my_111.pdf).

<sup>3</sup> *Id.* at 11.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Reply in Supp. of Pet. for Writ of Habeas Corpus at 18, *Tisius v. Vandergriff*, No. SC99938 (Mo. Feb. 6, 2023).

<sup>7</sup> Pet. For Writ of Habeas Corpus and Suggestions in Supp. at 4, 32-33, *Tisius v. Vandergriff*, No. SC99938 (Mo. Jan. 13, 2023).

<sup>8</sup> *Id.* at 4.

<sup>9</sup> Diagnostic Interview Rep. Ex. 2 at 1, Pet. For Writ of Habeas Corpus, *Tisius v. Vandergriff*, No. SC99938 (Mo. Jan. 13, 2023).

Michael was represented in sentencing proceedings by an attorney who received an up-front flat fee of \$10,000.<sup>10</sup> The ABA has long cautioned against flat fee arrangements in capital cases because of the “unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee.”<sup>11</sup> In Michael’s case, his attorney conducted no depositions or investigation and visited Michael only twice in four years leading up to the penalty phase. At the penalty hearing, he failed to present evidence related to Michael’s vulnerabilities or how those enabled Vance to exercise substantial influence over Michael.<sup>12</sup> Lacking this critical information, a jury sentenced Michael to death. Although Vance was also charged with first degree murder, he received a sentence of life without parole.

### *Why Michael Tisius was Uniquely Vulnerable*

At the age of 19, Michael lacked adult capacity for decision-making, particularly during extremely stressful circumstances.<sup>13</sup> Young adolescents have “a diminished capacity to anticipate the consequences of their actions and control their behavior” making their decision-making capacity more like that of someone under 18 than an adult.<sup>14</sup> This difference has already been recognized in other areas of Missouri law. At the time of the offenses, Michael could not, for example, have served on a jury,<sup>15</sup> purchased alcohol,<sup>16</sup> or served as a state representative.<sup>17</sup>

However, Michael’s decision-making capacity was below that of even a typical 19-year-old. Michael experienced delayed maturation of adolescent brain functioning due to the childhood physical abuse and neglect he suffered.<sup>18</sup> Compounding his brain immaturity, multiple experts have found that Michael had neurological deficits at the time of his crimes.<sup>19</sup> Neuropsychologist Dale Watson found that Michael suffered from serious impairments, particularly in the areas of the brain that help control a person’s response to stressful stimuli, which could lead to erratic and impulsive behavior, as well as “deficits in his capacity to think and problem solve using verbal

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<sup>10</sup> *Tisius v. State*, 519 S.W.3d 413, 430 (Mo. 2017).

<sup>11</sup> ABA Guidelines for the Appointment & Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 987-88 (2003), available at <https://ambar.org/2003guidelines>.

<sup>12</sup> 519 S.W.3d at 419.

<sup>13</sup> Pet. For Writ of Habeas Corpus, *supra* note 7, at 14.

<sup>14</sup> ABA Resolution 111, *supra* note 2, at 7. See also American Psychological Association (APA) Resolution on the Imposition of Death as a Penalty for Persons Aged 18 Through 20, also known as the Late Adolescent Class, APA (August 2022), p. 2, available at <https://www.apa.org/about/policy/resolution-death-penalty.pdf> (“it is clear the brains of 18- to 20-year-olds are continuing to develop in key brain systems related to higher-order executive functions and self-control, such as planning ahead, weighing consequences of behavior, and emotional regulation.”).

<sup>15</sup> Mo. Ann. Stat. § 494.425(1) (West).

<sup>16</sup> Mo. Ann. Stat. § 311.325 (West).

<sup>17</sup> Missouri Secretary of State, “2022 Elected Officials Qualifications,” available at <https://www.sos.mo.gov/CMSImages/ElectionCandidates/2022FilingDocuments/2022ElectedOfficialsQualifications.pdf>.

<sup>18</sup> Pet. For Writ of Habeas Corpus, *supra* note 7, at 8.

<sup>19</sup> *Id.*

reasoning skills.”<sup>20</sup> Dr. George Woods opined that “[g]iven all of his deficits, Michael has been vulnerable to being taken advantage of all his life. His ability to effectively weigh and deliberate, sequence his thinking, understand social cues, and recognize social context is impaired. This is especially true in new, novel, and stressful situations.”<sup>21</sup> Michael’s immature development as a late adolescent combined with his own unique brain deficits and dysfunction made him particularly susceptible to Vance’s grooming and influence.<sup>22</sup>

As a young adolescent at the time of the offenses, Michael had an underdeveloped and highly fluid character. Since then, Michael has amassed twenty years of evidence demonstrating that he has grown into an adult who is a vastly different person from the immature adolescent who committed this crime. Numerous experts who have evaluated Michael opine that he is an “exemplary prisoner” and an individual who has made an “excellent institutional adjustment.”<sup>23</sup> He currently paints murals within prison, including for those individuals confined within the Special Needs Unit.

Dr. Stephen Peterson, a psychiatrist who was able to evaluate Michael three separate times over his twenty year incarceration, noted that Michael “continues to develop more adaptive thinking patterns . . . this improved thinking is demonstrated by his consistently improved behavior, artistic endeavors, and no evidence of ongoing violent behavior in the correctional environment.”<sup>24</sup> Dr. Peterson noted the contrast between Michael’s immaturity in 2003 and his current adaptation as a more mature adult in 2022, opining that Michael at 41 years old “has made a successful transition to nonviolent living within the Missouri DOC. . . . He has learned self-control, has empathy for others, shows empathy for the men he killed, is no longer impulsive, and is seeking to make the best life he can in his current situation.”<sup>25</sup>

### *Why Clemency is the Only Legal Avenue Available for Michael Tisius*

Executive clemency is a unique part of our American legal tradition that allows for the presentation of evidence that the courts are unable to meaningfully consider. The U.S. Supreme Court has described executive clemency as the “fail-safe in our criminal justice system.”<sup>26</sup> This is especially true in Missouri, where executive clemency is the only formally authorized means for a criminal defendant to seek relief based on newly discovered evidence after their trial proceedings have concluded.<sup>27</sup>

In the last three decades, there have been overwhelming legal, scientific, and societal changes regarding how we consider late adolescents. This new scientific evidence concerning brain development was unavailable to the U.S. Supreme Court nearly 20 years ago when it chose a

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<sup>20</sup> Pet. For Writ of Habeas Corpus, *supra* note 7, at 31.

<sup>21</sup> *Id.* at 32.

<sup>22</sup> See *Roper*, 543 U.S. at 569 (finding “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”) (citation omitted).

<sup>23</sup> Pet. For Writ of Habeas Corpus, *supra* note 7, at 7, 9.

<sup>24</sup> Diagnostic Interview Rep., *supra* note 9, at 21.

<sup>25</sup> *Id.* at 23.

<sup>26</sup> *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

<sup>27</sup> *State v. Gray*, 24 S.W.3d 204, 208-09 (Mo. Ct. App. 2000).

bright-line cut-off in *Roper*.<sup>28</sup> Nor was it available to Michael during his 2010 trial or his 2012 post-conviction proceedings.

Similarly, the evidence of Michael's unique growth has largely been unavailable to the courts who have heard his case up to this point. Dr. Peterson evaluated Michael over the course of multiple decades and was able to give his expert opinion about Michael's growth and change from childhood to adulthood based on his direct observations. This is unusually compelling evidence, particularly alongside the testimony of additional experts who have examined Michael and reached the same conclusions. Unfortunately, there is no opportunity for Michael to present this to the courts. The evidence necessarily developed over the passage of many years and procedural rules prevent the introduction of this evidence in a new petition for relief.

The clemency process is the only meaningful avenue that exists for proper consideration to be given to how Michael's age and immaturity at the time of the offense and subsequent growth impact the appropriateness of his death sentence. Clemency provides an opportunity to review the offender as a whole person, considering his entire life—including evidence of change that comes too late for the courts. Michael's unique vulnerabilities as a traumatized late adolescent and his rehabilitation over the last two decades are a stark example of the disproportionality of the death penalty for murders committed by a 19-year-old. As the decision maker in Missouri, we urge you to exercise your clemency powers and commute Michael's sentence.

Sincerely,



Deborah Enix-Ross

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<sup>28</sup> See APA Resolution, *supra* note 14, at 1-2 (“much more extensive research has been conducted in developmental science in the years since several of these notable policy changes were enacted, and since the *Roper* decision, that significantly adds to the quantity and quality of existing scientific knowledge.”).