

**Summary of SC91209, *State of Missouri v. Michael Andrew Tisius***

Appeal from the Boone County circuit court, Judge Gary M. Oxenhandler  
Argued and submitted Dec. 1, 2011; opinion issued March 6, 2012

**Attorneys:** Tisius was represented by Jeannie Willibey of the public defender's office in Kansas City, (816) 889-7699; and the state was represented by Richard Starnes of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A man convicted of murder appeals his death sentence. In a unanimous decision written by Judge George W. Draper III, the Supreme Court of Missouri affirms the sentence. The trial court did not abuse its discretion or plainly err in admitting into evidence a certified court record showing a prior conviction of the defendant; in overruling the man's objections to the state's cross-examination of his expert witness; in failing to intercede, on its own motion, in response to certain comments the state made during closing argument; in submitting to the jury the verdict mechanics instructions or the instructions regarding mitigating evidence; or in not striking down the information charging the man with murder. Further, in its independent proportionality review, this Court concludes the imposition of the death penalty against the man meets the statutory requirements and is not disproportionate to sentences given in similar cases.

**Facts:** Michael Tisius was convicted of two counts of first-degree murder for killing two officers while trying to free another inmate from a county jail. This Court affirmed his convictions and sentence in his direct appeal, *State v. Tisius*, 92 S.W.3d 751 (Mo. banc 2002), but later affirmed, during the post-conviction process, a circuit court's judgment affirming the convictions but setting aside the sentences and ordering a new sentence trial, *Tisius v. State*, 183 S.W.3d 207 (Mo. banc 2006). After the penalty phase retrial, Tisius again was sentenced to death. He appeals.

**AFFIRMED.**

**Court en banc holds:** (1) The trial court did not abuse its discretion or plainly err in admitting into evidence a certified court record of a criminal complaint showing Tisius' prior conviction for possessing a prohibited item in the department of corrections. As a certified record of a judicial proceeding, the complaint was admissible as a recognized hearsay exception. There was no manifest injustice in admission of the complaint. Had Tisius wanted to exercise his Sixth Amendment right to confront the evidence against him in the complaint, he would have needed not to plead guilty to the charge. Tisius pleaded guilty to the complaint the state admitted into evidence, and this evidence was relevant to his character.

(2) The trial court did not abuse its discretion or plainly err in overruling Tisius' objections to the state's cross-examination of his expert witness. Because Tisius did not object to the state's questions regarding the foundation of the book or study about which the expert testified, he is not entitled to plain error review for his challenges to the foundation of either the book or study. As

to the cross-examination of the expert regarding the relevance of the book and his diagnosis, the court did not abuse its discretion because this evidence was admissible. The questions to which Tisius objected were both logically and legally relevant and were not prejudicial. The court also did not plainly err in allowing the state to cross-examine Tisius' expert about whether Tisius pleaded guilty to the murder charges for which the jury was being asked to sentence him. Had the Court not reversed and remanded the penalty phase for a new trial, one jury would have determined Tisius' guilt or innocence and then determined the sentence.

(3) The trial court did not plainly err by failing to intercede, on its own motion, regarding certain comments made during the state's closing argument that Tisius claims were improper and resulted in manifest injustice. The state's commentary that Tisius did not have a right to ask for mercy was an attempt to sway the jury that it should reject Tisius' appeal for mercy; it did not improperly inform the jury that the jury could not extend mercy to Tisius. The state's argument about Tisius' potential future dangerousness to the community did not suggest or imply that the jurors would be directly responsible or held accountable if Tisius harmed anyone else in the future. Certain comments the state made about the victims' families were not improper. One comment was a challenge to mitigating evidence Tisius had presented, not an argument that the jury should disregard the evidence. The other, that the death penalty would be an answer to the plea from the families of the victims and the county, did not amount to manifest injustice.

(4) The trial court did not plainly err in submitting the verdict mechanics instructions. This Court previously has considered and rejected arguments that these instructions prevented the jury from returning a life sentence if it believed the mitigating circumstances outweighed the aggravating circumstances. This Court declines to revisit these prior opinions or overturn these holdings.

(5) The trial court did not err in submitting the mitigating circumstances instructions. Tisius' claim that these instructions improperly shift the burden of proof from the state to the defense has been rejected by this Court and the United States Supreme Court.

(6) The trial court did not err in not quashing (striking down) the information charging him with first-degree murder for not charging him with an aggravated charge and for not pleading any aggravating circumstances. Tisius raised this issue in his first appeal, when it was rejected; he may not relitigate the issue again now. Further, this Court repeatedly has rejected such arguments. The notice of aggravated circumstances under section 565.005.1, RSMo, is sufficient to notify a defendant that he or she is charged with a capital offense.

(7) In its independent review of the sentence here, the Court concludes the imposition of the death penalty against Tisius meets the statutory requirements. It is not the result of passion, prejudice or other arbitrary factor; sufficient evidence supports the jury's finding of aggravating circumstances; and imposition of the death penalty here is not disproportionate in consideration of other similar cases in which the death penalty was submitted to the jury, including those resulting in a sentence of life in prison without the possibility of probation or parole.