No. 22-6091

In the Supreme Court of the United States

Brian Dorsey, Petitioner

v.

David Vandergriff, Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Missouri's Brief in Opposition

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Capital Case

Questions Presented

1. Should this Court hold and instruct the Court of Appeals that a certificate-of-appealability decision made by an administrative panel binds the merits panel?

2. Should this Court overrule *Strickland v. Washington*, 466 U.S. 668 (1984), and allow prisoners to establish ineffective assistance of counsel *without* showing prejudice?

3. After a district court has determined that the evidence before it is not enough to grant habeas corpus relief, must the district court hold an evidentiary hearing to rehear the same evidence?

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Opinions Below

The opinion of the court of appeals is published at *Dorsey v. Vandergriff*, 30 F.4th 752 (8th Cir. 2022), and is contained in Petitioner's appendix A. Pet. App. A.[1] The district court's decision is not published in the Federal Supplement but is available on Westlaw at *Dorsey v. Steele*, 2019 WL4740518 (W.D. Mo. Sept. 27, 2019), and is included as Petitioner's Appendix C. Pet. App. C.

Jurisdiction

The Eighth Circuit's judgment denying habeas relief was entered on April 7, 2022. Pet. App. A. A petition for rehearing and rehearing *en banc* was denied on June 16, 2022. Pet. App. B; *Dorsey v. Vandergriff*, 2022 WL2180216 (8th Cir. June 16, 2022). Justice Kavanaugh granted Dorsey an extension of time and ordered that his petition be filed on or before Sunday, November 13, 2022. The petition for writ of certiorari was filed on November 14, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statement

1. In 2006, just two days before Christmas, Sarah Bonnie (Dorsey's cousin) started the day by baking cookies and making a gingerbread house with her four-year

[1] Petitioner has filed three separate electronic documents as his appendix. The first document contains both "Appendix A" and "Appendix B". Respondent refers to Petitioner's second and third electronic documents as Pet. App. C and Pet. App. D, respectively.

old daughter, Jade, and Sarah's mother.[2] Tr. 539.[3] Jade was to spend the night with her grandparents. Tr. 540. After they finished baking cookies and making the gingerbread house, Jade left with Sarah's mother. Tr. 540. Between 3:00 p.m. and 6:30 p.m., Dorsey asked Sarah, his cousin, for money and help because Dorsey owed money to drug dealers. Tr. 580; Tr. 596–97. Ben, Sarah's husband, agreed to help Dorsey confront some drug dealers who were at Dorsey's apartment without permission. Tr. 596. Sarah, Ben, and their friend went to Dorsey's apartment to help Dorsey. Id. Sarah and Ben stayed until the drug dealers left and then took Dorsey into their home to protect him. Tr. 581. Before leaving the apartment, Sarah told Dorsey to gather Dorsey's dirty clothes and that Sarah would wash them for him. Tr. 581–82. When Jade learned that Dorsey intended to spend the night at the Bonnies' home, Jade wanted to come home so she could see Dorsey. Tr. 540. Sarah's mother brought Jade back home and then stayed for a while to visit. Tr. 542. Other friends and family members joined in. Tr. 540; Tr. 564–65.

The women visited inside the house while the men, including Dorsey, went to the "shop" to drink beer and shoot pool. Tr. 542; Tr. 565–66; Tr. 598–99. Before the men could shoot pool, they had to clean off the pool table. Tr. 566; Tr. 599–600. Ben removed a single-shot 20-gauge shotgun from the pool table. Tr. 599–601. The shotgun was Ben's first gun, a gift from his father. Tr. 799. The shotgun was

[2] The Warden refers to Sarah Bonnie and Ben Bonnie by their first names only for the sake of clarity. The Warden refers to Jade by her first name in order to help protect her identity.

[3] The Warden will provide a copy of the trial transcript upon request.

unloaded. Tr. 600. Eventually, all the houseguests left, leaving Sarah, Ben, Jade, and Dorsey in the house.

After everyone went to bed, Dorsey retrieved the shotgun and shot Sarah in the lower right jaw. Tr. 717; Tr. 961. The force of the shotgun blast was so powerful that it separated Sarah's brain from her spinal cord, doing "massive damage to [her] brain." Tr. 717. It was a "devastating injury." Tr. 718. Dorsey shot Ben in the head with the shotgun as well. Tr. 719; Tr. 961. Ben's gunshot wound had gunpowder in it, proving that the wound was a "close-contact wound" where the gun was "pressed very close" to Ben's body. Tr. 719. Dorsey then raped Sarah. Tr. 847–48.

After murdering Sarah and Ben and then raping Sarah, Dorsey stole personal property, such as Sarah's old cell phone, Sarah and Ben's jewelry, two firearms, and Jade's copy of Bambi II. Tr. 558–59; 577, 797; 742, 751; 559. Dorsey used these items to try to repay his drug debt. Tr. 605–610. Dorsey also stole Sarah's car. Tr. 534; Tr. 539; Tr. 807. Dorsey could not take his own car because Ben, a mechanic, had been repairing Dorsey's car at Ben's expense, but the repairs were not finished. Id.

On Christmas Eve, Sarah's mother received a phone call because Sarah, Ben, and Jade had not yet arrived for the Bonnie family gathering. Tr. 543–44. Sarah's mother and father went to the Bonnies' home to check on them. Tr. 544. When they entered the house, they found Jade sitting on the couch drinking chocolate milk and eating chips. Tr. 545. Jade, who jumped up and was glad to see her grandparents, said that she could not wake up Sarah. Tr. 535; Tr. 545. After knocking and calling

for Sarah and Ben, Sarah's father forced the bedroom door open and they discovered the bodies. Tr. 545–46.

When law enforcement entered the bedroom, they noticed the smell of bleach coming from Sarah's body. Tr. 672–73. Sarah's mid-section and groin had a "pour pattern," which was revealed under an alternative light source. Tr. 676; Tr. 687. Sarah's body was examined and a rape kit was performed. Tr. 724–25. Swabs were collected for DNA testing. Tr. 836. Upon examination, those vaginal swabs screened positive for the presence of semen. Tr. 839. The crime lab could not confirm that semen was present because of "chemical insults," which included "soap, detergent, cleansers and so forth." Tr. 840–41. Sperm cells were detected. Tr. 841. Dorsey could not be eliminated as the contributor of the DNA found on the vaginal swabs. Tr. 847.

When Dorsey was interviewed by police officers, he confessed to the murders, telling officers they had the "right guy concerning the death of the Bonnies." Tr. 764. Dorsey also had Sarah's social security card in his back pocket. Tr. 759.

After the murder, Sarah's parents began raising Jade. Tr. 552–53. Sarah's mother had to retire from working. *Id*. Jade began attending counseling. *Id*. Sarah's mother described Jade's "nightmares and crying" as "just horrible." *Id*.

Dorsey's experienced trial counsels advised him to plead guilty because, in one counsel's view, "the evidence of [Dorsey's] guilt was overwhelming" and that there was "a substantial chance of losing on murder first degree" and "a very substantial chance that [Dorsey] would receive the death penalty." Dist. Dkt. 29-11 at 580. Dorsey agreed with counsels' advice and pleaded guilty.

Dorsey then received jury sentencing, where his counsels determined the best strategy was for Dorsey to accept responsibility, for Dorsey to try to get credit for that acceptance from the jury, and for Dorsey to show to the jury that he "had some humanity in him." *Id.* at 581. One trial counsel hoped to show to the jury that this murder was "an aberration for [Dorsey]; that [Dorsey] had a history of being a good person, that [Dorsey] had some things in him that a jury could connect to." *Id.* at 587. In that trial counsel's experience, juries that returned life verdicts did so because of that kind of evidence. *Id.* Dorsey's other trial counsel explained that the trial strategy was "to present [Dorsey] as best we could, as sorry, remorseful, deeply upset." *Id.* at 723. At the sentencing, the prosecutor described trial counsel's closing argument as "a very eloquent plea for mercy." Tr. 1029.

Despite trial counsels' best efforts, the jury returned verdicts of death. Tr. 1042–43. The jury found seven aggravating circumstances, including that the murders were outrageously and wantonly vile, horrible, and inhuman, the murders were committed so Dorsey could steal, and that Dorsey raped Sarah. Tr. 1042–43.

2. After his conviction and sentences of death, Dorsey appealed, and the Missouri Supreme Court affirmed Dorsey's convictions and sentences. *State v. Dorsey*, 318 S.W.3d 648 (Mo. 2010). This Court denied certiorari review. *Dorsey v. Missouri*, 562 U.S. 1067 (2010). Dorsey then returned to state court and sought post-conviction relief, which the trial court denied. The Missouri Supreme Court affirmed the denial of post-conviction relief. *Dorsey v. State*, 448 S.W.3d 276 (Mo. 2014). Then Dorsey petitioned for federal habeas review, and the district court denied Dorsey's claims

without granting a certificate of appealability. Pet. App. C. An administrative panel of the Eighth Circuit granted a certificate of appealability, but after briefing and argument, the merits panel determined that Dorsey was not entitled to habeas relief. Pet. App. A.

Summary of the Argument

This Court should refuse to grant certiorari review to Dorsey's petition because his petition is an exceptionally poor vehicle and Dorsey has not identified any of the traditional reasons for this Court's review.

Aside from these threshold defects, Dorsey's petition presents three meritless claims. Dorsey's first claim—that the Eighth Circuit's merits panel could not deny him relief because an administrative panel decided to issue him a certificate of appealability—asks this Court to upend nearly thirty years of lower court practice and procedure. In Dorsey's view, this Court's precedents mean that if an administrative panel grants a certificate of appealability on a *Martinez* claim, then the later merits panel *must* grant habeas relief because the earlier administrative panel has already determined that the claims are "substantial."[4] But that conflates the role of an administrative panel, who is tasked with determining whether an appeal should proceed and not the merits of the appeal. Dorsey's view would render superfluous the careful task of weighing and hearing the merits of a habeas claim by the Court of Appeals. The common practice the Eighth Circuit followed does not violate any constitutional provision, statute, or case law and does not present any issue for this Court's review.

Dorsey's second claim—that the Eighth Circuit implemented a *per se* rule that prison-adjustment evidence can never overcome the facts surrounding the offense—misconstrues the record below of a particularly fact-bound claim. The Eighth Circuit

[4] *Martinez v. Ryan*, 566 U.S. 1 (2012).

merely held that, in the especially aggravated circumstances of Dorsey's double murder and rape of his own family members, his equivocal prison-adjustment evidence would not satisfy *Strickland*'s well-settled prejudice requirement.[5]

Dorsey's third claim—that he should have received an evidentiary hearing on post-conviction relief counsels' alleged ineffectiveness—misses the mark. Just last term, this Court expressed grave doubt that AEDPA would allow for an evidentiary hearing of any kind unless the petitioner can satisfy 28 U.S.C. § 2254(e)(2). And AEDPA is an absolute bar to Dorsey's efforts to place more sentencing evidence before the district court because Dorsey pleaded guilty to the offenses.

The bottom line is that Dorsey's petition suffers from procedural defects, meets none of the traditional certiorari criteria, and the decision below is correct. This Court should deny certiorari review.

Argument

I. This case is an exceptionally poor vehicle for addressing the questions presented.

Dorsey's petition arrives at this Court one day beyond the statutory deadline, devoid of the necessary steps to present a live issue, and teeming with evidence of Dorsey's delay. As a result, this petition presents an exceptionally poor vehicle for the Court to consider the questions presented.

A. Dorsey filed his petition one day beyond the statutory deadline.

[5] *Strickland v. Washington*, 466 U.S. 668 (1984).

Dorsey filed his petition 151 days after the Eighth Circuit denied rehearing *en banc*, and thus one day after the statutory deadline and Justice Kavanaugh's order allowed. Johnson requested a sixty-day extension of time, and requested that Justice Kavanaugh order the petition to be filed no later than November 13, 2022. Justice Kavanaugh, following the commands of 28 U.S.C. § 2101(c), granted Dorsey sixty additional days—not sixty-one—and ordered that the petition be filed no later than November 13, 2022. Dorsey did not comply, and instead mailed his petition on the 151st day: November 14, 2022. Pet. 1–2. Because § 2101(c) is "mandatory" and "jurisdictional," if the Court grants certiorari, then it must consider the interplay between its rules and § 2101(c). *See Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) ("We have no authority to extend the period for filing except as Congress permits.").

B. Dorsey's pleas of guilty to the two murders prevent any reasonable factfinder from finding him not guilty of the underlying offenses as 28 U.S.C. § 2254(e)(2) requires.

Dorsey's complaints all relate to his argument that his trial counsels provided ineffective assistance of counsel at his capital sentencing. Pet. i. But Dorsey cannot receive an evidentiary hearing on any sentencing claim. AEDPA provides that to be entitled to a hearing, a prisoner *must* show that "the facts underlying the claim 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*." 28 U.S.C. § 2254(e)(2)(B) (emphasis added). Dorsey cannot satisfy that requirement because his claims extend only to trial counsels' performance at the sentencing phase.

Dorsey may argue that he can avoid the statute's plain text by relying on the equitable rule in *Sawyer v. Whitley*, 505 U.S. 333 (1992), which extended gateway actual innocence claims to the sentencing phase of capital cases. *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). But *Sawyer* provides no assistance to Dorsey because *Sawyer* requires a showing that "no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Id.* Dorsey's complaint that his trial attorneys were ineffective at the sentencing phase relates *only* to their presentation of mitigation evidence. Pet. 20–24. Between both counts of murder, a Missouri jury found seven total statutory aggravating circumstances beyond a reasonable doubt: that each murder was committed while Dorsey was committing another murder, that each murder was committed to steal money, that each murder was outrageously and wantonly vile, horrible, and inhuman, and that Dorsey murdered Sarah while raping her. Tr. 1042–43. Dorsey does not argue that his trial attorneys were ineffective for failing to challenge the aggravating circumstances. So even if *Sawyer* applies to § 2254(e)(2)(B), Dorsey still could not receive relief because he does not even try to satisfy *Sawyer*'s exception.[6]

Taken together, this makes the petition a poor vehicle to consider Dorsey's complaints about the Eighth Circuit's opinion or his trial counsels' performance. Just last term, this Court declined to answer whether § 2254(e)(2) applied to only a hearing "on the claim" or whether it applied to any kind of evidentiary hearing held by a

[6] This Court's holding in *Shinn v. Ramirez* strongly suggests that *Sawyer* is not applicable to § 2254(e) because *Sawyer* is an equitable rule. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1736 (2022).

district court. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1738 (2022). Dorsey's petition is an exceptionally poor vehicle to answer the question held open by *Shinn* because Dorsey has never claimed he is actually innocent.[7] Nor can he; Dorsey pleaded guilty.

C. Dorsey's history of delay makes this case a poor vehicle.

Dorsey has unnecessarily delayed this capital litigation by often requesting extensions of time and stays. Because the State and crime victims have an important interest in the timely resolution of capital cases, Dorsey's history of delay makes this case a poor vehicle.

In the district court, Dorsey received 671 days to file his traverse—including time spent litigating a meritless instructional claim in state court. *Dorsey v. Steele*, 4:15-CV-8000-RK (W.D. Mo.). And the United States Court of Appeals for the Eighth Circuit found this claim did not merit a certificate of appealability. Many of Dorsey's requests to delay filing his traverse sprang from Dorsey's desire to press new, meritless claims and search for new evidence, even though the State had responded to his habeas petition. *Id.*

Dorsey's delay continued into the Eighth Circuit. At the Eighth Circuit, Dorsey requested 143 days of extensions to file his application for a certificate of appealability, to file his opening brief, to file his reply brief, and to move for rehearing and rehearing *en banc*. *Dorsey v. Vandergriff*, 20-2099 (8th Cir.). When the State filed

[7] On top of all of this, there can be no serious argument that Dorsey—who, two days before Christmas, murdered his cousin-in-law and raped and murdered his own cousin two days after she took Dorsey into her home—would ever be entitled to discretionary habeas relief "as law and justice require." *See, e.g., Crawford v. Cain*, 55 F.4th 981, 994 (5th Cir. 2022) (citing 28 U.S.C. § 2243).

a request to expedite the appeal, Dorsey opposed the motion because, in Dorsey's view, the case was no different than any other civil or criminal matter before the court. And Dorsey received another 60 days to petition for certiorari review in this Court, although Dorsey ultimately took one additional day to file his petition and failed to comply with this Court's order. *See* Point I, *supra*.

In total, Dorsey has received extensions totaling 875 days to litigate his meritless case in federal court. Federal review of Dorsey's death sentences began in 2015—more than seven years ago. States, and more importantly crime victims, have "an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)); 18 U.S.C. § 3771(a)(7). Federal review of a sentence should not last for more than seven years. *See, e.g., Rust v. Clarke*, 960 F.2d 72, 73 (8th Cir. 1992). Indeed, more than 30 years ago, this Court "pointed out the necessity of giving priority to capital habeas cases because of the interests of the petitioner, who may be unlawfully kept on death row, but also the State, whose interests in finality deserve the concern and deference of the federal courts." *Id*. (citing *Delo v. Stokes*, 495 U.S. 320 (1990)).

Delay, present here and too common in capital habeas cases, makes this case a poor vehicle to consider the questions presented. Starting at least thirty years ago, and as recently as three terms ago, this Court has expressed grave concerns with delays in capital litigation. Granting certiorari review here encourages rather than dissuades such delay.

Even if Dorsey presented important legal questions, Dorsey has unnecessarily delayed his case for years, failed to file a timely petition in this Court, and now seeks further review only to further delay. Dorsey's has not shown, and cannot show, that law and justice require vacating his sentences. This Court should decline to review Dorsey's claims.

II. Dorsey does not identify any traditional reasons for review and none are present.

Dorsey's petition fails to show that any traditional factor for granting certiorari weighs in his favor, instead only asking the Court to review the case for mere error correction. Pet. 16–28. No split between a circuit court and any other circuit court or state court of last resort exists. Rule 10(a). The Eighth Circuit has not departed from the accepted and usual course of judicial proceedings. Rule 10(b). And the decision below does not conflict with any of this Court's cases. Rule 10(c). Dorsey attempts to manufacture a conflict between the decision below and *Wiggins v. Smith*, 539 U.S. 510 (2003), by stating that the Eighth Circuit did not reweigh the evidence in aggravation against all the evidence in mitigation. Pet. 24–25. But that is exactly what the Eighth Circuit did. *Dorsey*, 30 F.4th at 760 (Dorsey did not prove that "evidence of Dorsey's adjustment to incarceration would have tipped the balance in favor of mitigation in the jury's view . . .").

Rather than identify a circuit split or a true conflict, Dorsey argues that the decision below is wrong. Pet. 18–20, 24–25. But this Court's certiorari review is not typically an avenue for mere error correction. *Ross v. Moffitt*, 417 U.S. 600, 616–17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors

other than the perceived correctness of the judgment we are asked to review."). Besides, the decision below was correct. *See* Point III, *infra*.

Absent any traditional reason for granting certiorari review, Dorsey is left to argue his belief that an administrative panel's decision to grant a certificate of appealability must bind the merits panel, and his belief that the decision below erred in various respects. Dorsey is wrong as explained in Point III below. Taking his failure to meet any of Rule 10's criteria together with Dorsey's erroneous belief that the decision below is wrong, this Court can reach only one conclusion: the petition is not worthy of certiorari review.

III. The decision below is correct and Dorsey's claims are meritless.

A. The law-of-the-case doctrine does not allow an administrative panel to bind a merits panel.

When Dorsey petitioned for a certificate of appealability, he told the Eighth Circuit administrative panel that it should issue a certificate of appealability because "reasonable jurists" could disagree so that the Eighth Circuit merits panel could give "the issue [its] full consideration . . . ." App. for Cert. of Appealability, *Dorsey v. Vandergriff*, at 20, 20-2099 (8th Cir.) (quoting *Rogers v. Mayes*, Fed.Appx. 984, 988 (6th Cir. 2020)). In fact, Dorsey argued at least 19 times in his application that the certificate should issue because "reasonable jurists could debate (or agree that) the Petition for Writ of Habeas Corpus should have been resolved differently." *Id.* at 33; see also *id.* at 1, 7, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 27, 28, 29, 31.

Inherent in this argument is the notion that a court considering whether to grant a certificate considers merely a decision about whether an appeal will be

allowed, not a decision about the merits of the appeal. *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003). What is more, this Court has held that when a court reviews the merits *before* issuing a certificate, then the court has exceeded its jurisdiction. *Id*. at 336 (". . . until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.").

Against this Court's cases and his own prior arguments, Dorsey meagerly contends that the law-of-the-case doctrine means the merits panel is bound by the administrative panel's decision. Pet. 18–20. Dorsey is estopped from making this argument because he took a contrary position when requesting a certificate and he prevailed. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

The argument is also meritless. The Eighth Circuit has long held that the law-of-the-case doctrine does not apply to administrative panel decisions that do not "provide sufficient directness and clarity to establish the settled expectations of the parties necessary for the subsequent application of the law of the case doctrine." *Nyffeler Const., Inc. v. Secretary of Lab.*, 760 F.3d 837, 842 (8th Cir. 2014) (internal quotations omitted). There is broad-based agreement among the other circuits. *Owens v. Stirling*, 967 F.3d 396, 426 (4th Cir. 2020) (rejecting law-of-the-case argument in the *Martinez* context as "antithetical" to this Court's cases); *Keahey v. Marquis*, 978 F.3d 474, 481 (6th Cir. 2020) ("Law-of-the-case doctrine "does not apply to a certificate of appealability . . . ."); *Phelps v. Alameda*, 366 F.3d 722, 728 n.6 (9th Cir. 2004); *Homans v. City of Albuquerque*, 366 F.3d 900, 905 (10th Cir. 2004); *Jones v. United States*, 224 F.3d 1251, 1256 (11th Cir. 2000) (citing *Henry v. Department of Corr.*, 197

F.3d 1361, 1366 n.2 (11th Cir. 1999)). And the courts of appeals have found that the law-of-the-case doctrine does not prevent the merits panel from expanding the certificate beyond that granted by the administrative panel. *See, e.g., Villot v. Varner*, 373 F.3d 327, 337 n.13 (3rd Cir. 2004) (citing *Hiivala v. Wood*, 195 F.3d 1098, 1102–03 (9th Cir. 1999)).

Elsewhere, Dorsey contends that no other circuit has found a *Martinez* claim insubstantial after granting a certificate of appealability. Pet. 19. But the Fourth Circuit did just that three times in 2020. *Owens*, 967 F.3d at 426; *Sigmon v. Stirling*, 956 F.3d 183, 204 (4th Cir. 2020); *Moore v. Stirling*, 952 F.3d 174, 181, 185–86 (4th Cir. 2020).

In short, neither Dorsey nor the State have found authority supporting Dorsey's argument that an initial hearing panel—without full briefing, a complete record, or oral argument—can bind a later merits panel who hears the appeal in the normal fashion. The COA standard looks to whether a claim is debatable. Here, the hearing panel found that Dorsey's claim was debatable, and the merits panel settled that debate. This Court's intervention is not warranted.

B. Dorsey's *Strickland* claim is meritless.

Dorsey next complains that the Eighth Circuit erred when it found that his *Strickland* claim was not substantial because, according to Dorsey, the Eighth Circuit improperly looked at the overwhelming evidence in aggravation. Pet. 18–25. This claim is little more than a request for error correction, which is not a basis for certiorari. At any rate, there is no error; the decision below is correct.

Dorsey simply cannot satisfy either prong of *Strickland*. Dorsey's trial counsel realized that "some of the aggravating factors were not really defendable. . . ." Dist. Dkt. 29-11 at 584. So counsel determined that, in his experience, the best strategy would be to show the jury that the murders and rape "was an aberration for Dorsey; that he had a history of being a good person, and that he had some things in him that a jury could connect to."[8] Dist. Dkt. 29-11 at 587. Dorsey spends time arguing that "the record itself reveals counsels' choices." Pet. 21–24. But all Dorsey really does is repackage the same arguments that were presented to, and rejected by, the state courts, the district court, and the Eighth Circuit.[9] *Id.*

At bottom, the Eighth Circuit correctly determined that no reasonable jurist could disagree with the state courts' conclusion that Dorsey's counsels were not ineffective. *Dorsey*, 30 F.4th at 757–58. Dorsey's crimes were horrible: he raped and murdered his cousin, he murdered his cousin-in-law, and he orphaned their young daughter. *Id*. Dorsey did all of this two days before Christmas and after Dorsey's victims rescued Dorsey from drug dealers, took him into their home, and worked to help him get back on his feet. *Id*. Presented with these awful events, trial counsel

[8] In his petition, Dorsey implies that the Eighth Circuit originated this language. Pet. 20. Not so. The Eighth Circuit's opinion quoted trial counsel to explain trial counsel's reasoning. *Dorsey*, 30 F.4th at 755. The Eighth Circuit agreed with those explanations, finding that "no reasonable jurist" could find that Dorsey met either prong of *Strickland*. *Id*. at 757–58.

[9] Unlike in *Wiggins*, this Court may not consider the prejudice prong analysis *de novo* because the state courts considered all of Dorsey's arguments other than those relating to prison-adjustment, and found Dorsey did not suffer prejudice. *Dorsey v. State*, 448 S.W.3d 276, 293–296 (Mo. 2014). This Court is, therefore, constrained by AEDPA. *See Wiggins*, 539 U.S. at 535.

reasonably determined that the best strategy would be for Dorsey to plead guilty, present some mitigation evidence, and beg for mercy. Although that strategy failed, that does not mean it was unreasonable. *Strickland*, 466 U.S. at 689.

Dorsey further complains that the Eighth Circuit only reviewed the weight of the evidence in aggravation. Pet. 24–25. But, as Dorsey admits, this Court's cases require a lower court to compare the evidence in aggravation against all the evidence in mitigation. *Wiggins*, 539 U.S. at 535. That is what the Eighth Circuit did, writing, "No reasonable jurist could believe that or find it debatable whether there is a reasonable probability that evidence of Dorsey's adjustment to incarceration would have tipped the balance in favor of mitigation in the jury's view . . ." *Dorsey*, 30 F.4th at 759. The Eighth Circuit found further support for its conclusion because Dorsey's proffered evidence was "not unequivocally positive." *Id*. In other words, Dorsey's middling adjustment to prison—including findings that Dorsey had not "expressed need for self-improvement," that Dorsey had "defied authority," that Dorsey had not "accepted responsibility for his situation," and that Dorsey was acting "self-centered"—would not have overcome the overwhelming evidence in aggravation. *Dorsey*, 30 F.4th at 754.

All in all, Dorsey's argument that the court below erred in determining that his trial counsel were not ineffective cannot withstand scrutiny. Even if the court erred, and it did not, the error does not justify certiorari review. This Court is not a court of error correction. Dorsey's trial counsel weighed all the circumstances affecting the case, and then developed and carried out the best strategy they could

despite the abundance of aggravating factors. Given Dorsey's abhorrent actions, any reasonable jury would find that Dorsey deserved the death penalty despite his trial counsels' best efforts, as happened here.

C. AEDPA's plain text prevented the lower courts from ordering an evidentiary hearing.

Dorsey presents one last-ditch argument for certiorari review: that AEDPA does not prohibit federal courts from holding evidentiary hearings on *Martinez* claims. Pet. 26–28. Dorsey is plainly wrong for two reasons.

First, as described in point I.B., *supra*, the plain text of § 2254(e) prohibits Dorsey from receiving a hearing on any claim unless Dorsey has presented evidence "to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [Dorsey] guilty of the underlying offense." § 2254(e)(2). But Dorsey confessed to the police, he pleaded guilty, he testified at sentencing that he committed the crimes,[10] he has never challenged the guilty plea, and he does not challenge his guilty plea now. Dorsey can never satisfy § 2254(e)(2) given that he does not dispute that he murdered his cousin-in-law and raped and murdered his cousin.

And *second*, § 2254(e)(2) prohibits holding an evidentiary hearing "on the claim" by its plain text. For his part, Dorsey contends that "nothing [in the statute] could reasonably be construed to prohibit a federal court from taking evidence on" a *Martinez* claim if that evidence was presented to the state court. Pet. 27. Assuming

[10] Tr. 894.

that is true, Dorsey never explains *why* an evidentiary hearing would be necessary when the evidence is already in the record.[11] Dorsey cannot offer an explanation because his true aim for an evidentiary hearing is to offer *additional* evidence. And as Missouri and other amici pointed out, that would allow Dorsey to "sidestep AEDPA's evidentiary bar in 28 U.S.C. § 2254(e)(2)." Br. for the States of Texas, et al., at 2, *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022) (No. 20-1009), 2021 WL 3172094 at *2. *Martinez* cannot override AEPDA because *Martinez* represents a judge-made exception to the judge-made rule of procedural default. *Martinez*, 566 U.S. 1 at 9–10. Procedural default merely prevents a claim from being heard on the merits. *Coleman v. Thompson*, 501 U.S. 722, 757 (1991). And *Martinez* merely provides a way for petitioners to bypass procedural default and have their claims heard on the merits. *Martinez*, 566 U.S. 1 at 9.

None of these decisions supersede the plain text of § 2254(e), which proscribes all evidentiary hearings in a habeas case *unless* the statutory requirements are satisfied. Dorsey asks for an evidentiary hearing on his *Martinez* claim. AEDPA forbade the district court from holding an evidentiary hearing unless Dorsey presented a claim based on a new rule of constitutional law made retroactive, or unless Dorsey presented a factual predicate that could not have been previously discovered through the exercise of due diligence. § 2254(e)(2). He failed to do either.

[11] Dorsey's petition plainly requests an *evidentiary* hearing. Pet. 28. He must make that request because he has already received a hearing—oral argument—on the procedural defaults in his petition. Dist. Dkt. 92–93; Pet. 4.

Thus, there is "good reason to doubt" Dorsey's claim that AEPDA's plain text does not bar a so-called "*Martinez* hearing." *Shinn*, 142 S. Ct. at 1738.

Dorsey also fails to explain how he is injured by this result. After all, if Dorsey is correct that all the evidence is already in the state-court record—Pet. 27—then Dorsey has suffered no prejudice. The district court considered the information in the record and found that it did not provide cause to excuse the procedural default. Pet. App. C at 49–50, 50 n.21. There is no explanation other than Dorsey's dissatisfaction with the result.

Dorsey's final collection of arguments fair no better than the balance of his petition. Dorsey's argument that the administrative panel binds a later merits panel is unsupported by law or custom. Dorsey's contention that his trial counsel were ineffective is wrong and contradicted by the considered judgment of four courts. Finally, Dorsey's statutory interpretation argument asks this Court to cast aside the plain text of AEDPA in favor of granting Dorsey a hearing the district court already considered and rejected. Dorsey's arguments fail, and the petition does not merit this Court's certiorari review.

Conclusion

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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