

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**

PETITIONER'S REPLY BRIEF

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ARGUMENT

Respondent alleges that Brian Dorsey’s petition for writ of certiorari was untimely filed. The record belies this allegation. Mr. Dorsey timely filed a motion for extension of time within which to file his petition for certiorari on September 2, 2022. On September 7, 2022, an extension was granted to and including November 13, 2022 by the Honorable Brett Kavanaugh, Circuit Justice. November 13, 2022 was a Sunday. Pursuant to Supreme Court Rule 30, which addresses computation and extension of time, “[t]he last day of the period shall be included, unless it is a Saturday, Sunday, federal legal holiday listed in 5 U.S.C. §6103, or day on which the Court building is closed by order of the Court or the Chief Justice, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed.” Rule 30.1. Hence, when Mr. Dorsey filed his petition for writ of certiorari with the Clerk’s Office on Monday, November 14, 2022, it was timely filed pursuant to Rule 30.1. Respondent’s argument to the contrary is feckless.

Respondent alleges that Mr. Dorsey’s petition asserts that no other circuit has found a *Martinez* claim insubstantial after granting a certificate of appealability, citing to page 19 of Mr. Dorsey’s petition for writ of certiorari. Mr. Dorsey makes no such argument. Rather, Mr. Dorsey asserts, and Respondent does not rebut, that no other circuit has ever revoked a certificate of appealability after granting it and adjudicating it on the merits except for technical reasons.

Respondent also complains that Mr. Dorsey has been intentionally dilatory. Mr. Dorsey rejects this affront, and notes for the record that the accusation is obviously boilerplate, as it references a petitioner named “Johnson” in the midst of the list of accusations against Mr. Dorsey. Brief in Opposition, at 15. What’s more, Respondent, too, sought and obtained an extension in this Court, sought and obtained an extension in the Eighth Circuit, and was

ultimately ordered by the District Court to file a response to the Petition for Writ of Habeas Corpus because it failed timely to respond to Mr. Dorsey's petition and failed timely to file a copy of the official records of the state courts.

Finally, Respondent acknowledges that an issue presented in this petition is unsettled, noting that this Court "declined to answer whether §2254(e) applied to only a hearing 'on the claim' or whether it applied to any kind of evidentiary hearing held by a district court. *Shinn v. Ramirez*, 142 S.Ct. 1718, 1738 (2022)." Brief in Opposition, at 16-17. This acknowledgment belies Respondent's extended argument that §2254(e) clearly prohibits an evidentiary hearing on a **claim** Mr. Dorsey is presenting. Respondent clearly understands that Mr. Dorsey is not seeking an evidentiary hearing on a claim, but raising the question whether a federal district court may take evidence on that which is **NOT** a **claim**, to-wit, whether cause exists to excuse the procedural default of a claim. In this case, the evidence to support Mr. Dorsey's claim of ineffective assistance of penalty phase trial counsel was before the state courts of Missouri, albeit presented on issues unrelated to that particular claim. The question here is whether a federal court has the discretion to take evidence on ineffective assistance of state post-conviction counsel's failure to raise and develop the claim of ineffective assistance of penalty phase trial counsel, a legal issue Respondent acknowledges was not resolved in *Shinn v. Ramirez, supra*.

Because the parties, both Petitioner and Respondent, admit that the issue presented here is unresolved by this Court, and because it is an important issue for the discretionary authority of the federal district court bench, this Court should grant the petition, and schedule full briefing and argument.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

(s) Kirk J. Henderson

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