No. 23-7153 and 23A890

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN DORSEY,

Petitioner,

v.

DAVID VANDERGRIFF,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Missouri

PETITIONER'S REPLY BRIEF

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CAPITAL CASE

Execution Scheduled for April 9, 2024 at 6:00 pm CDT

Brian Dorsey is scheduled to be executed in just over 24 hours, on April 9, 2024. Yet executing Mr. Dorsey no longer meets any of this Court's stated penological purposes for why capital punishment exists. Executing a man without any legitimate reason or justification is the epitome of the "cruel and unusual punishment" the Eighth Amendment to the Constitution is designed to prevent.

I. Respondents and the Missouri Supreme Court misconstrue the constitutional question.

This Court has repeatedly held that capital punishment is unconstitutional if it fails to meet the legitimate penological interests. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"). Nor is execution constitutional if the "social goal of retribution" is not furthered because the person being executed "for all moral purposes is not the same person who committed the crime." *Ford v. Wainwright*, 752 F.2d 526, 531 & n.3 (11th Cir. 1985) (Clark, J., dissenting), *rev'd by Ford v. Wainwright*, 477 U.S. 399 (1986).

Both the Missouri Supreme Court and Respondents mistake the other side of the Eighth Amendment analysis here.[1] The question is not whether capital punishment is a legitimate exercise of a State's ultimate power against Mr. Dorsey in lieu of no other punishment. Instead, the proper inquiry is whether execution serves any penological purpose as opposed to Mr. Dorsey remaining in prison for the

[1] The State's attempt to argue originalism is both ahistorical and insupportable. *See e.g.,* Erwin Chemerinskly, *Even the Founders Didn't Believe in Originalism*, The Atlantic (Sept. 6, 2022), https://shorturl.at/lqPV9.

remainder of his life with no opportunity for parole. And when there are compelling justifications and legitimate penological goals supporting life in prison, Missouri no longer has a constitutionally-sound reason to execute Mr. Dorsey. If "death is different," and requires heightened scrutiny to ensure "that death is the appropriate punishment in a specific case,'" that analysis should not end at the point of conviction, but must be reassessed at the time of execution as well, when a state can better evaluate whether death or life in prison without parole is the most just outcome. *Gregg*, 428 U.S. at 188; *Barefoot v. Estelle*, 463 U.S. 880, 913–914 (1983) (dissenting opinion) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

The Missouri Supreme Court stated below that "Dorsey does not explain how his execution would not further the penological goals of deterrence or retribution." Pet. App. A at 19. Studies have undermined the presumption that capital punishment provides any deterrent effect. *See Baze v. Rees*, 128 S. Ct. 1520, 1547 (2008) (Stevens, J., concurring in judgment) (pointing out that after more than thirty years of empirical research, social scientists have yet to produce any "reliable statistical evidence that capital punishment in fact deters potential offenders."); *see also, e.g.*, Jeffrey Fagan, *Death and Deterrence Redux: Science Law, and Causal Reasoning on Capital Punishment*, 4 Ohio St. J. Crim. L., 255, 261 (2006); Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. Crim. L. & Criminology 489, 490-500 (2009).

Moreover, deterrence should not be considered in a vacuum. As studies have repeatedly shown, other punishments such as life without parole may well provide

equal deterrence. *See Deterrence and the Death Penalty: A Critical Review of New Evidence: Hearings on the Future of Capital Punishment in the State of New York*, Before the New York State Assemblies, 2005 Leg., 228th Sess. 1-12, 9 (N.Y. 2005) (statement of Jeffrey Fagan, Professor of Law and Pub. Health, Columbia Univ.), available at www.deathpenaltyinfo.org/FaganTestimony.pdf. Additionally, part of the reason that over 70 correctional officers have signed a letter asking Governor Parson for clemency is because executing Mr. Dorsey only serves to deter those sentenced to death from trying to rehabilitate themselves, behave well, or adjust successfully to the prison environment. If an inmate has no hope of relief, why would any other Missouri inmate endeavor to remain conduct-violation free, or obtain and maintain a job within the institution?

Further, retribution cannot be defined as the personal desires of victims in any case. Living in a society that values certain fundamental rights requires a different calculus for retribution, in order to "protect the dignity of society itself from the barbarity of exacting mindless vengeance," *Ford*, 477 U.S. at 410. Where the Constitution is offended and society accordingly would be harmed by an execution, the interest some victims have in the execution taking place unfairly pits victims' emotions against fundamental constitutional values. Respondent surely knows this and his decision to inject irrelevant and inflammatory information into his argument is arguably unethical.

It is also inapposite. Family members might have similarly fraught feelings in a case where a person cannot be executed due to incompetency (*see, e.g., Ford; Panetti*

v. Quarterman, 551 U.S. 930 (2007)), or in a case where an intellectually disabled person is exempt from execution (*see, e.g., Atkins v. Virginia*, 536 U.S. 304 (2002)). The State of Missouri is held to a different, and constitutional, standard, and indeed must represent all of its citizens, including those that the State itself employs to maintain safety and security in its prisons, and the other family members, former judges, and former Missouri Supreme Court judge that are advocating for Mr. Dorsey's impending execution to be halted. *See* Edward Helmore, *More Than 150 People Call On Missouri Governor to Forgive Brian Dorsey's Death Penalty*, The Guardian (Apr. 3 2024), https://shorturl.at/jAFY0

Finally, the setting of an execution date is exactly when rehabilitation should be measured and the question of whether the execution serves any penological purpose should be evaluated. Earlier analyses would be arbitrary and likely unripe. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643 (1998) (during initial habeas proceedings, the district court properly dismissed the *Ford* competency claim as unripe because an execution date had not been set; the claim became "unquestionably ripe" when the execution date was set).

II. Mr. Dorsey's petition presents an open constitutional question for this Court.

The Supreme Court of Missouri erred below by attempting to reframe Mr. Dorsey's Eighth Amendment claim as an argument for clemency. Pet. App. A at 20-21. It is not. Executive clemency is not a sufficient vehicle in which to resolve any outstanding constitutional question. Here, that question—which this Court can and should resolve—is when "[a] penalty with such negligible returns to the State would

be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (opinion concurring in judgment).

This Court has recognized that an execution can be barred by the Constitution in extraordinary circumstances when it "ceases realistically to further the [] purposes" of capital punishment. *Furman*, 408 U.S. at 312 . When a death-sentenced person has spent years on death row with the kind of record achieved by Mr. Dorsey, the penological goal of rehabilitation has been satisfied and the constitutionally-required goals of retribution and deterrence are not met by an execution. This Court should decide whether the Eighth Amendment's power to "protect the dignity of society itself from the barbarity of exacting mindless vengeance," *Ford*, 477 U.S. at 410, extends to defend from execution those who have satisfied the penological goal of rehabilitation. As this Court has made clear, "[a] penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman*, 408 U.S. at 312.

CONCLUSION

The petition for a writ of certiorari and motion for stay of execution should be granted.

Respectfully submitted,

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