NO. _____

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

More than four decades ago, this Court held that it is crucial that the jury be allowed to hear evidence of a defendant's positive adjustment to prison. Despite this clearly established law, Brian Dorsey's trial counsel did not look for this evidence. Instead, they pled him guilty and then gave a brief presentation about Mr. Dorsey's struggles with substance abuse in contrast to his character in high school. Post-conviction counsel, likewise, did not present a claim about Mr. Dorsey's positive adjustment to prison. Both sets of attorneys, however, did place evidence in the state court record about his prison adjustment and still did not recognize that they should make an argument about its significance and how that evidence was sufficient to support a sentence of life instead of death.

Against this backdrop in the habeas proceedings, the Eighth Circuit, not surprisingly, found that this claim of ineffective assistance of counsel was "substantial" and the court granted a certificate of appealability. The same court ruled against Mr. Dorsey because it found this claim was *not* "substantial" pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012).

These interconnected questions are presented to this Court:

1. In its order granting a certificate of appealability, the Eighth Circuit ruled in Mr. Dorsey's case that his claim of ineffective assistance of counsel was "substantial." Nonetheless, in its opinion denying relief, the same court held that Mr. Dorsey's ineffectiveness claim was *not* "substantial" for purposes of finding cause and prejudice for his procedural default of that claim in state court pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). When there has been no intervening change of the facts or law, does the law-of-the-case doctrine prohibit a court from changing its previous ruling on the same question later during the course of litigation?

2. Correctional records – that were presented to the state court – established Mr. Dorsey's good adjustment to incarceration. In that situation, does an aggravated multiple homicide categorically render harmless trial counsel's failure to investigate, develop, and present to a capital sentencing jury that evidence of positive prison adjustment?

3. When a claim of ineffectiveness of trial counsel can be established based upon the record that has been presented to a state court, can a habeas court hold a hearing concerning post-conviction counsel's ineffectiveness to establish cause and prejudice pursuant to *Martinez v. Ryan*? This Court, in *Shinn v. Ramirez*, 142 S. Ct. 1718, 1738 (2022), left open the question whether 28 U.S.C. §2254(e)(2) bars a hearing for this cause-and-prejudice determination.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. The parties are Brian Dorsey, Petitioner, and David Vandergriff, Warden, Potosi Correctional Center, Respondent.

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Petitioner Brian Dorsey respectfully prays that this Court issue a writ of certiorari to review the judgment below.

OPINION BELOW

The April 7, 2022 opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A. It is published as *Dorsey v. Vandergriff*, 30 F.4th 752 (8th Cir. 2022).

JURISDICTION

Mr. Dorsey is seeking review from the denial of relief pursuant to 28 U.S.C. §2254 in the United States District Court for the Western District of Missouri, affirmed by the United States Court of Appeals for the Eighth Circuit. The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 7, 2022. A copy of that opinion is attached as Appendix A. Mr. Dorsey filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on May 19, 2022. That motion was denied on June 16, 2022. A copy of that order is attached as Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, as applied to the States via the Fourteenth Amendment, reads as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On March 10, 2008, Brian Dorsey, on the advice of counsel, and without any plea agreement, entered two pleas of guilty to first-degree murder before the Thirteenth Circuit Court for the State of Missouri. On August 26, 2008, a capital sentencing hearing commenced with jury selection and, two days later, on August 28, 2008, the jury returned a verdict recommending that Mr. Dorsey be sentenced to death. The sentence was formally imposed on December 1, 2008.

The Supreme of Court Missouri affirmed Mr. Dorsey's death sentences on direct appeal on July 16, 2010. *State v. Dorsey*, 318 S.W.3d 648 (Mo. 2010). This Court denied certiorari on November 29, 2010. *Dorsey v. Missouri*, 562 U.S. 1067 (2010).

On March 7, 2011, Mr. Dorsey filed an Amended Motion to Vacate, Set Aside, or Correct the Judgment and Sentences pursuant to Mo.S.Ct.R. 29.15, the state post-conviction procedure. An evidentiary hearing was held in the Circuit Court December 7-9, 2011. On December 31, 2012, that court denied the motion. Mr. Dorsey appealed to the Missouri Supreme Court, which affirmed on November 12, 2014. *Dorsey v. State*, 448 S.W.3d 276 (Mo. 2014).

On December 22, 2015, Mr. Dorsey filed a Petition for Writ of Habeas Corpus under 28 U.S.C. §2254 in the Western District of Missouri, challenging his convictions and death sentences. Respondents filed an Answer and the state-court record on March 16, 2016.

Thereafter, the district court stayed the proceedings and held them in abeyance to allow Mr. Dorsey to return to state court in the wake of this Court's decision in *Hurst v. Florida*, 577 U.S. 92 (2016), filing a Motion to Recall the Mandate in the Missouri Supreme Court on February 24, 2017. Following the state court litigation, the district court lifted the stay of the

federal habeas proceedings on June 27, 2017, and ordered Mr. Dorsey to file a Traverse, which he did on March 19, 2018. On April 16, 2018, the district court gave the parties notice of a hearing to be held "on the issue of procedural default" on May 4, 2018. The nearly six hour hearing went far beyond procedural default into the merits of the claims without notice to the parties that the merits were to be argued.

On July 26, 2018, the district court entered an order denying as procedurally defaulted Claim 5 of the habeas petition alleging that the State had failed to disclose exculpatory DNA evidence. On September 27, 2019 the district court denied all remaining claims in the petition, denied an evidentiary hearing, denied expansion of the record, and denied a certificate of appealability on any issue.

On October 25, 2019, Mr. Dorsey filed a motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e). The State responded on November 8, 2019, and the district court denied the motion on May 5, 2020. Mr. Dorsey filed a notice of appeal on June 2, 2020.

Mr. Dorsey filed his Application for a Certificate of Appealability on July 30, 2020, raising, *inter alia*, an issue that reasonable jurists would debate whether Mr. Dorsey's Sixth and Fourteenth Amendment rights were violated by the failure of trial counsel and post-conviction counsel to investigate and present evidence of Mr. Dorsey's positive adjustment to imprisonment. The State filed a response to Mr. Dorsey's application on September 3, 2020, and Mr. Dorsey filed a reply to the State's response on October 13, 2020.

On February 1, 2021, the United States Court of Appeals for the Eighth Circuit issued an order granting a certificate of appealability in part, on the following question: "Under *Martinez v. Ryan*, 566 U.S. 1, did the district court err in concluding that Dorsey's ineffective-assistance-of-trial-counsel claim based on trial counsel's alleged failure to investigate and present evidence of

Dorsey's good conduct while in custody is insubstantial and is thus procedurally defaulted?" Mr. Dorsey filed his brief on May 17, 2021. The Warden filed his brief on June 24, 2021. Mr. Dorsey filed a reply brief on July 26, 2021. Oral argument was held remotely on January 12, 2022. The Eighth Circuit issued its opinion on April 7, 2022. Mr. Dorsey filed a petition for rehearing and suggestion for rehearing *en banc* on May 19, 2022. That motion was denied on June 16, 2022, and the Court's mandate issued on June 23, 2022.

Mr. Dorsey sought an extension of time within which to file a petition for writ of certiorari on September 2, 2022, and on September 7, 2022, an extension was granted to and including November 13, 2022 by the Honorable Brett Kavanaugh, Circuit Justice.

This timely Petition for Writ of Certiorari follows.

II. FACTUAL HISTORY

Brian Dorsey is the only child of Patty and Larry Dorsey. When Brian was born on March 21, 1972, Patty Dorsey had been in labor for three days, and Brian's limbs were blue from oxygen deprivation resulting from the long and difficult delivery. Brian's parents each had significant, multi-generational family histories of depression, alcoholism, substance abuse, heart disease, cancer, diabetes, and neurogenerative diseases such as Alzheimer's and dementia. Both Larry and Patty themselves had lengthy histories of depression. In addition, Patty suffered from Alzheimer's disease for many years, and passed away in 2016. Larry suffered from longstanding alcoholism, heart disease, and diabetes before his death on October 19, 2021.

Throughout the marriage, Larry was verbally and physically abusive to Patty. When Brian was a child, Patty would send him to his room if Larry came home drunk, and Brian would hear the banging and his mother's screams as Larry abused her. Larry's attitude towards his only

child was one of negativity, impatience or indifference, and much of Brian's time at his parents' home was spent alone in his room.

Most of Brian's family – especially the extended family on his mother's side – was rooted in Cedar City, a once-thriving town on the river bottoms across the Missouri River from Jefferson City, which ultimately was wiped off the map in the Great Flood of 1993. During his childhood, Brian loved spending time in Cedar City with his Grandpa Mosier, who taught him how to fish, and later, how to drive. The happiest memories for Brian are the times he spent fishing with Grandpa Mosier and gathering with the extended family for the annual Fourth of July picnics and Thanksgiving and Christmas dinners at Grandma and Grandpa Mosier's house. Cedar City provided Brian with comfort, sanctuary, and a safe refuge from the unpredictable rages of his alcoholic father. Grandpa Mosier's death in 1989, when Brian was just sixteen years old, was a devastating loss and a turning point in Brian's young life.

Already suffering from major depression, Brian turned to alcohol and drugs for solace. He became severely addicted to crack cocaine, which he tried desperately (and unsuccessfully) to hide from his close-knit family. According to his cousin, Jenni Smith, who grew up with Brian and loved him like a brother, the whole family knew about Brian's struggles.

Brian was deeply ashamed of his crack addiction and he would disappear for days or weeks at a time when he went on a binge, which intensified the cycle of depression and self-medication. Between 1995 and 2006, Brian attempted suicide at least three times. After the first suicide attempt in 1995, Brian made serious efforts to establish himself. He attended barber school, obtained his barber's license, and worked at the White House Barber Shop in downtown Jefferson City for three years from 1996 to 1998. The owner of the shop, Donna Zaring, liked the way Brian cut hair and was hoping that Brian would take over the business when she retired.

Brian's crack addiction was too overpowering, however, and he ended up leaving the job and moving back into his parents' house in Holts Summit, the same house where he grew up on higher ground nearby the former Cedar City.

In 1998, Brian moved to Springfield, Missouri to live with a girlfriend he met at a family wedding. After the relationship fell apart in 2000, Brian was overtaken by his addiction and ended up walking away from a job at the Wedgwood Barber Shop and an offer to take over the shop from its owner, who wanted to retire. After his money ran out, Brian again returned to his parents' house in Holts Summit. By 2002, Brian's parents were retired and had moved to Warsaw, Missouri, and Brian continued to live in the Holts Summit house. Though Brian worked for three years at the Dollar Distribution Center in Fulton, Missouri from 2000-2003 and became engaged to a co-worker there in 2003, he could not escape the cycle of depression, addiction, and shame. He walked away from Dollar General and the chance for a management training program. Brian's marriage collapsed after less than a year. His mental health deteriorated and his drug use to self-medicate only worsened.

Brian was arrested for possession of crack cocaine two times in Jefferson City – once in November 2004 and a second time in January 2005. He attempted suicide again in May 2005 and was admitted to a psychiatric hospital in Kansas City, but was discharged after only three days. Brian was subsequently accepted into the Cole County Drug Court program, but as a condition of the program, Brian had to reside in Cole County. This requirement forced Brian to move from his familiar Holts Summit home to an unfamiliar small apartment in downtown Jefferson City his parents located that also happened to be in a drug-infested area of the city. Brian's mother Patty observed when she had stayed there with Brian that people would come to the apartment at all hours during the night trying to sell drugs to Brian. Brian was unable to meet

the demands of drug court, his major depression remained untreated, and his drug-binging continued. In December 2005, Brian was admitted to St. Mary's Hospital in Jefferson City after cutting his wrist with a razor blade in yet another suicide attempt. Then he was kicked out of the Cole County Drug Court program.

In June 2006, Brian was placed on five years' supervised probation for the two drug possession cases. In September 2006, he pled guilty to a felony for leaving the scene of an accident and was again placed on supervised probation. By December 2006, although Brian had complied with his probation terms by completing community service, providing verification of employment, and managing to pass two urine drug tests, below the surface, his downward spiral continued. At that time, Brian was on a waiting list for residential mental health and substance use treatment that had been recommended by his probation officer months earlier.

In the days before Christmas 2006, Brian frantically contacted members of his extended family to collect enough money to pay the drug dealers he owed. On Saturday, December 23, 2006, Brian called his cousin, Sarah (Mosier) Bonnie, desperate to borrow money because the drug dealers – Patricia Cannella, accompanied by a male friend of hers – were at his apartment, demanding money and threatening him. Sarah and her husband, Ben Bonnie, went to Brian's apartment in Jefferson City to try to help him out of the jam. A friend of Sarah's and Ben's, Darin Carel, met them at Brian's apartment. Sarah Bonnie's sister, Traci Sheley, also came to the apartment. At some point, they all went inside Brian's apartment; it was obvious Brian was strung out on drugs, and he was on his bed, crying. Patricia Cannella demanded the money Mr. Dorsey owed, but Sarah and Ben told her she could not get the money that day, but maybe the next day. Cannella and her male associate left, angry that they were leaving without the money. The Bonnies told Brian to get some clothes so that he could spend the weekend with them, and

he rode with them to their home in New Bloomfield. Darin Carel picked up some beer and joined them, as did Sarah's sister and brother-in-law (and Brian's cousins) Traci and Jon Sheley and their kids.

The men played pool and drank beer in the detached garage, while Traci joined Sarah in the house. A little later, Sarah's mother (Brian's aunt), Diana Mosier, came by the house, bringing home Sarah's four-year-old daughter, J.B., who was also very close to Brian and called him "Beej." After visiting for a while, Ms. Mosier left at around 9:00 p.m., then the Sheleys left, then finally Carel left at around 11:00 p.m.

The next day, December 24, 2006, the Bonnies were supposed to attend a family gathering at Ben Bonnie's parents' home. When they did not show up, family members began calling each other to find out if anyone knew what was going on. Finally, Diana Mosier and her husband Mike agreed to drive to the Bonnies' house, arriving a little after 1:00 p.m. They found the front door open (with the storm door closed), entered the house, and saw J.B. sitting on the couch watching television and eating cookies. The Mosiers found the master bedroom doors locked, so Mike found a screwdriver to pop open the lock, entering to find his daughter and son-in-law both shot to death. Sarah Bonnie appeared to have been sexually assaulted.

Unable to reach her son on December 24 or 25, and concerned about Brian's emotional condition, his previous suicide attempts, and his drug use, Patty Dorsey filed a missing person's report on Christmas Day. When Patty finally heard from Brian, who called her from Sarah's cell phone around 11:00 p.m. Christmas night, Brian was suicidal. Patty did her best to talk her son down from suicide, and Brian told her he would think about it. Brian called his mother back about an hour later and asked his parents to go with him to the Sheriff's Department. Patty and Larry Dorsey met Brian at 3:00 a.m. and found him near a river road next to the Missouri River,

standing outside of Sarah Bonnie's car. The three of them spent a few hours together in a motel before they went to the Callaway County Sheriff's Department between 10:00 and 11:00 a.m. on December 26. Brian was taken into an interview room and advised of his *Miranda* rights. When officers asked whether it would be fair to say that he was the right person to be talking to concerning what happened to the Bonnies, Brian said that it would. Still wearing the same clothes he had been wearing three days before at Sarah and Ben's, Brian consented to be searched, and Sarah Bonnie's social security card was found folded up in his back pocket. Brian's pant leg had what appeared to be a dark stain on it (later analysis showed there was no blood on Brian's clothing or shoes, facts that Brian's jury never heard), and he consented to the seizure of his clothes and to the taking of a buccal DNA swab. After a break, Brian answered "no" to further questions about whether he went to the Bonnies with the intention of hurting them or whether he planned or plotted to go to the Bonnies and "do that" to them. Shortly thereafter, Brian invoked his right to counsel, and officers terminated the interview. Brian was placed under arrest for the murders and put on suicide watch in the Callaway County Jail.

Law enforcement officers began an investigation, interviewing J.B., the four-year-old daughter of Sarah Bonnie. J.B. volunteered she had not heard any loud noises, and, in a subsequent interview, said she heard the front door and her parents' bedroom door open, and that "they" had come in and killed her parents and took her "uncle" Beej with them. She said after her parents were killed, her uncle Beejy came into her room and gave her a hug.

Meanwhile, Sarah Bonnie's car was towed and inventoried. Found in the front passenger seat was a bolt-action rifle loaded with one .308 live round in the firing chamber. Numerous other items belonging to the Bonnies were found in the car, including an empty .20-gauge shotgun in the trunk. (A DNA profile later obtained from the shotgun, which the prosecutor

alleged was the murder weapon, eliminated Brian as the source, as well as Ben Bonnie, Sarah Bonnie, and Daren Carel, facts that Brian's jury never heard.) Through interviews, the police discovered Brian had spent the better part of two days running errands for others, including Patricia Cannella, in Sarah's car and tried to use the items from the Bonnies to repay the drug debt he owed or to sell items to repay that debt. Canella herself was found to be in possession of several items belonging to the Bonnies, including a DVD player, CDs, and jewelry. Law enforcement investigation showed that during this time Cannella had taken Sarah's car, without Brian, to try to sell the guns.

A rape kit was performed on Sarah Bonnie's body, and vaginal swabs taken, establishing through DNA the presumptive presence of semen, which was a preliminary finding that later testing did not support. Y-chromosomal testing excluded Ben Bonnie and Darin Carel as the source, but did not exclude Brian. The y-chromosomal results matched 2.3 out of every thousand Caucasian men. There were other potential sources in the state DNA database, but these were not turned over to the defense.

Brian Dorsey was charged with the murders of the Bonnies and related offenses, and the prosecution sought the death penalty. Chris Slusher and Scott McBride were retained with flat fee contracts from the Missouri State Public Defender (MSPD). This flat fee – interpreted by Mr. Slusher as the fee "for representation without trial" – resulted in little to no investigation of Brian's case regarding guilt or penalty. Instead, trial counsel decided to plead Brian guilty and, in their words, to "take their chances" at a penalty trial in front of a jury. Yet no mitigation specialist was ever utilized by trial counsel. Rollin Thompson, an investigator employed by Mr. Slusher and the only investigator assigned to Brian's case, conducted no guilt phase investigation, never looked at the physical evidence, never investigated the DNA evidence, and

never interviewed any guilt phase witnesses. Mr. Thompson, who had no mitigation investigation experience, conducted a total of four telephone interviews for mitigation. Mr. Slusher's flat fee did not include the work done by Mr. Thompson, and Slusher admittedly could not afford to pay Thompson to do much work on the case for this flat fee.

As a result, trial defense counsel never investigated or presented evidence to the penalty phase jury of Brian's positive adjustment to prison and his stellar record, including his work record and complete absence of disciplinary violations. With respect to Brian's positive adjustment to prison, federal habeas counsel discovered and presented to the district court below abundant mitigating evidence of Brian's history of good institutional behavior prior to his August 2008 penalty trial including correctional records and testimony submitted to the state court in Rule 29.15 post-conviction proceedings. Trial counsel neither investigated nor presented this readily available evidence, nor consulted with or retained an expert who could have educated Brian's jury about how prisoners like Brian tend to do well in structured institutional settings such as maximum-security prisons. However, state post-conviction counsel did introduce some testimony, and some of Brian's correctional records, without focusing on the evidence of good adjustment to incarceration that established ineffective assistance of penalty phase trial counsel's failures to focus on this theme of mitigation.

The correctional records Brian's state post-conviction lawyers proffered in the state courts set forth specific facts about his good behavior and work history. A State of Missouri Department of Corrections record entitled "Complete Medical Record History" contained a checklist that had the following questions and answers: "Signs of Trauma-No; Medical/Mental Health Complaints-No; Existing Medical/Mental Health Complaints-No; Crying-No; Oriented x3-Yes; Withdrawn-No; Hostile/Angry-No; Quiet-Yes; Manic Behavior-No; Denies Complaint-

Yes." These same or similar questions and responses were repeated within that same document just a few lines farther down the page, except "y" and "n" were the responses instead of "yes" and "no." This was dated 8/26/2007. [Federal PWHC Ex. N (787 of 2940); State's Ex. G, p. 36]. Another State of Missouri Department of Corrections record noted that Mr. Dorsey had been medically cleared to be an inmate food service worker at South Central Correctional Center (SCCC), dated 10/9/2007. [Federal PWHC Ex. N, State's Ex. G, p. 13]. A similar document from the State of Missouri Department of Corrections also provided fully duty medical clearance for Mr. Dorsey to work in food service at SCCC. [Federal PWHC Ex. N, State's Ex. G, p. 12]. Yet another State of Missouri Department of Corrections record entitled a Transfer/Receiving Screening – Medical Mental Health dated 10/9/2007 indicated as to "Behavioral/Physical Appearance – good."

The proffered evidence included testimony from Dr. A.E. Daniel, a board-certified forensic psychiatrist who testified for Mr. Dorsey at the Rule 29.15 state post-conviction proceeding. Dr. Daniel testified that, beginning in 2001, he became director of psychiatric services for the Missouri Department of Corrections. 12-07-2011 NT at 224-225 (Bates 020232-020233).] He served as director of psychiatric services for the Missouri Department of Corrections until 2008. *Ibid.* Dr. Daniel testified that among the documents he reviewed prior to evaluating Mr. Dorsey and forming his expert opinion were Missouri Department of Corrections records, particularly from South Central Correctional Center, where Mr. Dorsey was housed prior to his capital sentencing proceeding. 12/07/2011 NT at 230-231 (Bates 020238-39). The relevant records are chronicled above. Dr. Daniel testified that Mr. Dorsey had "no conduct disorder violations, which we call a CDV. There's no CDV in his file." 12/08/11 NT at 287 (Bates 020295). During a *voir dire* by the prosecution, Dr. Daniel was asked about how he used,

in particular, records that Mr. Dorsey attended barber school. Dr. Daniel responded, "all of the documents are necessary, particularly if he had any issues with regard to discipline, whether they were supervisory issues or stability in the – stability in his career." 12/07/2011 NT at 236 (Bates 020244). In further support of this, Dr. Daniel testified that he'd reviewed the handwritten notes of Dr. Robert Smith, the defense psychologist who testified at the capital sentencing proceeding, and relied upon them in forming his opinions. *Id.* at 241-242 (Bates 020249-020250). One of those handwritten notes of Dr. Smith contained the following content: "He [Mr. Dorsey] reported no disciplinary write-ups while incarcerated." Ex. R, p. 17, dated 8/25/2007 (Bates 022431).

Habeas counsel went further, obtaining many more correctional records from Mr. Dorsey's time in prison prior to his capital sentencing proceeding. Habeas counsel also interviewed correctional officers and provided an affidavit from their investigator containing the statements of those correctional officers about Brian's positive adjustment to incarceration as a proffer of what could be presented at an evidentiary hearing to establish ineffective assistance of penalty phase trial counsel. They also obtained and presented an expert report by Dr. Mark Cunningham, Ph.D., a clinical psychologist who reviewed extensive records and opined that there was an overwhelming likelihood that Mr. Dorsey would adapt well to a life-without-parole sentence and would not present a future danger to others. This Court's decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), precludes presenting evidence in federal court to support this claim of ineffective assistance of penalty phase trial counsel that Mr. Dorsey failed to develop as a factual basis for the claim in state court proceedings. Nevertheless, Brian Dorsey had an impeccable record of good adjustment to incarceration prior to his capital sentencing trial, and some of State of Missouri Department of Corrections records were part of the state court record in post-conviction proceedings, and would have been available to capital sentencing counsel to

present to the jury as a reason to sentence Mr. Dorsey to life, not death. Similarly, the testimony of Dr. A.E. Daniel, M.D., forensic psychiatrist, admitted into evidence in the Rule 29.15 state post-conviction proceedings could have been presented by capital sentencing counsel to the jury to establish Mr. Dorsey's positive adjustment to incarceration, *Skipper v. South Carolina*, 476 U.S. 1 (1986). The failure to present this evidence to the jury in mitigation fell below an objective standard of reasonableness, and the failure created a reasonable probability that, but for this omission, the result of the capital sentencing proceeding would have been different.

REASONS FOR GRANTING THE WRIT

In the absence of a plea agreement, Mr. Dorsey's trial counsel advised him to enter pleas of guilty to two counts of first-degree murder without fully investigating available defenses. Mr. Dorsey did so. Hence, the only issue before the jury was whether Mr. Dorsey would be sentenced to life imprisonment or death. Mr. Dorsey was incarcerated for nearly two years prior to the imposition of his death sentences, yet despite the narrow issue to be litigated, his capital sentencing lawyers failed to present his impeccably good adjustment to incarceration as mitigation to support a sentence of life in prison, not the death penalty. This Sixth Amendment issue of ineffective assistance of capital sentencing counsel was not presented in state post-conviction proceedings. It was therefore procedurally defaulted in federal court. Mr. Dorsey argued that ineffective assistance of post-conviction counsel excused the default. *Martinez v. Ryan*, 566 U.S. 1 (2012). Claims of ineffective assistance of trial counsel cannot be raised on direct appeal in Missouri, and state post-conviction is the first opportunity to raise such claims in state proceedings there. *Harris v. Wallace*, 984 F.3d 641, 648 (8th Cir. 2021). *Martinez*, thus, applies to Missouri proceedings. *Id.*

The United States District Court denied a certificate of appealability on this issue, finding the underlying claim of ineffective assistance of capital sentencing counsel insubstantial. However, the United States Court of Appeals granted a certificate of appealability on this claim. Doing so *a fortiori* included an implicit finding that the underlying claim of ineffective assistance of capital sentencing counsel was in fact substantial. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003). Mr. Dorsey argued that having granted a certificate of appealability, the Eighth Circuit had already found that the underlying claim of ineffective assistance of penalty phase trial counsel was substantial for purposes of *Martinez v. Ryan*. As a result, Mr. Dorsey argued,

the case had to be remanded to the district court for a hearing on ineffective assistance of state post-conviction counsel. The Eighth Circuit agreed that "substantial" was the same in both contexts. *Dorsey v. Vandergriff*, 30 F.4th 752, 756 (8th Cir. 2022). Consequently, in order to avoid the effect of that finding, the Eighth Circuit revoked the certificate of appealability after full briefing and argument in order to hold that the underlying claim of ineffective assistance of trial counsel was insubstantial.

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY THAT A FEDERAL COURT MAY NOT REVOKE A CERTIFICATE OF APPEALABILITY AFTER GRANTING ONE IN ORDER TO AVOID THE CONSEQUENCES OF THAT DECISION WITHOUT SOME CHANGE OF CIRCUMSTANCES OR ADDITIONAL FACTUAL OR LEGAL BASIS.

A. The Eighth Circuit's granting of a certificate of appealability, and its implicit conclusion that the underlying claim of ineffective assistance of capital sentencing counsel was substantial, is the law of the case, and should not be revoked in the absence of extraordinary circumstances.

When the Eighth Circuit granted a certificate of appealability, it had before it briefing on the substantiality of the underlying claim of ineffective assistance of capital sentencing counsel. It had before it the district court record that contained all of the evidence, and much of the law, that was presented to it in merits briefing and discussed at oral argument. It evaluated the underlying claim of ineffective assistance of capital sentencing counsel, evaluated whether or not the claim was "substantial" for purposes of a certificate of appealability, and concluded that it was substantial. Having done so, that finding of substantiality became law of the case.

This Court has explained that "[t]he law of the case doctrine generally provides that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Pepper v. United States*, 562 U.S. 476, 506 (2011) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). "A court has the power to revisit prior decisions of its own or a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.' *Arizona v. California*, *supra*, 460 U.S. at 618, n.8 (citations omitted)." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988).

As does this Court, the Eighth Circuit likewise recognizes and applies the law of the case doctrine. It has "observ[ed] that the law of the case doctrine applies to matters that have been explicitly or implicitly decided at an earlier stage in the same case." *White v. Dingle*, 616 F.3d 844, 848, n.1 (8th Cir. 2010) (citing *UniGroup, Inc., v. Winokur*, 45 F.3d 1208, 1211 (8th Cir. 1995)); *see also Wilwording v. Swenson*, 502 F.2d 844, 848 (8th Cir. 1974), *following remand*, 404 U.S. 249 (1971) ("The Supreme Court determined that Wilwording's state habeas claim had fulfilled the exhaustion requirement by giving the state an initial opportunity to pass on and correct alleged violations of its prisoners' federal rights. Thus the law of the case is that the exhaustion requirement has been satisfied.").

Here, there was nothing intervening between the time the Eighth Circuit granted a certificate of appealability, implicitly finding that the underlying claim of ineffective assistance of trial counsel was substantial, and the issuance of its opinion, holding that the underlying claim was insubstantial and therefore necessitating revocation of the certificate of appealability. No other Circuit has revoked a certificate of appealability under these circumstances.

In *United States v. Pena*, 687 Fed.Appx. 756 (10th Cir. 2017), the Tenth Circuit declined the government's invitation to revoke a certificate of appealability. In *United States v. Stanton*, 683 Fed.Appx. 714 (10th Cir. 2017), that same court granted the government's motion to withdraw or rescind a certificate of appealability where an intervening Supreme Court decision undercut the rationale for the grant, and the defendant concurred. In *Wilson v. Bryant*, 655 Fed.Appx. 636 (10th Cir. 2016), that court also withdrew a certificate of appealability as to a claim for which the appellant had not sought a certificate of appealability.

In *Rudenko v. Costello*, 322 F.3d 168 (2d Cir. 2003), the 2nd Circuit withdrew a certificate of appealability governing 16 cases and required individualized consideration of

applications for certificates of appealability in each case. These are the only cases from other Circuits discussing the authority to revoke, rescind, or withdraw a certificate of appealability. In short, the Eighth Circuit is the sole circuit that has revoked or withdrawn a certificate of appealability after briefing and argument on the merits of the arguments, absent some other intervening basis for the revocation.

There are no extraordinary circumstances here that warranted revisiting a matter previously decided. At most, the case would have been remanded for the district court to determine, in the first instance, whether Mr. Dorsey could establish ineffective assistance of post-conviction counsel in order to excuse a defaulted claim of ineffective assistance of penalty phase trial counsel, and to determine whether Mr. Dorsey in fact received ineffective assistance of penalty phase trial counsel. The issue would merely have been remanded for adjudication. Under such circumstances, the law of the case doctrine applies.

B. Even in the absence of the law of the case doctrine, the underlying claim of ineffective assistance of penalty phase trial counsel is substantial, and the case should be remanded for consideration of whether ineffective assistance of post-conviction counsel may serve as cause for the procedural default of the underlying Sixth Amendment claim.

This Court has counseled that the writ of habeas corpus pursuant to 28 U.S.C. §2254 is an extraordinary remedy that guards against extreme malfunctions in the state's criminal process. *Shinn v. Ramirez*, 142 S.Ct. 1718, 1731 (2022) (citations omitted). Such an extreme malfunction occurred in this case.

Mr. Dorsey was charged with a double homicide, and there was substantial evidence available to trial counsel that his chronic, acute major depression rendered him incapable of the deliberation necessary to convict him of first-degree murder under Missouri law; indeed, a defense expert so testified at the capital sentencing proceeding. But his trial lawyers counseled

Mr. Dorsey to plead guilty to two counts of first-degree murder before ever retaining that expert and obtaining his opinion as to Mr. Dorsey's ability to deliberate. Having thus limited the scope of their work to capital sentencing only, they then utterly failed to conduct a thorough investigation for mitigating evidence to present to the jury empaneled to decide whether Mr. Dorsey should live or die.

The Eighth Circuit concluded that "given the nature of the crimes and the fact that 'some of the aggravating factors were not really defendable,' Dorsey's attorneys focused on trying to convince the jury that 'this 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.'" *Dorsey v. Vandergriff*, 30 F.4th at 755; *see also id. at* 758 ("[I]t was reasonable for Dorsey's trial attorneys to focus on portraying the crimes as 'an aberration' in Dorsey's 'history of being a good person,' rather than on how Dorsey was adjusting to incarceration."). The Court of Appeals surmised that "Dorsey's trial attorneys 'could have reasonably concluded' that the best chance of securing a noncapital sentence was to mitigate retributivist impulses by portraying the crimes as not in keeping with Dorsey's character and that presenting evidence of Dorsey's adjustment to incarceration 'would have only detracted from' this effort." *Id.* at 758 (citations omitted).

The Eighth Circuit's speculation about counsels' strategy is unsupported by the record; indeed, the record itself reveals counsels' choices. "The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins v. Smith*, 539 U.S. 510, 526 (2003). Here, the defense presented eight lay character witnesses at the sentencing hearing who knew Mr. Dorsey and testified about their relationships with him. There was almost no good character testimony from any of those witnesses. Rather,

almost all of their testimony focused on Mr. Dorsey as a teenager in high school, or on Mr. Dorsey's long-standing drug and alcohol addictions that were his self-medication for chronic, acute major depression, evidenced by multiple suicide attempts. The Court of Appeals simply mischaracterized the nature of capital sentencing counsels' mitigation presentation. Nothing about that presentation would have conflicted with additional presentation of Mr. Dorsey's positive adjustment to incarceration. *See Wiggins*, 539 U.S. at 535 ("While it may well have been strategically defensible upon a reasonably thorough investigation to focus on Wiggins' direct responsibility for the murder, the two sentencing strategies [additionally focusing on his troubled youth as mitigation] are not necessarily mutually exclusive.").

Since *Skipper*, this Court has recognized that the failure to develop and present good adjustment to incarceration evidence, where weighty, can support a claim of ineffective assistance of capital sentencing counsel. *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (counsel was ineffective for failing to have investigated adjustment to prison); *Andrus v. Texas*, 140 S.Ct. 1875 (2020) (same). Though not determinative, the ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases call for capital trial lawyers to investigate "[p]rior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services)." ABA Guidelines, Guideline 10.7, Commentary (Rev. 2003), 31 Hof. L. Rev. 913, 1023 (2003). Such evidence is weighty precisely because it comes from correctional records prepared by people who have no particular interest in portraying the defendant in a positive light; rather, they are simply reporting objectively on the experiences of people under their care and supervision. "The testimony of more disinterested witnesses – and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges – would quite naturally

be given much greater weight by the jury. Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations." *Skipper*, 476 U.S. at 8. In this case, capital sentencing counsel's failure to investigate, develop, and present solid evidence of Mr. Dorsey's good adjustment to incarceration fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Given the limited scope of trial counsel's focus, the failure to consider that Mr. Dorsey's positive pre-trial adjustment to incarceration was woefully deficient. The records from the Missouri Department of Corrections made part of the state court record in state post-conviction proceedings were available to trial counsel. These records telegraphed that there was a wealth of additional evidence even beyond those records to support a mitigating theme of positive adjustment to incarceration. Despite the Eighth Circuit's conclusion that trial counsel "decided" to focus on other themes, there really was no strategic decision because trial counsel failed to investigate sufficiently to make that strategic decision. *See Wiggins v. Smith*, 539 U.S. at 527-28 (abandoning a mitigation investigation "at an unreasonable juncture" makes "a fully informed decision with respect to sentencing strategy impossible").

Some records on Mr. Dorsey, particularly his medical records from the Missouri Department of Corrections, were admitted into evidence in the Rule 29.15 state post-conviction proceeding. There is support for his claim that capital sentencing counsel were ineffective in failing to present his positive adjustment to incarceration as mitigation contained in those records chronicled above. First, there is nothing in those records evincing any behavioral or disciplinary problems on his part. This was highlighted by Dr. A.E. Daniel, a forensic psychiatrist who testified for the defense at the state post-conviction hearing. That testimony went unrebutted by

the State. Second, there were notes of Dr. Robert Smith, who testified at the capital sentencing proceeding that Mr. Dorsey had reported to him that he had no disciplinary infractions while incarcerated prior to the capital sentencing proceeding. Third, there were affirmative indicators of Mr. Dorsey's positive adjustment to incarceration even in the limited Department of Corrections records that were admitted at the state post-conviction proceeding. For example, there are records establishing that Mr. Dorsey was medically cleared for a food service job at South Central Correctional Center, and records that Mr. Dorsey was not hostile or angry, was quiet but not withdrawn, and exhibited no manic behavior.

This evidence and more could have been presented in mitigation of a death sentence had counsel only sought it out. They simply did not, and their failure to investigate his good adjustment to incarceration fell below an objective standard of reasonableness.

C. The Eighth Circuit's prejudice analysis is contrary to this Court's decisions in multiple cases.

The Eighth Circuit found not only that Mr. Dorsey's claim of ineffective assistance of capital sentencing counsel was insubstantial for purposes of considering ineffective assistance of state post-conviction counsel as cause for a procedural default, but also found that Mr. Dorsey failed to show a reasonable probability that, but for counsel's unreasonable performance, the result of the capital sentencing hearing would have been different. *Dorsey v. Vandergriff*, 30 F.4th at 759 ("Even assuming *arguendo* that reasonable jurists could believe that or find it debatable whether *Strickland*'s performance prong is met, no reasonable jurist could believe or find it debatable whether *Strickland*'s prejudice prong is met."). The Eighth Circuit reached this conclusion by means of considering only the aggravating evidence in the case. *Dorsey*, *ibid.* ("Here, the jury found no fewer than seven statutory aggravating factors. 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. . . ."). This analysis is simply methodologically and factually erroneous. *See Wiggins*, 539 U.S. at 534 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."); *Ayestas v. Davis*, 138 S.Ct. 1080, 1100 (2018) (Sotomayor, J., concurring) (Fifth Circuit's decision finding no prejudice "based on its belief that no amount of mitigation would have changed the outcome of the sentencing given the 'brutality of the crime' . . . is simply contrary to our directive in case after case that, in assessing prejudice, a court must "consider the totality of the available mitigation evidence . . . and reweigh it against the evidence in aggravation"; "by considering aggravation in isolation, the Fifth Circuit directly contravened this fundamental principle" (citing *Porter v. McCollum*, 558 U.S. 30, 41 (2009); *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000); *Wiggins v. Smith*, 539 U.S. at 534 (internal quotation omitted)).

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY THAT 28 U.S.C. §2254 DOES NOT DEPRIVE A DISTRICT COURT OF DISCRETION TO CONDUCT AN EVIDENTIARY HEARING ON INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL AS CAUSE FOR A PROCEDURAL DEFAULT OF A CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE THE FACTUAL BASIS FOR THE UNDERLYING CLAIM WAS DEVELOPED IN THE STATE COURT.

In *Shinn v. Ramirez*, 142 S.Ct. 1718 (2022), this Court held that, generally, 28 U.S.C. §2254(e)(2) proscribes evidentiary development of a constitutional claim of ineffective assistance of trial counsel where a federal habeas petitioner failed to develop the factual basis for that claim in state court proceedings. However, the consolidated cases in *Ramirez* did not present the issue presented here because the habeas petitioners in that case "d[id] not dispute, and therefore concede[d], that their habeas petitions fail[ed] on the state-court record alone." *Id*., 142 S.Ct. at 1730. However, as part of a broader argument, the habeas petitioners in *Ramirez* argued for evidentiary development on the question of cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012), noting that cause and prejudice is not a "claim," and that 28 U.S.C. §2254(e)(2) only bars evidentiary development in federal court where a habeas petitioner has failed to develop the evidentiary basis for a **claim** in state court proceedings. This Court commented on the argument in *Ramirez*, but did not reach or decide it. "There are good reasons to doubt respondents' first point [that a federal court could take evidence on ineffective assistance of post-conviction counsel to establish cause and actual prejudice], but we need not address it because our precedent squarely forecloses the second [that a federal court could then consider the evidence developed on the cause and prejudice issue to evaluate the underlying Sixth Amendment claim of ineffective assistance of trial counsel]." *Ramirez*, 142 S.Ct. at 1738. This dictum from *Ramirez* does not control the question presented here.

Nothing in 28 U.S.C. §2254(e)(2) could reasonably be construed to prohibit a federal court from taking evidence on the question of whether ineffective assistance of post-conviction counsel established cause for the default of an ineffective assistance of trial counsel claim where the evidence to support the underlying ineffective assistance of trial counsel claim (and the actual prejudice from the cause for the default) was presented in state court proceedings, as here.

In this case, state post-conviction counsel obtained and introduced Mr. Dorsey's medical records from the Missouri Department of Corrections. Those medical records, while limited in their scope as to Mr. Dorsey's positive adjustment to incarceration, provided sufficient information to warrant further investigation into Mr. Dorsey's positive adjustment to incarceration for purposes of investigating more fully an ineffective assistance of trial counsel claim for failing to investigate and develop Mr. Dorsey's positive adjustment to incarceration. *See Wiggins*, 539 U.S. at 527-28 ("In light of what the PSI and the DSS records actually revealed, however, counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.").

Mr. Dorsey was sentenced to death without the jury's knowledge that he was a model prisoner. As previously noted, such evidence can be very significant to a sentencing jury because, unlike family members and friends who testify in support of the defendant, evidence from the correctional institution is not "biased" toward the defendant. Rather, it reflects the objective facts about a prisoner's adaptation to incarceration untethered to the purpose of deciding the appropriate sentence in a capital proceeding. *Skipper*, *supra*. The evidence of good adjustment to incarceration is strong in this case, and the other evidence presented in mitigation was significantly less strong. Capital sentencing counsel's performance was wholly unreasonable. Post-conviction counsel reasonably should have presented this claim, but did not.

The evidence already presented to the state court clearly establishes the striking strength of the ineffectiveness-of-trial-counsel claim. Because this claim is so strong, prohibiting a federal court from taking evidence on cause – and only on cause – for the default would perpetuate an "extreme malfunction in the state criminal justice systems." *Ramirez*, 142 S.Ct. at 1731 (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). 28 U.S.C. §2254 is designed to prevent such extreme malfunctions.

CONCLUSION

Mr. Dorsey was denied the effective assistance of counsel at his capital sentencing proceeding. He can establish cause for the default of this claim in state post-conviction proceedings. Failure to allow him to do so will result in an extreme malfunction in the state's criminal process. The Eighth Circuit employed a mechanism to avoid giving him the opportunity to have his Sixth Amendment claim adjudicated that no other federal circuit in the country has employed. The writ of certiorari should be granted.

Respectfully submitted,

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