NO. _____

In the

Supreme Court of the United States

BRIAN J. DORSEY,
Petitioner

v.

WARDEN DAVID VANDERGRIFF,
Respondent

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

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PETITION FOR WRIT OF CERTIORARI

KIRK J. HENDERSON
Counsel of Record
ARIN MELISSA BRENNER
Assistant Federal Public Defenders
Federal Public Defender for the
Western District of Pennsylvania
1001 Liberty Avenue, Suite 1500
Pittsburgh, PA 15222
412-644-6565
kirk_henderson@fd.org
Supreme Court Bar No. 229934

Counsel for Petitioner Brian J. Dorsey

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

QUESTION PRESENTED

*** CAPITAL CASE ***

This Court has a long history of barring execution when a death sentence no longer furthers the penological goals of capital punishment. *See Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Kennedy v. Louisiana*, 554 U.S. 407 (2008). As the Court has recognized, the two principal goals of capital punishment are retribution and deterrence. *See Kennedy*, 554 U.S. at 420, 441; *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); *Glossip v. Gross*, 576 U.S. 863, 896 (2015) (Scalia, J., with Thomas, J., concurring). But when a person on death row has been rehabilitated, execution of the individual would not sufficiently further those penological goals. The Court has not yet addressed whether it would violate the Eighth Amendment's prohibition on cruel and unusual punishment to execute a person who has been rehabilitated during his time on death row.

This is the rare case where a person facing an imminent execution unquestionably is fully rehabilitated. Brian Dorsey committed the offense during a drug-induced psychosis. During Mr. Dorsey's many years on death row, removed from the circumstances that led to his psychosis, he has been rehabilitated. Notably, he earned the extraordinary trust of prison staff: he served as the prison's barber – cutting the hair of inmates, correctional officers, and even wardens – and lived in the prison's honor dorm. He never broke a prison rule and maintained a clean prison record for more than 17 years. And he has received the unprecedented support of more than 70 correctional officers in seeking clemency.

The question presented is:

When a death-sentenced person has demonstrated that he has been rehabilitated, does the Eighth Amendment prohibit his execution because the penological goals of the death penalty would not be met by executing that person?

PARTIES TO THE PROCEEDINGS

Petitioner is Brian J. Dorsey, a death-row inmate imprisoned at the Potosi Correctional Center in the State of Missouri.

Respondent is Warden David Vandergriff, Warden at the Potosi Correctional Center.

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The opinion of the Supreme Court of Missouri was issued on March 20, 2024. *In re: Dorsey v. Vandergriff*, No. SC100486, ___ S.W.3d ___, 2024 WL 1194417 (Mo. 2024).

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Missouri was entered on March 20, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

Brian Dorsey called his cousin, Sarah Bonnie, looking for help because he was being held by two drug dealers. Ms. Bonnie and her husband, Ben Bonnie, went to his apartment and the drug dealers left. The three then went back to the Bonnie's home, where they and other friends spent the evening drinking and playing pool in the "shop." Opinion of the Supreme Court of Missouri (March 20, 2024) at 2-3, attached as Appendix A. Mr. Dorsey, who had a life-long history of suffering from major depression, had been on a crack cocaine binge and had not slept in about 72 hours. As he was crashing from this binge, he experienced a drug-induced psychosis. As he drank more beer and vodka, he became suicidal and also experienced hallucinations and paranoid delusions. *Id.* at 8.

Once Ms. Bonnie, Mr. Bonnie, and their child went to their bedrooms, Mr. Dorsey, while in this state, picked up a shotgun from the shop and went into the parents' bedroom, where he shot both Ms. Bonnie and Mr. Bonnie. At the penalty phase, the State presented evidence that Mr. Dorsey raped Ms. Bonnie and poured bleach over her torso, even though it did not charge him with any crime related to this. *Id.* at 3. Mr. Dorsey left the home, taking several items with him, including the Bonnie's car, and later attempted to sell them. *Id.* at 3. When he later learned that the police were looking for him, Mr. Dorsey turned himself into the police. When asked if the police were speaking to the correct person about these killings, Mr. Dorsey immediately said they were. *Id.* at 4.

The Missouri Public Defender contracted with two attorneys who were each paid a $12,000 flat fee to represent Mr. Dorsey, irrespective of whether his case required a trial or how much time they would have to spend on the case. With that arrangement, the contract attorneys convinced

Mr. Dorsey to plead guilty without the benefit of an agreement that, in exchange for a guilty plea, the State would not pursue the death penalty.[1] After a short penalty phase hearing, during which little was done by counsel to obtain a life sentence, Mr. Dorsey was sentenced to death.

B. PROCEDURAL HISTORY

Following the imposition of Mr. Dorsey's death sentence, the sentence was upheld on direct appeal. *State v. Dorsey*, 318 S.W.3d 648 (Mo. 2010), *cert. denied*, 562 U.S. 1067 (2010). Mr. Dorsey sought post-conviction relief in state court, the denial of which was upheld by the Supreme Court of Missouri. *Dorsey v. State*, No. SC93168, 448 S.W.3d 276 (Mo. 2014), *reh'g denied*. Mr. Dorsey filed a Rule 91 habeas petition in the Missouri Supreme Court, which was denied. *State ex rel. Dorsey v. Griffith*, No. SC96440 (Mo. 2017), *cert. denied*, 583 U.S. 1018 (2017). Mr. Dorsey's efforts to obtain federal habeas relief also failed. *See Dorsey v. Steele*, 2019 WL 4740518 (W.D.Mo. 2019); *Dorsey v. Vandergriff*, 30 F.4th 752 (8th Cir. 2022), *rehearing denied*, 2022 WL 2180216, *cert. denied*, 143 S.Ct. 790 (2023).

On December 13, 2023, the Supreme Court of Missouri issued an execution warrant. Mr. Dorsey filed a Rule 91 habeas petition in the Missouri Supreme Court on December 22, 2023, arguing that his conviction and death sentence were obtained in violation of the Sixth Amendment right to unconflicted, effective counsel and that his execution would be a manifest injustice because he is actually innocent of capital murder. *State ex rel. Dorsey v. Vandergriff*, No. SC100388. Mr. Dorsey filed a separate Rule 91 habeas petition on February 25, 2024, the denial of which is the

[1] This flat fee arrangement is the basis of the petition for certiorari that was filed in this Court on April 1, 2024 and is docketed at No. 23-7119 and is still pending. That claim was presented to the Missouri Supreme Court in a separate Rule 91 habeas petition, which was docketed at No. SC100388, but it was decided in the same opinion with the Rule 91 habeas petition that is at issue here. The court did issue separate mandates for each case.

basis for this petition for writ of certiorari. *In re Dorsey v. Vandergriff*, No. SC100486. On March 20, 2024, the Supreme Court of Missouri issued an opinion denying both Rule 91 habeas petitions. Appendix A (Missouri Supreme Court Opinion), ___ S.W.3d ___, 2024 WL 1194417 (Mo. 2024). The court issued separate mandates for each of the distinct habeas petitions. *See* Appendix B (mandate related to the judgment challenged here). The court denied the Eighth Amendment claim presented here on its merits.[2] *See* Appendix A (Missouri Supreme Court Opinion) at 18.

[2] As Mr. Dorsey argued in the Missouri Supreme Court, the claim presented in this petition could not have been raised prior to the issuance of an execution warrant because it was not yet ripe. The Missouri Supreme Court did not find, as the State argued, that the claim should have been raised earlier. *See* Appendix A (Missouri Supreme Court Opinion) at 17-21. This is not surprising, as that court previously held that a Rule 91 habeas petition is the appropriate vehicle for a claim that has not become ripe until an execution date has been set. *See State ex rel. Middleton v. Russell*, 435 S.W.3d 83, 83 (Mo. banc 2014) (in the context of an incompetency-to-be-executed claim, the Court noted that "[a] petition for a writ of habeas corpus under Rule 91 is a proper means of asserting such a claim in this Court and has been used by inmates facing execution in the past"). Moreover, in Rule 91 proceedings, the Missouri Supreme Court has unfettered discretion to issue a writ to correct a manifest injustice, regardless of when a claim is raised. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000); *see also State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546 (Mo. 2003).

REASONS FOR GRANTING THE WRIT

I. WHEN A DEATH-SENTENCED PERSON EXHIBITS REMARKABLE REDEMPTION AND FULL REHABILITATION, HAS A PERFECT PRISON RECORD, AND RECEIVES UNPRECEDENTED SUPPORT FROM SCORES OF CORRECTIONAL OFFICERS, THE PENOLOGICAL GOALS SUPPORTING CAPITAL PUNISHMENT ARE NOT FURTHERED AND EXECUTING A PERSON IN THAT UNIQUE CLASS OF PEOPLE VIOLATES THE EIGHTH AMENDMENT.

Brian Dorsey, who is scheduled for execution on April 9, 2024, belongs to a unique class of persons sentenced to death who have achieved remarkable redemption and rehabilitation while under a sentence of death. He has spent more than 17 years on death row without a single rules infraction. No death-sentenced person has ever had a better prison record. Mr. Dorsey lives in the prison's honor dorm, and he has been entrusted as the prison barber to handle potentially-dangerous tools and cut the hair of fellow inmates, prison staff, and even wardens. Mr. Dorsey also has the unprecedented written support of over 70 prison staff members, as well as the former warden of the prison, who attest to Mr. Dorsey's rehabilitation and believe he should not be executed.

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 v. Georgia*, 408 U.S. 238, 312 (1972) (opinion concurring in judgment). When a death-sentenced person has spent years on death row with this kind of record, the penological goal of rehabilitation has been satisfied and the capital punishment goals of retribution and deterrence are not met by an execution. The question never answered by this Court is whether, to "protect the dignity of society itself from the barbarity of exacting mindless vengeance," *Ford*, 477 U.S. at 410, means that the Eighth Amendment protects 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. The Court should grant certiorari because the goals of capital punishment will not be furthered by the execution of Brian Dorsey.

A. BRIAN DORSEY'S UNPARALLELED PRISON BEHAVIOR AND PRISON STAFF SUPPORT.

1. Prior to the crime and imposition of the death penalty.

Prior to the events that underlie this case, Brian Dorsey, like many in his family, was diagnosed with major depressive disorder; despite his attempts to get treatment, the disease would prove medication-resistant. Beginning when he was a teenager, he was introduced to crack cocaine and, without other viable options, he used crack cocaine to self-treat his depression. Mr. Dorsey would go on long binges, but because of the paranoid delusions he would routinely experience, he would do so sequestered by himself. In December 2006, however, he was effectively kidnapped by drug dealers who wanted to be paid. Mr. Dorsey's cousin, Sarah Bonnie, and her husband, Ben Bonnie, extricated Mr. Dorsey and took him back to their house. By that evening, Mr. Dorsey had not slept in over 72 hours, was suffering from withdrawal, which historically came with paranoid delusions and hallucinations, and he also was drinking heavily that night (beer and then vodka). After other people had left and Ms. Bonnie and Mr. Bonnie had gone to bed, Mr. Dorsey saw their shotgun and considered killing himself. While he does not recall other details due to heavy intoxication, he was severely sleep-deprived and suicidal, and the withdrawal from cocaine would have, as it had many times before, plunged him into psychosis. It was during this time that Mr. Dorsey shot Sarah and Ben Bonnie. While still in a psychotic state, Mr. Dorsey left the home, taking with him some of the Bonnie's possessions.[3]

[3] Mr. Dorsey's other Rule 91 Petition filed in the Missouri Supreme Court presented evidence never before considered by a court that Mr. Dorsey was actually innocent of capital

Mr. Dorsey eventually turned himself in to the authorities. His trial attorneys were paid a $12,000 flat fee for their entire representation of Mr. Dorsey irrespective of how much – or how little – time they invested in the case. Because this flat-fee construct incentivizes doing less work for a client, *see* Letter of Mary Fox, Director of Missouri State Public Defender at 1-2, attached as Appendix C, these attorneys convinced Mr. Dorsey to plead guilty in exchange for absolutely nothing. Worse yet, they devised this misguided plan before their retained psychologist completed his evaluation and provided an opinion. Had counsel completed this minimal work with the expert, they would have known that Mr. Dorsey had a viable defense to capital first-degree murder, which would have provided a basis for seeking an agreement not to pursue the death penalty in exchange for a guilty plea. Counsel also could have presented a defense at a trial. That counsel was unwilling to spend the time needed to competently represent Mr. Dorsey is further demonstrated by the fact that, even though they did not have to prepare for a guilt phase trial, they did little to even prepare for the penalty phase trial and did not even retain a mitigation specialist.

Had counsel taken the time to do the work, they would have learned that Mr. Dorsey was suffering from a drug-induced psychosis, which meant he was incapable of forming the necessary intent for capital murder. They also would have discovered a wealth of mitigation information, confirming that Mr. Dorsey never was among the "worst of the worst" for whom capital

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murder. That petition was the first time that any Court has been presented with compelling evidence, from independent, consistent experts, that Mr. Dorsey was experiencing drug psychosis the night of the crime and thus was incapable of deliberation – the requisite intent for capital murder. Mr. Dorsey's trial attorneys, who were operating under a flat fee contract, did not undertake the standard investigation that would have provided then with the evidence to present this to the jury. For the Missouri Supreme Court's restatement of this evidence, see Appendix A (Missouri Supreme Court Opinion) at 8-10. A petition for certiorari covering that claim is docketed in this Court at No. 23-7119. This Court "may properly take judicial notice of the record in that litigation between the same parties who are now before us." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 157 (1969); *see also*, *e.g.*, *United States v. Pink*, 315 U.S. 203, 216 (1942).

punishment should be reserved. *See Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution"); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (the death penalty is reserved for "the most deserving of execution" (quoting *Roper*, 543 U.S. at 568)).

Instead, counsel quickly convinced Mr. Dorsey to avoid a guilt phase by pleading guilty. And even though that meant counsel did not have to prepare for a guilt phase, they nevertheless failed to even retain a mitigation investigator or do the necessary investigation to prepare for a capital penalty trial. As a result, the sentencing jury never received important information about Mr. Dorsey that would have enabled it to make the individualized sentencing determination required by the Constitution. *Lockett v. Ohio*, 438 U.S. 586, 602-05 (1978) (plurality opinion). Given the shortcuts taken by counsel, and their failure to provide the jury with a complete picture of Mr. Dorsey's life and mental illness, it is not surprising that the jury sentenced Mr. Dorsey to death after a brief sentencing hearing. He was sent to death row at Potosi Correctional Center.

2. Mr. Dorsey's Time at Potosi Correctional Center.

During Mr. Dorsey's seventeen-plus years of incarceration, he became the quintessential model prisoner. He never – not once –was cited for any kind of misconduct while incarcerated. *See* Report of Retired Warden Troy L. Steele (Steele Report) at 1-2, attached as Appendix D. Warden Steele, who was the Potosi Correctional Center Warden earlier in Mr. Dorsey's incarceration, noted that "his behavior is reported as exceptional, having received no reports for any type of misconduct." *Id.* at 1. According to the institution's review of all inmates, Mr. Dorsey

has been "consistently scored as a level 1 demonstrating his commitment to following institutional standards. *Id.* at 1-2. The level 1 rating "indicat[es] exceptional behavior." *Id.* at 1.

Mr. Dorsey's exceptional behavior must be viewed in the context of serving a sentence at Potosi Correctional Center, one of four maximum security male prisons in Missouri and the only one that "was designed specifically to house the capital punishment offenders for the State of Missouri." *Id.* at 3. Those under a sentence of death "are not housed in a specific unit but are allowed to integrate with other offenders throughout the institution." *Id.* In addition to those sentenced to death, Potosi Correctional Center often receives those who have proven to be troublemakers or violent inmates at other institutions. *Id.* Therefore, "the offenders that Offender Dorsey must interact with daily are some of the most problematic offenders that the State incarcerates." *Id.* Consequently, "[d]ue to this clientele the staff have a heightened degree of observation and requirements for compliance." *Id.* And, yet, even under this microscope, Mr. Dorsey has never had an infraction.

Mr. Dorsey has been promoted to live in the honor dorm. *Id.* at 2. Not only that, "Offender Dorsey is currently assigned to the highest possible honor status." *Id.* Newly arrived inmates "receive only the very basic privileges." *Id.* Inmates are "held to a stringent standard where their continued appropriate adjustment will allow them advancement in privileges and housing assignments." *Id.* To keep this honor status, Mr. Dorsey must "demonstrat[e] exceptional behavior daily." *Id.*

All inmates at Potosi are required to maintain a job and most involve mundane tasks such as cleaning the prison, working in food preparation, and doing routine maintenance around the prison. *Id.* Some work assignments, however, "are only given to those offenders who have earned the trust of corrections officials" because they "have exhibited exceptional abilities and appropriate

behavior." *Id.* Mr. Dorsey was given the job of staff barber to cut and style the hair of his fellow inmates as well as the staff of the prison. *Id.* Barber is "one of the most trusted positions" that an inmate could have. *Id.* This is so, not surprisingly, because "he is entrusted with equipment that could be used as weapons to harm staff." *Id.* The prison staff, thus, "trust him in that they put themselves in a position of vulnerability" when sitting in the barber chair. *Id.*

The prison undertakes a periodic predatory assessment of all inmates. *Id.* at 3. For Mr. Dorsey "[i]t is documented that he does not victimize other offenders, he accepts responsibility for his actions, he does not stir up trouble with other offenders, and he cooperates with staff." *Id.* The various prison assessment tools "demonstrated that he has the ability to interact appropriately with other offenders and staff, and requires little supervision in this area." *Id.*[4]

Warden Steele analyzed Mr. Dorsey's records, he weighed the records in light of the culture at Potosi Correctional Center, and he considered his own personal experience with Mr. Dorsey as one of the offenders he oversaw while warden. He concluded that "Offender Dorsey has been able to conduct himself in this environment in exceptional fashion having exhibited no behavioral issues while under the scrutiny of the correctional staff and the harassment of other offenders." *Id.* (emphasis added). In those conditions, "[h]e has obtained the highest levels of respect and confidence as exhibited by his housing and work assignments." *Id.* (emphasis added). "Professional staff evaluate his attitude and appearance and indicate he appears to be positive and appropriate notwithstanding his present predicament." *Id.* at 3-4 (emphasis added). "Adding the

[4] Mr. Dorsey has not achieved this record by eschewing opportunities to socialize with other inmates and avoiding anything that could become antagonistic. For example, Mr. Dorsey has played softball while at Potosi Correctional Center. This has not led to any sort of problems with other inmates that one could envision developing during a competitive game involving those incarcerated at this maximum security prison. Being allowed to play softball also demonstrates "the level of staff trust which is given as he is permitted the use of a baseball bat in close proximity to staff." *Id.*

stress of his possible upcoming execution, it is remarkable in how he conducts himself as relayed by those who supervise him throughout the institution." *Id.* at 4 (emphasis added).

After conducting this analysis, Warden Steele concluded that he has "no reason to believe that should his sentence be commuted that his behavior would diminish in any way." *Id.*

3. The Unprecedented Support from Correctional Staff.

Mr. Dorsey's exceptional behavior and his service to the prison as the staff barber has led to an extraordinary 70+ staff members from Potosi Correctional Center urging Governor Michael Parson to commute Mr. Dorsey's sentence to life in prison.

A group of over 70 corrections staff members at Potosi Correction Center have signed a letter to Governor Parson. Noting that they "are part of the law enforcement community who believe in law and order" and that they "[g]enerally believe in the use of capital punishment," they nonetheless "are in agreement that the death penalty is not the appropriate punishment for Brian Dorsey." Report of Dr. Steven N. Gold (Gold Report) at 4, attached as Appendix E. Echoing Warden Steele's evaluation of Mr. Dorsey, the letter states that these correctional officers "believe that Brian is a good guy, someone who has stayed out of trouble, never gotten himself into any situations, and been respectful of us and his fellow inmates." *Id.* "Brian never presented any problems, either inside the institution or outside during recreation time." *Id.* The letter notes they understand that, "[i]f all of the inmates were like Brian, there would never be a problem in the institution." *Id.* While understanding that Mr. Dorsey was convicted of murder, they also explained that "that is not the Brian Dorsey that we know." *Id.*

In addition to those 70+ correctional officers, five officers wrote heart-felt individual letters that conveyed their individual experiences with and feelings about Mr. Dorsey. Below are excerpts from those five letters:

Letter 1

Over the course of my time in the DOC, I have met a lot of inmates, but I have never written a letter like this.

When you spend time around Brian like I have, you can just tell that he has changed.

We trusted him with scissors to cut our hair. That says a lot about Brian.

I am a person that respects law and order. I do not take this letter lightly. The Brian I have known for years could not hurt anyone. The Brian I know does not deserve to be executed.

Letter 2

Not only has law and order been my life's work, but I believe in the use of capital punishment. . . . But the death penalty is not the appropriate punishment for Brian Dorsey.

He is a role model to other inmates.

I watched Mr. Dorsey during his court hearings, and observed him struggle with the pain he caused his parents and his family.

If you ask me, if it were not for drugs, none of this would have happened.

Letter 3

I have encountered some inmates who are clearly not rehabilitated, and others who are. Brian Dorsey fits in the description of the latter.

I know that he is very sorry for his crime. Brian demonstrates a spirit of remorse and regret. . . . Brian's remorse is genuine and always present.

Brian does a good job and is an asset to the prison and the state in his employment as the staff barber.

I believe that Brian must have been extremely high on drugs and out of his right mind to have committee murder or even to have caused harm to another person.

Letter 4

I believe in our correctional system and I believe in capital punishment. . . . But I do not believe Mr. Dorsey should be executed.

Mr. Dorsey has accepted what he did and taken accountability for his crime. It is my impression that he has spent his time since then trying to do his best by being a role model to other inmates and providing a valuable service to the staff. . . . He is an example of what we want inmates to be.

> I have known many offenders who should be executed. Mr. Dorsey simply is not one of them. He stands out from other inmates. It would be a loss to the state if he were executed.
>
> I have never written a letter like this before, and I doubt that I ever will again. Brian Dorsey is just different.
>
> *Letter 5*
>
> I have learned that Brian is different in a couple of ways. The first thing that stands out is that in all the years we have both been here [at Potosi Correctional Center], Brian has never caused a problem. . . . Brian has never even been written up. Not even once. I cannot think of another inmate that has that sort of record.
>
> Aside from staying out of trouble, . . . He is always respectful. He is always kind. People who no longer work here will come back just to get a haircut from Brian.
>
> I believe actions have consequences. I believe Brian deserves to spend the rest of his life in prison for what he did. However, I do not want to see him executed. He is very sorry and remorseful about his crime.

Id. at 5-6.

Common themes run through these letters:

- Supporting a capital inmate is something new to these correctional officers; it is the first and, likely the last, time they will feel moved to do it.
- They favor the use of capital punishment, but believe it is inappropriate for Mr. Dorsey.
- The Brian Dorsey they know would not have been involved in murders but for the impact of drugs.
- From their time with him, they know that Mr. Dorsey is genuinely remorseful.
- Mr. Dorsey's behavior in prison is better than anyone they have seen, and he has never caused a problem.
- Because of that, not surprisingly, Mr. Dorsey has become a role model for other inmates.
- It would be a loss to the State of Missouri if a rehabilitated model inmate, who also is the staff barber, were to be executed.

These Potosi Correctional Center officers have daily contact with those on death row and with "offenders throughout the State [who] exhibit extreme acts of inappropriate behavior or violence [so that] they are often transferred to [Potosi Correctional Center]." Appendix D (Steele Report) at 3. These members of law enforcement know who "the worst of the worst" are in Missouri. Thus, not surprisingly, these staff members support capital punishment. *See* Appendix E (Gold Report) at 4-6. These officers nonetheless understand that Mr. Dorsey is not among "the worst of the worst." *Id.*

In short, Mr. Dorsey came to be incarcerated as someone whose severe mental illness and florid drug psychosis precipitated a double homicide, rather than as one of "the worst of the worst" of offenders. Against that backdrop, he has not ever, even once, been cited for any sort of infraction, which, according to the previous warden at Potosi Correctional Center, is "remarkable." Appendix D (Steele Report) at 4. Though this is hard to pin down because correctional officer support is so rare, it appears that Mr. Dorsey's level of prison staff support is unparalleled in any of the 1500+ clemency application ever made in any state.[5]

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[5] For example, an Idaho death row inmate was supported by seven staff members. Ruth Brown, *Judge who sentenced Idaho inmate Thomas Creech now says he shouldn't be executed*, Idaho Capital Sun (10/16/2023), *available at* https://idahocapitalsun.com/2023/10/16/judge-who-sentenced-idaho-inmate-thomas-creech-now-says-he-shouldnt-be-executed. Seven prison employees supported clemency in a Tennessee case. Zuri Davis, *Corrections Officers, Jurors, and the Families of Nick Sutton's Victims Want Him Taken Off Death Row*, Reason Magazine (1/15/2020), *available at* https://reason.com/2020/01/15/corrections-officers-jurors-and-the-families-of-nick-suttons-victims-want-him-taken-off-death-row. An Alabama inmate found support from four staff members. Equal Justice Initiative, *Despite Appeal from Prison Guards for Clemency, Jeff Land is Executed*, Equal Justice Initiative (8/12/2010), *available at* https://eji.org/news/alabama-executes-jeff-land-despite-appeal-from-prison-guards-for-clemency.

Other requests for mercy have noted good prison behavior and support from fellow inmates, but, tellingly, without support from corrections staff. *See*, *e.g.*, *Bucklew clemency petition*, St. Louis Post-Dispatch (9/24/2019), *available at* www.stltoday.com/bucklew-clemency-petition/pdf_25f4e6df-084f-5d52-add8-a5c4ae978fd0.html (noting that Mr. Bucklew was not violent in prison, but no corrections staff appear to have requested clemency on his behalf); Bob

One may ask why is corrections staff support so rare? First, frankly, few people sentenced to death have never violated any prison rule and consistently – from start to end – conducted themselves in such a way as to earn that support. Second, even then, "[i]t's unusual for corrections officers to speak well of inmates. . . . There's this old adage in corrections . . . 'If you can't say nothing bad about an inmate, you don't say nothing at all.'" Pamela Ortega & Emily Smith, *3 corrections officers say Nicholas Sutton protected them. He was executed Thursday night*, CNN (2/21/2020), *available at* www.cnn.com/2020/02/20/us/nick-sutton-execution/index.html; [6] Report of Dr. Steven N. Gold at 12 (prison staff letters supporting a death row inmate "is an exceedingly rare occurrence").

Third, there are implicit pressures against a prison employee coming forward to offer support for one of the people incarcerated in the prison in which they work. "To advocate for an inmate this assertively, which can be viewed by prison administrators as problematic or even insubordinate, provoking concern that one may be endangering one's career, strongly suggest that Brian has conducted himself in a way that has stirred an incomparable degree of dedication from prison staff." Appendix E (Gold Report) at 6.

If there is any question that this is true, a federal judge has ruled that a correctional officer at Potosi was placed under investigation after he indicated willingness to write a supportive letter.

Holden, *Parson must intervene and stop the execution of Ernest Johnson*, Missouri Independent (10/1/2021), *available at* https://missouriindependent.com/2021/10/01/former-gov-bob-holden-parson-must-intervene-and-stop-the-execution-of-ernest-johnson (Mr. Johnson did not have "any significant conduct violations," but no correctional staff supported his request for mercy).

[6] This story is quoting James E. Aiken, a former prison warden with more than 33 years of experience in correctional administration. He now consults on topics such as future dangerousness and prison conditions and has served on commissions such as the National Prison Rape Elimination Commission. *See* https://cybercemetery.unt.edu/archive/nprec/20090820154824/http://nprec.us/home/commissioners.

The federal judge found that the officer feared for his job. The correctional officer ultimately did not submit the letter in support of clemency. *Winfield v. Steele*, 26 F.Supp.3d 890, 894-95 (E.D. Mo. 2014), *rev'd* 755 F.3d 629 (8th Cir. 2014), *cert. denied*, 573 U.S. 928 (2014).[7] Altogether, five federal judges believed the evidence showed that this correctional officer feared for his job if he supported clemency. *See id.*; *Winfield v. Steele*, 755 F.3d 629, 632-35 (8th Cir. 2014) (dissenting opinions joined by Murphy, J., Bye, J., Melloy, J., and Kelly, J.), *cert. denied*, 573 U.S. 928 (2014). The point is that staff of the Missouri Department of Corrections would understand that they could be putting their career in jeopardy by supporting clemency – and, yet, scores of them have done just that.

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[7] Though the Eighth Circuit reversed the district court, it was because the Eighth Circuit found there was no due process violation or interference with the clemency process because the DOC ultimately relented and gave the correctional officer's declaration in support of clemency to the Governor. The Circuit did *not* hold that the DOC did not threaten the officer. The district court, however, did speak to this in detail:

> [P]rison officials took actions to intimidate Cole to keep him from providing support for Winfield's clemency petition. . . . Cole denies being threatened, although his demeanor, and the recording of his interview with Wilson, shows that he was intimidated and feared for his job. . . . [T]here is substantial evidence that the department's actions caused Cole to fear that his employment would be negatively affected if he continued to support clemency. And there is substantial evidence that Cole was, in fact, deterred from supporting the request for clemency.

Winfield v. Steele, 26 F.Supp.3d at 894-95.

Moreover, the Eighth Circuit four-judge dissent said that "a reasonable trier of fact could conclude Mr. Cole's [the correctional officer's] change of heart and unwillingness to support Winfield's clemency was the result of ongoing pressure from the MDOC. The State does not contend that Winfield's allegations of intimidation are without merit, and, in fact, it implicitly concedes the allegations are true." *Winfield v. Steele*, 755 F.3d at 635 (Bye, J., dissenting).

4. Executing a Wholly Rehabilitated Model Prisoner Harms Correctional Staff, the Prison Community, and Society.

When an inmate is as well-liked and respected as Mr. Dorsey is by the Potosi staff, an execution can traumatize staff. The trauma suffered by those who take part in the actual execution is well known. Appendix E (Gold Report) at 7-8. That trauma is present in every execution. *Id.* Missouri already knows this to be true; in fact, it is the reason why it changed the site of executions from the Potosi Correctional Center to the Eastern Reception, Diagnostic and Correctional Center in Bonne Terre. *Id.* at 9.

What is unique about Mr. Dorsey's situation is the unmatched level of support he is receiving from the staff at Potosi Correctional Center where he is housed. Mr. Dorsey is known by more staff than the typical death-sentenced person because of his job as the staff barber. As documented above, he is highly regarded by the staff at Potosi. "For those in close proximity to the condemned, executions can be especially traumatizing." *Id.* "The fact that they know and have interacted with the condemned and are aware that they have been put to death, can take a considerable toll, especially if they have grown attached to them." *Id.*

This trauma can be experienced by most if not all of the staff at the housing prison in certain circumstances – like this one. "The risk for enduring harmful consequences expands outward to those who assume an ancillary role in implementing the death penalty such as death row personnel who have extensive contact with condemned over their often long periods of imprisonment, wardens and other prison administrators, prison medical personnel who examine condemned inmates before and after the execution, and chaplains who act to provide spiritual guidance and comfort to them." *Id.* at 8 (references to scientific literature omitted). These people who have gotten to know the death-sentenced person over a period of time can expect to suffer "[s]ubstantial deleterious psychological and medical effects" following an execution. *Id.* at 8. In sum, "the

impact of the death penalty radiates far beyond those who actually are engaged in carrying it out or even those who are present to witness the death of the condemned." *Id.* at 9.

The impacts upon the Potosi staff can lead to PTSD or other psychiatric syndromes, such as acute stress disorder, even though the staff is not present at the execution. *Id.* "It has been well established in the psychological research literature that physical proximity to a potentially traumatic event is not the sole or even necessarily the most relevant factor in determining whether or how traumatic an experience may be." *Id.* (reference to scientific literature omitted). This concern "is especially relevant to Brian's situation given the widespread positive reaction to him among prison employees and fellow inmates." *Id.*

Even for staff at the housing prison (as opposed to the executing prison), "those who come to view an instance of [the death penalty's] implementation as unjust are vulnerable to developing what is referred to in the psychological research as 'moral injury.'" *Id.* at 10. Accordingly, this would be true for an execution of a particular person, even if the staff member generally supports capital punishment, as is the case with those who are advocating for Mr. Dorsey. "Moral injury manifests as emotional disturbance and maladjustment arising from participation in a system that endorses acts of violence that are at odds with one's personal moral convictions." *Id.* (citation omitted).

The letters written by the Potosi staff certainly show that allowing this execution to occur would be "at odds with one's personal moral convictions." For example, one correctional officer says that he "respects law and order," but "[t]he Brian I know does not deserve to be executed." *Id.* at 5. Another says that "[n]ot only has law and order been my life's work, but I believe in the use of capital punishment. . . . But the death penalty is not the appropriate punishment for Brian Dorsey." *Id.* A different correctional officer said that "I have known many offenders who should

be executed. Mr. Dorsey simply is not one of them." *Id.* This was how another correctional officer felt about Mr. Dorsey: "I believe Brian deserves to spend the rest of his life in prison for what he did. However, I do not want to see him executed." *Id.* at 6. The group letter signed by the scores and scores of Potosi staff says that "[w]e are part of the law enforcement community who believe in law and order. Generally, we believe in the use of capital punishment. But we are in agreement that the death penalty is not the appropriate punishment for Brian Dorsey." *Id.* at 4.

"Although the symptoms of moral injury can overlap with those found in PTSD, moral injury has been found to be characterized by higher levels of guilt, intrusive and unbidden episodes of re-experiencing the traumatic event (i.e., traumatic flashbacks, in which the affected person compellingly revivifies the event, feeling as if it is happening in the present), and remorse." *Id.* at 10. (citation omitted).

When this many staff members are suffering from this type of psychological harm, it will decrease their effectiveness on the job, which in turn will make the prison a less safe environment. *Id.*; *id.* at 11. And, in a system already plagued by high turnover,[8] this type of trauma likely will lead to some staff members leaving this line of work altogether.

Maintaining staff supports prison safety. According to University of Missouri Sociology Professor Christopher Conner, "[i]f there is a constant turnover of officers, prisoners could push boundaries." Hunter Walterman, *'Wherever they're needed most:' New units support Missouri's*

[8] *See* Alisa Nelson, *Turnover Rate of Missouri's Prison Guards Continues to Climb*, MissouriNet (12/15/2016), *available at* www.missourinet.com/2016/12/15/turnover-rate-of-missouris-prison-guards-continues-to-climb/#:~:text=The%20percentage%20of%20Missouri%0corrections corrections,ago%20to%20the%20current%2025%25 (according to the Missouri Corrections Officers Association, 25% of officers quit each year); *Mounting job vacancies push state and local governments into a wage war for workers*, Spectrum News (7/30/2023), *available at* https://spectrumlocalnews.com/mo/st-louis/news/2023/07/28/mounting-job-vacancies-push-state-and-local-gov-ernments-into-a-wage-war-for-workers- ("Almost 1 in 4 positions – more than 2,500 jobs – were empty in the Missouri Department of Corrections late last year.").

understaffed prisons, KOMU (10/8/2023), *available at* www.komu.com/news/midmissourinews/wherever-theyre-needed-most-new-units-support-missouris-understaffed-prisons/article_db5f3a8e-63b2-11ee-8a06-37c35aed3acc.html. Also, correctional staff who "were more empathetic to inmates . . . were quitting, [and that would] legitimiz[e] and heighten[ ] the presence of officers known to escalate conflicts, antagonize offenders, and endanger themselves and fellow officers." Claudia Levens, *Corrections staffing shortages persist*, Jefferson City News Tribune (1/3/2023), *available at* www.newstribune.com/news/2023/jan/03/corrections-staffing-short-ages-persist.

In short, executing Mr. Dorsey would harm the Potosi staff and that also could lead to the prison being less safe for both staff and those incarcerated there.

B. GOALS OF THE DEATH PENALTY AND CATEGORICAL BARS TO EXECUTION.

"The Eighth Amendment succinctly prohibits '[e]xcessive' sanctions." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting U.S. Const. amend VIII). It provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Amendment proscribes "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins*, 536 U.S. at n.7. The Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic "precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791, but by the norms that "currently prevail." *Atkins*, 536 U.S. at 311; *id.* ("A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by

those that currently prevail"). This Court has been clear that the Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This is so because "[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Furman*, 408 U.S. at 382 (Burger, C. J., dissenting). Ultimately, "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Atkins*, 536 U.S. at 313 (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

This Court has repeatedly held that the evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of those convicted of a crime must conform to that rule. *Trop*, 356 U.S. at 100. Accordingly, the death penalty might serve "two principal social purposes: retribution and deterrence."[9] *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). The death penalty, however, "is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." *Kennedy*, 554 U.S. 407, 441 (2008) (citing *Gregg*, 427 U.S. at 173, 183, 187); *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

[9] The Court elsewhere has also identified rehabilitation and incapacitation as rationales for punishment. *See Kennedy*, 554 U.S. at 420 (in that capital case, the Court noted that "punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution"); *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring) (discussing rehabilitation, deterrence, and retribution); *see also Williams v. People of State of N.Y.*, 337 U.S. 241, 248 (1949) ("Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence"); *see also infra* at §C, pp. 24-29 (discussing both rehabilitation and incapacitation).

When the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. 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 (opinion concurring in judgment). "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham v. Florida*, 560 U.S. 58, 71 (2010); *see also Gregg*, 428 U.S. at 183 ("the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering").

In the modern era, this Court has recognized multiple situations where executing a person would not support the goals of retribution and deterrence and, thus, would be "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Furman*, 408 U.S. at 312. Indeed, shortly after reinstating the death penalty in 1976, this Court started carving out categorical exemptions of classes of people who cannot be executed because the goals supporting capital punishment would not be furthered. *Coker*, 433 U.S. at 593-96 (exempting individuals convicted of rape); *Enmund v. Florida*, 458 U.S. 782, 789-93, 798, 801 (1982) (exempting individuals convicted under felony murder theory who did not kill, attempt to kill, or intend to kill).

The Court continued this trend by finding that a person with an intellectual disability is not in the class of "only the most deserving of execution" and executing them would not further either objective of retribution or deterrence. *Atkins*, 536 U.S. at 319-20. The Court then held that executing juveniles who have killed someone violates the Eighth Amendment because neither penological goal of deterrence nor retribution is furthered by taking the life of an immature child. *Roper*, 543 U.S. at 572. The death penalty also is an unconstitutional sentence for child rape

because the goals of deterrence and retribution are not advanced by an execution. *Kennedy*, 554 U.S. at 420, 442, 445-46.

In *Ford v. Wainwright*, the Court held that the Eighth Amendment prohibits executing a person who is incompetent to understand or appreciate the punishment. In that case, Ford's condition deteriorated while he was on death row to the point it was not clear whether he understood why the state wanted to execute him. *Ford*, 477 U.S. at 401-04. In determining that such a person cannot be executed, the Court based its decision on "one of the death penalty's critical justifications, its retributive force," which is not furthered without the defendant's awareness of the pending penalty. *Id.*, 477 U.S. at 421 (Powell, J., concurring). The Eighth Amendment, in that situation, is "protect[ing] the dignity of society itself from the barbarity of exacting mindless vengeance." *Id.*, 477 U.S. at 410. The Court also recognized that "the execution of an insane person simply offends humanity." *Id.*, 477 U.S., at 407.

In *Panetti v. Quarterman*, the Court held that a person may not be executed not only when suffering delusions, but also when he or she suffers from a psychotic disorder so that he or she does not understand the reason for the imminent execution. The Court noted that such an execution "provides no example to others," *i.e.*, it will not deter others from committing homicides. *Panetti*, 551 U.S. at 958 (quoting *Ford*, 477 U.S.at 407). The goal of retribution is not served because "[t]he potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question" because "the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole." *Id.*, 551 U.S. at 958-59.

Where, as here, the penological goal of retribution is diminished, the evolving standards of decency do not call for the law to administer an equally retributive sentence. In some situations,

the evolving standards of decency dictate that the penological goal of retribution can only be met with incarceration. *See Kennedy*, 544 U.S. at 435-36.

These cases all recognize that the Court's Eighth Amendment jurisprudence prohibits the execution of particular classes of people. The Court has determined that, when the goals of deterrence and retribution are not met, the person should not be subjected to the law's harshest penalty. Instead, in this situation, the penalty of life without the possibility of parole serves the goals set by society to punish those convicted of murder – including by furthering the goal of rehabilitation. *Furman*, 408 U.S. at 304-05 (Brennan, J., concurring) ("When the overwhelming number of criminals who commit capital crimes go to prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment"); *Roper*, 543 U.S. at 571-72 ("it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction"). [10]

C. REHABILITATION AND BECOMING "A CHANGED HUMAN BEING" DURING THE MANY YEARS ON DEATH ROW.

It is noteworthy that, beyond identifying retribution and deterrence as goals of the death penalty, the Court has also recognized that rehabilitation is an important objective of punishment generally.[11] *See Kennedy*, 554 U.S. at 420; *Glossip v. Gross*, 576 U.S. 863, 896 (2015) (Scalia, J.,

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[10] Though the Missouri Supreme Court said that Mr. Dorsey "does not explain how his execution would not further the penological goals of deterrence or retribution," Appendix A (Missouri Supreme Court opinion) at 19, this simply is not true. In his Rule 91 habeas petition, Mr. Dorsey discussed the penological goals of deterrence and retribution (plus rehabilitation) throughout much of the pleading. *See* Petition for Writ of Habeas Corpus Pursuant to Missouri Supreme Court Rule 91 and Suggestions in Support at 9, 27-34, 36-39 (deterrence and retribution), 34-41 (rehabilitation).

[11] Incapacitation also is a justification for punishing criminal behavior. *Powell v. Texas*, 392 U.S. 514, 539 (1968) (Black, J., concurring) ("isolation of the dangerous has always been

with Thomas, J., concurring); *see also Williams v. People of State of N.Y.*, 337 U.S. 241, 248 (1949) ("Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence"). What the Court has not yet addressed is whether evolving standards of decency require a court to consider if a person who is rehabilitated while on death row should be ineligible for execution.

Even for those who have received a death sentence, some small number of them can become reformed and rehabilitated during their time on death row. In such cases, life in prison better serves *all* the goals of punishment – deterrence, retribution, *and rehabilitation*. As the Court has recognized, "[i]n most cases justice is not better served by terminating the life of the perpetrator

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considered an important function of the criminal law"); *Foucha v. Louisiana*, 504 U.S. 71, 99 (1992) (Kennedy, J., dissenting) ("Incapacitation for the protection of society is not an unusual ground for incarceration"); *see also Ewing v. California*, 538 U.S. 11, 25 (2003) (explaining the deterrence, incapacitation, retribution, and rehabilitation theories of punishment). While a death-sentenced person sits on death row, they necessarily are incapacitated. Should they be executed, of course, this is no longer a factor. Nonetheless, the length of time that a person sits on death row is now measured in decades. *See* Death Penalty Information Center, *The Death Penalty in 2023: Year End Report*, *available at* https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2023-year-end-report#executed-prisoners-spent-longer-on-death-row ("Those executed in 2023 spent an average of nearly 23 years on death row. . . . More than half (54%) of the prisoners had been on death row for more than 20 years"). These people are certainly incapacitated during these many years. *Glossip v. Gross*, 576 U.S. 863, 929-30 (2015) (Breyer, J., dissenting) (a death sentence "does, of course, incapacitate the offender"). For those whose sentences are converted to a life-without-parole sentence via clemency or litigation, they remain incapacitated for the rest of their lives. *Id.* at 930 ("But the major alternative to capital punishment – namely, life in prison without possibility of parole – also incapacitates").

Part and parcel of incapacitating those convicted of a crime is the laudable objective of safely managing the prison population. If perfect behavior meets the same fate as disruptive or assaultive conduct, there is no reason to choose to be a model prisoner, especially in a maximum-security facility where some might see a benefit to cultivating a dangerous persona. *See* Appendix E (Gold Report) at 12 (if "there is no reward for pro-social behavior," other Potosi inmates may "see little incentive in adhering to prison rules and instead may become demoralized, rebellious, and uncooperative, leading to substantial challenges for staff in maintaining order"); *id.* ("there will be an appreciably heightened probability of emotional disturbance and disruptive and uncooperative behavior among other inmates at Potosi who will be demoralized by evidence that even Brian's exceptional behavior and unsurpassed reputation among prison staff did not mitigate his death sentence").

rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense." *Kennedy*, 554 U.S. at 447.

In that same vein, "[t]he [death-sentenced] offender may have found himself a changed human being" after many years on death row. *Glossip*, 576 U.S. at 932 (Breyer, J., dissenting). The "social goal of retribution" is not furthered in some situations, such as with the execution of an incompetent person, 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). In short, when the offender has lived a "second lifetime" on death row and may well be a very different person than the one who was originally sentenced to death, execution should no longer be a legitimate expression of retribution. Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Stabilization: Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 Law And Inequality 211, 230-31 (2012); *see also State v. Andrews*, 843 P.2d 1027, 1033-34 (Utah 1992) (Stewart, J., concurring) ("if I were a member of the Board of Pardons, I would vote to commute the death sentence to a sentence of life imprisonment" because the condemned person "today is not the same person he was" at the time of the crime"), *cert. denied*, 505 U.S. 1233 (1992); *Jones v. Mississippi*, 141 S.Ct. 1307, 1323 (2021) (in the case of a juvenile being resentenced for murder after having spent 17 years in prison, the majority opinion recognized the value of having "maintained a good record in prison and that he is a different person now than he was when he killed his grandfather").

The passage of time inherent in any capital case leaves ample time for some small number of those on death row to achieve this transformation. Mr. Dorsey has now been incarcerated for just over 17 years.

Many members of this Court have noted that "neither ground [*i.e.*, retribution and deterrence] retains any force for prisoners who have spent some 17 years under a sentence of death." *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., memorandum respecting denial of certiorari). Likewise, "the longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 120 S.Ct. 459, 462 (1999) (Breyer, J., dissenting from denial of cert.)); *see also Glossip*, 576 U.S. at 929-35 (Breyer, J., joined by Sotomayor, J., dissenting) (making the same point and noting the average time spent on death row in 2015 was about 17 years); *Bucklew v. Precythe*, 139 S.Ct. 1112, 1144-45 (2019) (Breyer, J., joined by Ginsburg, J., Sotomayor, J., Kagan, J., dissenting).

"[T]he additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal."[12] *Lackey v. Texas*, 514 U.S. at 1045 (Stevens, J., memorandum respecting denial of certiorari). In fact, "the deterrent value of incarceration during that period of uncertainty [while awaiting execution] may well be comparable to the consequences of the ultimate step itself." *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., respecting denial of certiorari).

Likewise, "after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted" by the years on death row. *Lackey*, 514 U.S. at 1045 (Stevens, J., memorandum respecting denial of certiorari). These

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[12] Whether the death penalty actually has any deterrent effect at all is debatable. *See Glossip*, 576 U.S. at 930-31 (Breyer, J., dissenting) (citing numerous studies showing no deterrent effect); *Baze v. Rees*, 553 U.S. 35, 79 (2008) (Stevens, J., concurring in judgment) ("Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders"). The relevant point here, however, is that any deterrent effect that might exist is reduced to near zero when the execution takes 17 or more years to happen.

individual opinions are consistent with Court precedent recognizing that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890). And, if the person is not ever executed, "the community and victims' families will know that, even without a further death, the offender will serve decades in prison under a sentence of life without parole." *Glossip*, 576 U.S. at 932-33 (Breyer, J., dissenting).

And yet, despite being subjected to those "horrible feelings" for 17 years, Mr. Dorsey has lived such a life that more than 70 prison staff members are advocating that he not be executed. This unprecedented support from the staff is evidence that the penological goal of rehabilitation has been accomplished in this case, and that the goals of capital punishment – retribution and deterrence – would not be meaningfully furthered by his execution. "Brian's record, general behavior, and quality of interactions with officers and fellow detainees epitomizes the ideal of rehabilitation." Appendix E (Gold Report) at 11.

The person who Mr. Dorsey is today is not the same person who committed the crimes in 2006. If the goals of punishment mean anything, they must mean that Mr. Dorsey's life should be spared. Executing Mr. Dorsey after 17 years of extraordinary reformation and impeccable conduct will not sufficiently further the goals of retribution and deterrence. Instead, a life sentence for Mr. Dorsey best furthers *all* the goals of punishment – including rehabilitation. When the person to be executed is not the same person who was convicted of committing the crime, "[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. This Court should grant certiorari to determine whether rehabilitation must be considered by a court in those rare cases where the

death-sentenced person can show that he or she has been fully rehabilitated. Because of Mr. Dorsey's unsurpassed record on Missouri's death row, this case presents the best vehicle for the Court to take up this question.

In sum, this Court has held that the Eighth Amendment demands that some offenders be categorically exempt from execution. This Court should grant certiorari to determine whether a condemned person who falls into the rare category of an offender who has shown full rehabilitation and redemptive transformation should be categorically exempt from execution.

D. GOOD PRISON BEHAVIOR ALREADY IS RECOGNIZED AS AN IMPORTANT FACTOR IN DETERMINING WHO SHOULD AND WHO SHOULD NOT BE EXECUTED.

This Court has been clear that a person's behavior while incarcerated certainly is an important and relevant fact for a sentencer to consider when determining if a defendant should be sentenced to die. In *Skipper v. South Carolina*, 476 U.S. 1 (1986), the Court held that a defendant must be allowed to present evidence of successful adaptation to incarceration. A person facing a death sentence has a constitutional right to present evidence of his "well-behaved and peaceful adjustment to life in prison," because it is "by its nature relevant to the sentencing determination." *Id.*, 476 U.S. at 7. "[T]here is no question but that [this evidence] would be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" *Id.*, 476 U.S. at 4-5 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). Therefore, "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." *Id.* at 5.

Likewise, the Court has found that evidence showing "commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described [the defendant] as among the inmates 'least likely to act in a violent, dangerous or provocative way'" is relevant evidence when making decisions about the imposition of the death

penalty. *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *see also id.* (the Court also discussed evidence that the defendant "seemed to thrive in a more regimented and structured environment" and that he "was proud of the carpentry degree he earned while in prison"). This is clearly established law from this Court.

As the Court has been clear that prison-adjustment evidence is relevant and crucial for jurors to consider when deciding the sentence to be imposed, it should grant certiorari to consider whether these same factors should also be relevant after the issuance of a death warrant when determining whether executing a rehabilitated death row inmate violates the Eighth Amendment. Though the timing of the decision is different and the venue for making the determination is not the same, the recognition that behavior in prison should play a role on who is allowed to be executed is the same.

E. GOOD BEHAVIOR WHILE ON DEATH ROW IS RECOGNIZED AS A REASON TO SPARE SOMEONE FROM BEING EXECUTED.

In the modern era of the death penalty (since its reimposition in 1976 following *Gregg v. Georgia*), at least seven people have been spared from execution because of good behavior while incarcerated. *See* Death Penalty Information Center, *List of Clemencies Since 1976*, *available at* https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976. The reasons given for granting clemency in these cases included an exemplary prison record, the rehabilitation of the inmate, excellent behavior in prison, exemplary prison behavior emphasized by a former corrections officer, statements from prison officials that the crime was an outlier from his upstanding life in prison, the commission of only one minor infraction over thirty years in prison, and exemplary conduct and transformation while in prison.[13]

[13] This information was compiled by the Death Penalty Information Center. The cases discussed, in order, are William Moore (1990), William Saunders (1997), Willie James Hall

This number of grants of clemency represent two seemingly contrary yet related concepts. On the one hand, this shows that behavior such as Mr. Dorsey has shown can indeed merit setting aside a sentence of death. On the other hand, these grants are relatively rare.[14] But, they are rare precisely because very few inmates can make a compelling case that their life should be spared for this reason. The takeaway is that excellent prison behavior is a compelling reason to spare someone from execution, but those who qualify on this basis are exceedingly rare. Should this Court grant review, this provides a basis by which to measure these metrics and their frequency.

Noting that governors grant clemency on this basis does not make this a nonjusticiable clemency application, which is what the Missouri Supreme Court said. *See* Appendix A (Missouri Supreme Court Opinion) at 20-21. Bases for clemency are often – even mostly – presented to courts first as legal claims.[15] That is what Mr. Dorsey has done here with this legal claim.

(2004), Samuel David Crowe (2008), Daniel Greene (2012), Jimmy Meders (2020), and Renaldo Hudson (2020). Death Penalty Information Center, *List of Clemencies Since 1976*, *supra*.

[14] For perspective, there have been 1586 executions since 1976. *See* Death Penalty Information Center, *Facts About the Death Penalty* (updated 3/21/2024), *available at* https://dpic-cdn.org/production/ documents/pdf/FactSheet.pdf.

[15] Below are a just few of the multitude of possible examples where a governor has granted clemency for a reason that had previously been litigated:

- In 2008, the Governor of Virginia granted clemency because Percy Walton was incompetent to be executed. *But see Walton v. Johnson*, 440 F.3d 160 (4th Cir. 2006) (court found him competent to be executed), *cert. denied*, 547 U.S. 1189 (2006).
- In 2012, the Governor of Ohio commuted the sentence of Ronald Post because there were too many problems with his ineffective trial counsel's representation. *But see Post v. Bradshaw*, 621 F.3d 406 (6th Cir. 2010) (habeas court rejected claim of ineffective assistance of trial counsel), *cert. denied*, 563 U.S. 1009 (2011).
- In 2003, the Governor of Louisiana commuted Herbert Welcome's sentence to life because he suffered from an intellectual disability. *But see State v. Welcome*, 458 So.2d 1235 (La. 1983) (the question rejected by the court was "whether the death sentence is appropriate for this mental retardate"), *cert. denied*, 470 U.S. 1088 (1985).

CONCLUSION

It already is clear that when the death penalty "ceases realistically to further these [penological] purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. 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 (opinion concurring in judgment). Mr. Dorsey's rehabilitation, his unblemished prison record during more than 17 years on death row, and the unprecedented support from more than 70 correctional officers puts him in a unique class of persons for whom the penological goals of retribution and deterrence are not furthered. This Court should grant certiorari to determine whether a death-row inmate's remarkable redemption and rehabilitation during the many years while on death row makes a person ineligible for execution under the Eighth Amendment.

- In 2003, the Governor of Kentucky granted clemency because Kevin Stanford was 17 at the time of the murder. *But see Stanford v. Kentucky*, 492 U.S. 361 (1989) (execution of a 17-year-old was constitutional), *rev'd by Roper v. Simmons*, 543 U.S. 551 (2005) (*Roper* was decided two years after clemency was granted to Mr. Stanford).
- In 1998, the Governor of Texas granted clemency because of Henry Lucas's possible innocence. *But see Lucas v. Johnson*, 132 F.3d 1069 (5th Cir. 1998) (habeas relief denied despite claim of newly discovered evidence showing actual innocence), *cert. denied*, 524 U.S. 965 (1998).

All of these clemency examples can be found at Death Penalty Information Center, *List of Clemencies Since 1976*, *available at* https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976.

Respectfully submitted,

/s/ Kirk J. Henderson
KIRK J. HENDERSON
Counsel of Record
ARIN MELISSA BRENNER
Assistant Federal Public Defenders
Federal Public Defender for the
Western District of Pennsylvania
1001 Liberty Avenue, Suite 1500
Pittsburgh, PA 15222
412-644-6565
kirk_henderson@fd.org
Supreme Court Bar No. 229934

Counsel for Petitioner Brian J. Dorsey