

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

WALTER BARTON, Inmate # 990108)
Potosi Correctional Center)
11593 State Highway O)
Mineral Point MO 63660)
Petitioner)

v.)

Case # 6:20-CV-3130

WILLIAM STANGE)
Warden)
Potosi Correctional Center)
11593 State Highway O)
Mineral Point MO 63660)
Respondent)

and)

ERIC SCHMITT)
Missouri Attorney General)
P.O. Box 899)
Jefferson City MO 65102)
Respondent)

PETITION, SUGGESTIONS AND REQUEST FOR HEARING REGARDING
ISSUES DECIDED BY MISSOURI SUPREME COURT ON APRIL 27, 2020
DEATH PENALTY

Comes now Petitioner, by attorney, and does set forth the following as his petition, pursuant to 28 U.S.C. 2254, addressing issues considered and decided by the Missouri Supreme Court on April 27, 2020.

A. PETITIONER: The Petitioner is Walter Barton. Mr. Barton's Missouri Inmate Number is 990108. Mr. Barton is incarcerated at the Potosi Correctional Center, in Mineral Point, Missouri.

B. RESPONDENTS: Respondents are William Stange, Warden of the Potosi Correctional Center, and Eric Schmitt, Attorney General of the State of Missouri.

C. UNDERLYING JUDGMENT OF CONVICTION AND SENTENCE:

1. **CHARGED OFFENSE:** In Christian County, Missouri case number CR291-679F, Mr. Barton was charged with the October 9, 1991 murder of Gladys Kuehler in Ozark, Missouri. There were no other counts or indictments brought against Mr. Barton.
2. **FIRST JURY TRIAL-ENDED IN MISTRIAL:** On April 2 and 3, 1993, a Henry County jury was selected and sworn, but on April 5, 1993, a mistrial was declared because the State had failed to endorse witnesses for trial.
3. **SECOND JURY TRIAL-ENDED IN MISTRIAL:** The second trial began on October 22, 1993 in Cooper County and ended on October 28, 1993 when the jury was unable to reach a unanimous verdict.
4. **THIRD JURY TRIAL-ENDED IN GUILTY VERDICT AND DEATH SENTENCE, BUT REVERSAL WAS ORDERED ON DIRECT APPEAL DUE TO UNLAWFUL LIMITATION ON DEFENSE ARGUMENT:** The third trial was conducted in Callaway County from April 8, 1994 through

April 14, 1994, a guilty verdict and death sentence were returned, and sentence was imposed on June 22, 1994. Upon a combined appeal involving the trial and post-conviction proceedings, the Missouri Supreme Court reversed due to unlawful limitations placed upon defense closing argument. See *State v. Barton*, 936 S.W.2d 781, 785-786 (Mo.banc 1996).

5. FOURTH JURY TRIAL-ENDED IN GUILTY VERDICT AND DEATH SENTENCE, WAS AFFIRMED ON DIRECT APPEAL, BUT WAS REVERSED IN RULE 29.15 PROCEEDINGS DUE TO PROSECUTION USE OF PERJURED TESTIMONY FROM JAILHOUSE INFORMER:

The fourth jury trial was conducted in Benton County under case number CR197-4 from April 27, 1998 through April 30, 1998; a guilty verdict and death sentence were returned; sentence was imposed on June 10, 1998. The result was affirmed upon direct appeal by a 5-2 vote. *State v. Barton*, 998 S.W.2d 19 (Mo.banc 1999). In initial Rule 29.15 proceedings, relief was denied, but that result was reversed by the Missouri Supreme Court, and Benton County Circuit Judge John Sims was appointed to rehear the matter. *Barton v. State*, 76 S.W.3d 280 (Mo.banc 2002). After hearing evidence, Judge Sims set aside the conviction and death sentence due to the State's use of perjured testimony from a jailhouse informer (Appendix J).

6. FIFTH JURY TRIAL-ENDED IN GUILTY VERDICT AND DEATH SENTENCE, BUT THE MISSOURI SUPREME COURT BARELY AFFIRMED BY THE SLIMEST OF MARGINS, 4-3: The fifth jury trial was conducted in Cass County, Missouri under case number 05CA-CR00877 from March 6, 2006 through March 10, 2006; a guilty verdict and death sentence were returned. Sentence was imposed on July 6, 2006. However, the Missouri Supreme Court was closely divided on the result, with four Judges voting to affirm, and three Judges voting to reverse, dissenting that the “sorry record” in the case did not support the conviction or death sentence. *State v. Barton*, 240 S.W.3d 693, 711, 718-719 (Mo.banc 2007). A petition for writ of certiorari to the United States Supreme Court was denied. *Barton v. Missouri*, 555 U.S. 842 (2008).
7. Mr. Barton has no other sentences to serve after completion of the sentence imposed by the judgment under attack.

D. PREVIOUS STATE AND FEDERAL POST-CONVICTION PROCEEDINGS

1. INITIAL STATE POST-CONVICTION PROCEEDINGS RELATED TO FIFTH TRIAL: Defense Counsel for Mr. Barton was appointed and a State Court post-conviction challenge against the fifth trial result was brought under Cass County case number 08CA-CV01371-01; these proceedings dragged on

for seven years; ultimately, Mr. Barton was denied relief. *Barton v. State*, 432 S.W.3d 741 (Mo.banc 2014).

2. STATE POST-CONVICTION PROCEEDINGS RELATED TO MENTAL ILLNESS OF APPOINTED STATE POST-CONVICTION COUNSEL:

Investigation for Federal habeas corpus proceedings uncovered that the problems in state post-conviction proceedings owed to the mental illness of appointed State Post-Conviction Defense Counsel; argument was immediately raised that State Post-Conviction Defense Counsel's mental illness amounted to an abandonment of his duties, and that Mr. Barton should be granted a new proceeding with proper counsel; the Missouri Supreme Court essentially conceded the mental illness of Counsel, but found that to be a non-remediable form of ineffectiveness of post-conviction counsel, and denied relief. *Barton v. State*, 486 S.W.3d 332 (Mo.banc 2016).

3. FEDERAL HABEAS CORPUS PROCEEDINGS: In the United States District Court for the Western District of Missouri, a Federal Habeas Corpus petition was brought under case number 14-08001- CV-W-GAF; the Federal District Court denied relief in large measure because the issues had not been properly preserved for review in State Court proceedings (Appendix L). The District Court's decision was affirmed by the United States Court of Appeals

for the Eighth Circuit (Appendix W). The United Supreme Court denied a petition for writ of certiorari on November 18, 2019. *Barton v. Stange*, 140 S.Ct. 525 (2019)

E. EXECUTION DATE:

On February 18, 2020, the Missouri Supreme Court scheduled an execution date for Mr. Barton for May 19, 2020 (Appendix P). On April 27, 2020, the Missouri Supreme Court overruled a request for stay of that execution date (Appendix R).

F. MISSOURI SUPREME COURT DECISION ADDRESSED IN THIS PETITION AND TIMELINESS OF THIS PETITION

1. On February 3, 2020, in case number SC98343, the Missouri Supreme Court approved for filing a Petition for Writ of Habeas Corpus on behalf of Mr. Barton (Appendix D). In that Petition, two issues of Constitutional dimension were raised which had newly become ripe, and which had not previously been decided by any Court, those being Mr. Barton's actual innocence of the charges and Mr. Barton's incompetence for execution. The State rapidly filed suggestions in opposition to the petition on February 6, 2020 (Appendix F). With similar speed, on February 10, 2020, undersigned counsel filed reply suggestions (Appendix G). Two-and-a-half months later, on April 27, 2020, the Missouri Supreme Court overruled Mr. Barton's petition for writ (Appendix A).

2. All grounds raised in the current petition were presented to, and decided by, the Missouri Supreme Court in case number SC98343 (Appendix A).
3. Because the issues raised in this petition have been newly decided by the Missouri Supreme Court, this petition, addressing those issues, is not a second or successive request for relief, and thus should be filed with this Court. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641-646 (1998); *Morgan v. Javois*, 744 F.3d 535, 537-538 (8th Cir. 2013).
4. Because this petition is being brought on May 4, 2020, this petition has been brought within one year from the April 27, 2020 final state court determination being challenged, and is therefore timely per the dictates of 28 U.S.C. 2244(d)(1).

G. NAME AND ADDRESS OF EACH ATTORNEY WHO REPRESENTED MR. BARTON AT VARIOUS STAGES OF PROCEEDINGS:

1. At preliminary hearing: Dan Gralike, Office of State Public Defender, Columbia MO
2. At arraignment and plea: Dan Gralike, Office of State Public Defender, Columbia MO
3. At first three trials and first sentencing trial: Dan Gralike and Mary Ellen Young, Office of State Public Defender, Columbia MO

4. At post-conviction proceedings after fourth trial and upon fifth trial direct appeal: Elizabeth Carlyle, 6320 Brookside Plaza, #516, Kansas City MO 64113
5. At fifth trial: Brad Kessler, 1520 Washington Ave., St. Louis MO 63103, David Bruns, 8000 Bonhomme Ave., St. Louis MO 63105, Kim Freter, 225 S. Meramec, #301, Clayton MO 63105
6. At post-fifth-trial post-conviction proceeding: Amy Bartholow, Pete Carter, Valerie Leftwich Office of State Public Defender, Columbia MO 65201, Gary Brotherton, 1514 Kinloch Ct., Columbia MO 65203
7. On appeal from any adverse ruling in a post-conviction proceeding: William J. Swift, Office of State Public Defender, , Columbia MO 65201
8. Upon original 2254 proceedings: Frederick A. Duchardt, Jr., P.O. Box 216, Trimble MO 64492

H. TABLE OF APPENDICIES TO THE PETITION:

There are documents offered in support of the contentions made in this Petition. Those items are as follows:

Appendix A: 4/27/2020 Supreme Court Opinion in case number SC98343

Appendix B: Report of Dr. Patricia Zapf, Ph.D.

Appendix C: Curriculum Vitae for Dr. Patricia Zapf, Ph.D.

Appendix D: State Court Petition for Writ filed 2/3/2020

Appendix E: Barton's Original Suggestions in support of state court petition

Appendix F: Respondent's Suggestions in Opposition of state court petition

Appendix G: Barton's Supplemental Suggestions re actual innocence

Appendix H: Barton's Supplemental Suggestions re execution incompetence

Appendix I: Lawrence Renner Affidavit

Appendix J: 2004 Judge John Sims Rule 29.15 Judgment

Appendix K: Affidavit of Juror Ashleigh Bauernfeind

Appendix L: District Court Judgment, *Barton v. Griffith*, WDMO Case # 14-8001

Appendix M: Catherine Demaree 2016 Conviction record

Appendix N: Request for Execution Date in Case Number SC87859

Appendix O: Objections to Execution Date Setting in Case Number SC87859

Appendix P: Order Setting Execution Date in Case Number SC87859

Appendix Q: Motion for Stay of Execution in Case Number SC87859

Appendix R: Order overruling Motion for Stay in Case Number SC87859

Appendix S: Governor's COVID-19 Stay at Home Order

Appendix T: Governor's April 27, 2020 COVID-19 Order

Appendix U: Affidavit of Jury Foreperson Paul Bartlett

Appendix V: Affidavit of Juror Edwin Anderson

Appendix W: Eighth Circuit Affirmance of Judge Fenner Judgment

I. GROUNDS FOR RELIEF:

The following is a concise statement of each and every ground upon which Petitioner claims that he is being held unlawfully, together with a brief summary of the facts supporting each ground. Petitioner does state that, in connection with each and all of these grounds for relief, he was denied his rights pursuant to one or all of the 6th, 8th and 14th Amendments to the Constitution of the United States. Petitioner does further state that, in ruling upon the grounds as they have, the Missouri Supreme Court made decisions which were contrary to, or involved unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States, and/or have made decisions based on an unreasonable determination of the facts in light of the evidence presented in State Court proceedings. 28 U.S.C. 2254(d)(1) and (2).

GROUND ONE

Mr. Barton is not mentally competent to be executed, and the Missouri Supreme Court's opposite conclusion relies upon interpretations of the law which are contrary to United States Supreme Court precedent upon the matter and an unreasonable determination of the facts presented

1. After four previous trials, at a fifth jury trial, the State of Missouri obtained against Walter Barton a conviction and sentence of death for the October 9, 1991 murder of Gladys Kuehler in Christian County, Missouri. *State v. Barton*, 240 S.W.3d 693, 696, 700 (Mo.banc 2007).

2. Upon direct appeal, the Supreme Court of Missouri affirmed the judgment and sentence against Mr. Barton, but only by the narrowest of margins; that is, four Judges voted to affirm, finding sufficient the evidence against Mr. Barton, consisting of expert testimony about blood stains found on Barton's clothing, informer testimony about a purported admission of guilt by Barton, and certain circumstantial evidence; and, three Judges dissented that the case against Mr. Barton was insufficient to justify the judgment and sentence. *State v. Barton*, 240 S.W.3d 693, 711, 718-719 (Mo.banc 2007).

3. Walter Barton is currently in the custody of the State of Missouri, under the control of Respondent, Warden William Stange, at the Potosi Correctional Center in Mineral Point, Missouri. In case number SC87859, the Missouri Supreme Court has set an execution date for Mr. Barton for May 19, 2020 (Appendix P).

4. Several months prior to the setting of an execution date, undersigned counsel enlisted the services of Dr. Patricia Zapf to render an expert opinion regarding Mr. Barton's competence for execution (Appendix B, p. 1). Undersigned counsel sought this expert opinion because, through more than five years experience in representing Mr. Barton, undersigned counsel had serious concerns that Mr. Barton's abilities to understand the proceedings against him and assist with his defense were always substantially impaired, and were progressively

getting worse (Appendix B, p. 5-6). In addition, during Federal habeas corpus proceedings, specifically in 2015, undersigned counsel sought and received expert opinions that Mr. Barton, due to brain injuries, primarily one suffered when Barton was a teen, could not understand the proceedings against him, could not assist with his defense, and was not competent for execution (Appendix B, p. 7-8).

5. As her process, Dr. Zapf reviewed and summarized voluminous records about Mr. Barton and conducted a two-day, in person session with Mr. Barton, administering testing and evaluation (Appendix B, p. 2-10). Dr. Zapf also cited to and considered records pertaining to neuro-imaging and neuro-psychological testing of Mr. Barton which reported significant brain damage (Appendix B, p. 6-7, 14). As well, Dr. Zapf highlighted and considered the opinions of psychiatrist Dr. John H. Wisner, M.D., who in 2015 diagnosed Mr. Barton as suffering, then and for years before, from Traumatic Brain Injury and Major Neurocognitive Disorder due to a skull fracture and concussive injury sustained in 1974, and concluded that those conditions created for Mr. Barton "...extensive deficits of thinking ability, ability to sequence and predict the course of decisions/events, moderate his mood and emotional responses (affect) and consistently and reliably reach conclusions..." (Appendix B, p. 7). Dr. Zapf also took into account records concerning the opinions about Mr. Barton's competence expressed by those involved with incarcerating Mr. Barton, understanding that those institutional

records contained no reference to or acknowledgment about the contrary imaging, neuropsychological and psychiatric opinions by other professionals (Appendix B, p. 2).

6. Relying upon her expertise, accounting for the information obtained from her review of the records, her testing, and her in-person sessions with Mr. Barton, and considering the matters to a reasonable degree of psychological certainty, Dr. Zapf diagnosed Mr. Barton as suffering from Major Neurocognitive Disorder due to traumatic brain injury (Appendix B, p. 10). Dr. Zapf went on to explain the functional impacts for Mr. Barton caused by this condition.

This disorder impairs his ability to encode information that is presented to him, to make complex and/or abstract determinations, to engage in logical reasoning and rational decision making, to divide his attention, to process information, to engage in planning behavior, and to switch from one task to another. In addition, this disorder results in impaired expressive and receptive language ability (Appendix B, p. 13).

7. Dr. Zapf went on to conclude, to a reasonable degree of psychological certainty, that as a result of Major Neurocognitive Disorder, Mr. Barton is unable to understand the proceedings against him, is unable to assist with his defense, and is not competent for execution because Mr. Barton "...has significant impairments in executive function, problem solving, attention, concentration, working memory, and abstract reasoning, which result in the inability to provide rational assistance to counsel and to engage in consistent, logical and rational decision making" (Appendix B, p. 14-15).

8. Dr. Zapf allowed that Mr. Barton’s condition permits him to have “a rudimentary and non-delusional understanding of the punishment he is about to receive and the reasons for it” (Appendix B, p. 14-15). Dr. Zapf went on to firmly state that, under the standards universally accepted by the mental health community, and in light of prevailing legal principles which are consistent with mental health community standards, despite Mr. Barton’s rudimentary abilities, and because of Mr. Barton’s deficiencies, as described under subparagraph 6, above, Mr. Barton is not competent to proceed to execution (Appendix B, p. 15).

9. In a habeas corpus petition brought to the Missouri Supreme Court on Mr. Barton’s behalf on February 3, 2020, it was urged that Mr. Barton should be found not competent for execution in light of the findings and conclusions by Dr. Zapf that Mr. Barton’s mental condition so impairs him that he cannot reach a rational understanding of the reason for execution, and that Mr. Barton lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him, or matters in extenuation, arguments for executive clemency, or reasons why the sentence should not be carried out (Appendix A, p. 6-7; Appendix C, p. 12-15).

10. The Missouri Supreme Court determined that Mr. Barton had not proven that he is incompetent to be executed (Appendix A, p. 11). In so ruling, the Missouri Supreme Court deemed as the “controlling” standard for competency for execution the concurring opinion by Justice Powell in *Ford v. Wainwright*, 477

U.S. 399, 422 (1986) (Appendix A, p. 7, fn. 5). Based upon that interpretation of the law, the Missouri Supreme Court found that its determination was supported by Dr. Zapf's allowance that Mr. Barton's condition permits him to have "a rudimentary and non-delusional understanding of the punishment he is about to receive and the reasons for it" (Appendix A, p. 7-8). The Missouri Supreme Court also relied upon the opinions of Mr. Barton's incarcerators that Barton "does not appear to have any clinically significant symptoms of a mental illness at this time" and "continues to make a good institutional adjustment" (Appendix A, p. 9). Finally, the Missouri Supreme Court took out of context a statement of Mr. Barton to Dr. Zapf that "they're going to execute me if I can't prove my innocence" (Appendix A, p. 10). The Missouri Supreme Court found this latter comment significant even though it was deemed by Dr. Zapf, in context, as "demonstrating some illogical thought process" (Appendix B, p. 10). The Missouri Supreme Court expressed no doubt whatsoever about the conclusions by Dr. Zapf and the other psychiatrists, psychologists and other imaging specialists that Mr. Barton suffers from Major Neurocognitive Disorder caused by Traumatic Brain Injury. The Missouri Supreme Court also expressed no doubt whatsoever about the full range of impacts of this condition upon Mr. Barton's functioning as described by Dr. Zapf.

11. In ruling the matter as they did, the Missouri Supreme Court relied upon legal conclusions which are contrary to or involve unreasonable applications of precedent from the United States Supreme Court. The United States Supreme Court has been clear that “the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane.” *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986); *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007). Unfortunately, the United States Supreme Court has not been nearly so clear about the meaning of the term “insane” in this context. Thus, in his concurring opinion in *Ford*, Justice Powell, noting this lack of clarity, ventured his personal thought that there should be a lesser standard at play for execution competence, and on that basis posited that “the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.” *Ford v. Wainwright*, 422. Since the Court, in *Ford*, was not deciding this question, Judge Powell’s notions were mere dicta. However, in *Panetti*, the United States Supreme Court rejected outright the contention which was then being made then, and is now being made by the Missouri Supreme Court, that Justice Powell’s lower standard is itself the proper, controlling standard; rather, it was made perfectly clear that one would be incompetent for execution for broader reasons, especially if his mental conditions “so impair the prisoner’s concept of reality that he cannot reach a rational understanding of the reason for the execution.” *Panetti*

v. Quarterman, 958-959. Since then, the lower Federal Courts have clarified that the *Panetti* standards for lack of competence for execution include the mental-illness-induced inability to understand the proceedings and assist with defenses. *Simon v. Epps*, 463 Fed.Appx. 339, 341-342, 348-349 (5th Cir. 2012); *Thompson v. Bell*, 580 F.3d 423, 436 (6th Cir. 2009).

12. In addition, the Missouri Supreme Court has made unreasonable determinations of the facts in light of the evidence presented in the State Court proceedings. The Missouri Supreme Court has teased out Dr. Zapf's conclusions that Mr. Barton is free from delusions and can understand only the simplest of concepts, all in an effort to satisfy the standard suggested by Justice Powell in *Ford*, but rejected in *Panetti* (Appendix A, p. 7, fn. 5). In so doing, that Court has minimized or completely ignored the conclusions by Dr. Zapf which establish Mr. Barton's incompetence under the proper legal standards (Appendix B, p. 13-15). That Court has completely left out mention, much less consideration, of the unanimous conclusions of the psychiatrists, psychologists and brain imaging specialists about Mr. Barton's Major Neurocognitive Disorder and Traumatic Brain Injury conditions and sequelae (Appendix B, p. 6-7). Instead, that Court has focused solely upon the prison records of Mr. Barton, which contain no reference to, acknowledgment about, or consideration of the Major Neurocognitive Disorder and Traumatic Brain injury diagnoses (Appendix B, p. 2). And, that Court gave

out-of-context significance to a comment by Mr. Barton which, in context, was described as “demonstrating some illogical thought process” (Appendix B, p. 10).

13. For the reasons set forth in the record before the Missouri Supreme Court, and described in subparagraphs 5-9 and 11 above, Dr. Zapf’s findings and conclusions fully support a finding of Mr. Barton’s lack of execution competence under the correct legal standards. Consequently, should Mr. Barton be executed by the State of Missouri, that would violate his rights to be free from cruel and unusual punishment in derogation of the 8th and 14th Amendments to the Constitution of the United States.

WHEREFORE, Mr. Barton prays that this Honorable Court issue its findings that Mr. Barton is not competent for execution, per the principles set forth in *Panetti v. Quarterman*, supra. It is further prayed that this Court set aside the Missouri Supreme Court order of execution.

COUNT TWO

Entitlement to relief in light of actual innocence

1. After four previous trials, at a fifth jury trial, the State of Missouri obtained against Walter Barton a conviction and sentence of death for the October 9, 1991 murder of Gladys Kuehler in Christian County, Missouri. *State v. Barton*, 240 S.W.3d 693, 696, 700 (Mo.banc 2007).

2. Upon direct appeal, the Missouri Supreme Court of Missouri affirmed the judgment and sentence against Mr. Barton, but only by the narrowest of margins; that is, four Judges voted to affirm, finding sufficient the evidence against Mr. Barton, consisting of expert testimony about blood stains found on Barton's clothing, informer testimony about a purported admission of guilt by Barton, and certain circumstantial evidence; and, three Judges dissented that the case against Mr. Barton was insufficient to justify the judgment and sentence. *State v. Barton*, 240 S.W.3d 693, 711, 718-719 (Mo.banc 2007).

3. Walter Barton is currently in the custody of the State of Missouri, under the control of Respondent, Warden William Stange, at the Potosi Correctional Center in Mineral Point, Missouri. In case number SC87859, the Missouri Supreme Court has set an execution date for Mr. Barton for May 19, 2020 (Appendix P).

4. At the Fifth Trial, evidence was adduced

- a. that, Mr. Barton, along with a neighbor, Carol Horton, and a granddaughter, Debbie Selvidge, discovered the dead body of Gladys Kuehler in her blood-soaked bedroom, *State v. Barton*, 698
- b. that, at the time that Mr. Barton was being questioned about the death of Gladys Kuehler, police saw small stains on Barton's clothing, and took the clothes for scientific testing, *State v. Barton*, 699

- c. that, during police questioning, Mr. Barton explained that the stains must have happened when, at the time of the discovery of the body, he (Barton) slipped while pulling Debbie Selvidge away from the body, *State v. Barton*, 699,
- d. that, at time of questioning by police, Ms. Selvidge confirmed Mr. Barton's account, but at trial said that Barton never entered the room where the body was found, *State v. Barton*, 698, 716,
- e. that, DNA testing was performed on only one of the small stains, the shoulder portion of the shirt, and that testing developed a profile which corresponded to the profile of the victim's blood, *State v. Barton*, 699,
- f. that, this DNA testing on the shoulder portion of the shirt required the cutting out and using up that portion of the shirt, and therefore that portion of the shirt was not available for any further testing of any kind (Fourth Trial Tr. 681, 683-684, 696-697, 698-701),
- g. that, William Newhouse, an expert enlisted by the State, examined Mr. Barton's clothing, and opined that three stains, one on the lower left front of the shirt, and the others on the jeans, were the result of impact spatter, and could not have been created by rubbing up against already-present blood, as described by Barton, *State v. Barton*, 699.

5. Prior to the fifth trial, Barton's Defense Counsel for that trial met, shared exhibit pictures with, and talked to, Lawrence Renner, a blood spatter expert; this occurred at a seminar at which Mr. Renner was lecturing and Counsel was attending; on the basis of this encounter, and personal study by Counsel, Counsel decided against using a defense blood spatter expert, and in favor of efforts to generally discredit the field of blood spatter analysis as "junk science" (2012 State Postconviction Hearing Tr. 411-412, 415-416), *Barton v. State*, 432 S.W.3d 741, 755 (Mo.banc 2014).

6. State postconviction counsel did not bring an ineffectiveness of trial counsel claim for failure to properly develop and present expert testimony from Mr. Renner. Such a challenge was brought in Federal habeas proceedings, but that claim was denied because of the failure to raise the claim in state proceedings coupled with the great deference, under the law, paid to strategy decisions by trial defense counsel (Appendix L, p. 24-25).

7. Through the process of preparing Federal habeas corpus claims, Mr. Renner was given the opportunity to analyze the same clothing of Mr. Barton which had been collected by police, and previously analyzed by the State's expert, William Newhouse; Mr. Renner then prepared an affidavit regarding his background, his work with the clothes, and his conclusions; that affidavit was submitted to the Missouri Supreme Court, and supplied evidence which was not

presented at the fifth trial, and which was not considered by the Missouri Supreme Court in deciding the direct appeal, to wit:

- a. an explanation that Mr. Renner is a certified crime scene and bloodstain pattern examiner and has worked in the field for more than 40 years (Appendix I, p. 1);
- b. the conclusion that the clothing could not have been worn at the time of the killing of Gladys Kuehler by her killer because there were too few stains on the clothing, especially in light of the number and kinds of wounds inflicted on the body of Ms. Kuehler (Appendix I, p. 5),
- c. the conclusions that there were no blood stain patterns at all on Mr. Barton's jeans, and that this was likely because whatever blood might have ever been present was used up in testing done before any blood spatter expert examined the clothing (Appendix I, p. 2);
- d. the conclusions that none of the stains on Mr. Barton's shirt were impact spatter stains, and rather all of the stains on the shirt were transfer stains, made by contact by the shirt with some substance (Appendix I, p. 2);
- e. the conclusion that a stain on the shirt singled out by Mr. Newhouse as supposedly being impact spatter is actually a transfer stain, and is

so obviously so that no experienced examiner would mistake it for impact spatter (Appendix I, p. 2);

- f. the conclusion that the reasoning which Fifth Trial Defense Counsel said was employed in deciding to not use a blood spatter expert at the Fifth Trial was flawed, and reflected a lack of understanding of blood spatter analysis science (Appendix I, p. 4-5).

8. At Mr. Barton's Fifth Trial, the State also called to witness one jailhouse informer, a woman who at the time called herself Katherine Allen, who testified that, on more than one occasion, Mr. Barton asked her if she knew the reason for which he (Barton) was in jail, and threatened that he (Barton) would kill her (Allen) "like he killed that old lady." *State v. Barton*, 699. This was "...the only evidence of a so-called admission of guilt" presented at trial. *State v. Barton*, 715.

9. The conviction and sentence of death handed down to Mr. Barton at his Fourth Trial were set aside in Rule 29.15 proceedings by Circuit Judge John Sims because of perjury committed by this same witness, Katherine Allen (Appendix J, p. 19). Particularly, at the Fourth Trial, after implicating Mr. Barton, and upon examination about her criminal record, Allen claimed she had "six" convictions for "check" charges; Judge Sims found that, in light of records presented by Mr. Barton's state post-conviction Counsel, Allen's conviction total was actually twenty-nine, and not six as Ms. Allen claimed in her testimony (Appendix J, p. 17-

18, 21-22). In addition, Judge Sims found, through other records presented at the hearing before him, that Allen had received dismissal of Cass County, Missouri criminal charges in return for testifying against Mr. Barton, and that fact was not brought forward to the Fourth Trial jury (Appendix J, p. 19-20). And, ultimately, Judge Sims set aside Mr. Barton's Fourth Trial conviction and sentence, concluding that, in light of the significance of the witness, had such impeachment been offered against her, there was a reasonable probability that the result of Mr. Barton's Fourth Trial would have been different (Appendix J, p. 21, 22). The State decided to not appeal Judge Sims' decisions, and thus the rulings by Judge Sims became final judgments upon the matters. *Barton v. State*, 432 S.W.3d 741, 748 (Mo.banc 2014).

10. At the Fifth Trial, when questioned about her criminal record, Ms. Allen again averred that her conviction total was six (Fifth Trial Transcript, p. 930). Moreover, Ms. Allen essentially denied receiving dismissal of the Cass County charges against her in return for her testimony against Mr. Barton (Fifth Trial Transcript, p. 931). The State never corrected Ms. Allen's perjury and Mr. Barton's Fifth Trial Defense Counsel confronted Ms. Allen with twelve of her convictions but not all of the 29 found by Judge Sims. And, neither the State nor Mr. Barton's Fifth Trial Defense Counsel mentioned the *quid pro quo* agreement

for dismissal of Cass County criminal charges in return for testimony, as found by Judge Sims.

11. State postconviction counsel did not bring an ineffectiveness of trial counsel claim for failure to properly confront Ms. Allen with the *quid pro quo* agreement for dismissal of Cass County charges in return for testimony, or for failure to confront Allen with all of her twenty-nine convictions. An ineffectiveness of trial counsel claim was brought in Federal habeas proceedings; relief was denied because of the failure to raise the claim in state proceedings coupled with the great deference paid to strategy decisions by trial defense counsel (Appendix L, p. 19-22).

12. In light of the facts as set forth in subparagraphs 10 and 11 above, neither the jury who decided guilt and punishment for Mr. Barton, nor the Missouri Supreme Court in deciding the direct appeal, had considered the facts of the case, as determined by Judge John Sims, that Katherine Allen received dismissal of Cass County criminal charges in return for testifying against Walter Barton, and that Katherine Allen had twenty-nine prior criminal convictions.

13. In addition, through investigation, it has been learned that Katherine Allen, since the time of the Fifth Trial, assumed a new name, Catherine Demaree, and in 2016 was convicted in the Federal District Court for the Southern District of

Indiana for identity theft and mail fraud involving ten individuals and eleven financial institutions (Appendix M).

14. The evidence, about Allen/Demaree's *quid pro quo* receipt of Cass County criminal charges dismissals in return for testimony against Mr. Barton, and about Allen/Demaree's criminal conviction record, the twenty-nine convictions found by Judge Sims, plus the 2016 convictions, amounts to clear and convincing evidence of Mr. Barton's actual innocence which undermines confidence in the correctness of the judgment and sentence of death for the killing of Gladys Kuehler.

15. In a habeas corpus petition brought to the Missouri Supreme Court on Mr. Barton's behalf on February 3, 2020, it was urged that, in light of the closeness of this case upon direct appeal, all of the evidence described in subparagraphs 3-14 above, taken as a whole, was of kind and strength to raise sufficient doubt about Mr. Barton's guilt to undermine confidence in the conviction and sentence of death handed down against him; particularly, it was posited that the new evidence established that it is more likely than not that no reasonable juror would convict in light of the new evidence, and that therefore it was incumbent that review be made of otherwise defaulted Constitutional rights violations which occurred at Mr. Barton's trial, particularly discovery failures and advancement of perjurious

testimony by the State (Appendix A, p. 3-11; Appendix G, p.10). *Schlup v. Delo*, 513 U.S. 298, 317, 327 (1995).

16. In supplementary suggestions to the Missouri Supreme Court, there was further presented the affidavit of Ashleigh Bauernfeind, one of the twelve jurors from the fifth trial (Appendix H, Appendix K). Ms. Bauernfeind affied that she found the new evidence “compelling” and opined that the new evidence would have impacted upon jury deliberations. Specifically, the Juror felt, at time of trial, that the State’s blood spatter expert testimony “was the State’s strongest evidence against [Barton]”, especially since Fifth Trial defense counsel did nothing to counter that evidence; however, having now seen expert Lawrence Renner’s affidavit regarding his analysis of the evidence, the Juror now believes “Mr. Renner’s testimony to be compelling as it directly contradicts the State’s theory that the blood stains on Mr. Barton’s clothing were impact spatter, and supports the defense theory that they were transfer stains...” (Appendix K). Suggestion was made to the Missouri Supreme Court that this Juror’s beliefs about the “compelling” nature of the new evidence confirmed the argument being made for relief (Appendix H, p. 4-5).

17. The Missouri Supreme Court correctly recognized that Mr. Barton would be entitled to review of his claims of Constitutional dimension which had been defaulted by his trial and state post-conviction counsel if he was able to “show his

innocence by a preponderance of the evidence” (Appendix A, p. 3).¹ *Schlup v Delo*, supra. The Court went on to find that Mr. Barton did not meet his burden of proof (Appendix A, p. 6). However, in so doing, the Court relied upon unreasonable determinations of the facts in light of the record made in state court proceedings.

18. The Missouri Supreme Court minimized the new evidence from Mr. Renner to supposedly be nothing more than him saying “...that the blood found on Barton’s shirt and pants after the murder was not blood spatter evidence as claimed by the State’s expert” (Appendix A, p. 3). Having given such short shrift to Mr. Renner’s far more extensive findings, the Court was able to contend that Mr. Barton’s Fifth Trial Defense Counsel “made this very claim at trial” (Appendix A, p. 3).

19. However, in the very next sentence, the Court itself acknowledged that the state court record, instead, reflected that Fifth Trial Defense Counsel made a completely different argument at trial, deemed “frivolous” by the Court itself, that blood spatter science should be discounted, in *toto*, by the jury and the Court as

¹ The Missouri Supreme Court also addressed and rejected Mr. Barton’s Missouri-law-recognized free-standing claim of actual innocence (Appendix A, p. 5-6). That portion of the decision is not addressed here since the United States Supreme Court has held that free standing claims of actual innocence cannot constitute grounds for 2254 relief. *Herrera v. Collins*, 506 U.S. 390, 400 (1993); *Meadows v. Delo*, 99 F.3d 280, 283 (8th Cir. 1996).

“junk science” (Appendix A, p. 3). *State v. Barton*, 705. The Court further acknowledged what the record also reflected, that Fifth Trial Defense Counsel considered hiring Mr. Renner, but decided instead “to just impeach the State’s expert” (Appendix A, p. 3). *Barton v. State*, 755. The record from the state court further showed that the decision by Fifth Trial Counsel to not hire Mr. Renner, and instead follow a “frivolous” alternative strategy, was based upon flawed reasoning reflecting a lack of understanding of blood spatter analysis science (Appendix I, p. 4-5). The record from the state court also showed that, in the estimation of Juror Bauernfeind, the “frivolous” strategy by Fifth Trial Defense Counsel did not do much to counter “a compelling piece of evidence supporting Mr. Barton’s guilt” (Appendix K, p. 1).²

20. As detailed in subparagraph 7 above, the new evidence from Lawrence Renner is, as characterized by Juror Bauernfeind, and now by two other Jurors, far more “compelling” than the truncated version set forth in the Missouri Supreme Court opinion. The state court record certainly reflects that Mr. Renner concluded that the blood found on Mr. Barton’s clothing was not blood spatter evidence, as

² Thanks to further investigation, and despite restrictions imposed due to the COVID-19 pandemic, further evidence had been developed since the April 27, 2020 decision by the Missouri Supreme Court, particularly the affidavits by two other jurors, one of whom was the foreperson. Both agree about the power of the new evidence (Appendix U; Appendix V). This additional evidence is being offered to this Court per the dictates of 28 U.S.C. 2246.

reported in the Missouri Supreme Court opinion (Appendix A, p. 3). The record further details that these conclusions were reached, not by a lawyer just making “frivolous” arguments, but by a blood spatter expert of long experience and high repute (Appendix I, p. 1). The record also provides Mr. Renner’s detailed, expert opinions about how each and all of the conclusions drawn by the state’s expert were contrary to blood spatter analysis science (Appendix I, p. 2, 4-5). And, the record provides Mr. Renner’s ultimate expert conclusion regarding Mr. Barton’s actual innocence, that Mr. Barton’s clothing, with the small blood stains, could not have been worn at the time of the killing of Gladys Kuehler by her killer because there were too few stains on the clothing, especially in light of the number and kinds of wounds inflicted on the body of Ms. Kuehler (Appendix I, p. 5).

21. In the alternative, the Missouri Supreme Court advances that “Barton already presented similar evidence in support of his post-conviction motion alleging ineffective assistance, and this Court found counsel was not ineffective in presenting (sic) this evidence” (Appendix A, p. 4). Actually, the State Court record reflects that, in the prior post-conviction proceedings, the Missouri Supreme Court found that Fifth Trial Defense counsel was not ineffective for NOT presenting the expert developed by state post-conviction counsel. *Barton v. State*, 755-756. The state court record further demonstrates that this post-conviction evidence was in no way similar in two critical respects. First, this evidence came,

not through Fifth Trial Defense Counsel's chosen expert, Mr. Renner, but rather from a man named Stuart James; by relying upon a different expert, state post-conviction counsel doomed his argument since, under long-standing principles of law, trial counsel "is not obligated to shop for an expert witness" until a favorable one is found. *Barton v. State*, 755. Reliance upon Mr. Renner, Fifth Trial Defense Counsel's chosen expert, immunizes against this legal argument. Second, Stuart James was found "not particularly credible", and his conclusions were deemed nebulous and conflicting. *Barton v. State*, 756. On the other hand, the conclusions from Mr. Renner came from a consummate expert in the field, were clearly and unequivocally contrary to the State's expert opinions, and have been found "compelling" by jurors who decided the case (Appendix I, p. 1, 2-5; Appendix K; Appendix U; Appendix V).

22. On the other hand, as to the jailhouse informer, the Missouri Supreme Court found the facts to be exactly as alleged in the state habeas petition. The Court found that the informer lied at the fourth trial that her number of convictions was only six, and at the fifth trial "again lied and said she had only six convictions" (Appendix A, p. 4). The Court further found that, even though fifth trial defense counsel knew that the informer had "29 prior convictions" and that "certain additional criminal charges had been dismissed in return for her testimony", Fifth Trial Defense Counsel "chose to impeach her with 12" of her convictions, and "did

not mention the other convictions or the charges that had been dismissed” (Appendix A, p. 4-5). The Missouri Supreme Court went on to find that “the issue was raised but relief was denied in federal habeas proceedings” (Appendix A, p. 5). However, the Missouri Supreme Court did not go on to explain what the record reflects, that the issues raised in federal habeas proceedings did not concern whether Mr. Barton is actually innocent in light of the evidence, and whether certain defaulted claims can now be considered as a result; rather, as noted above, an ineffectiveness of trial counsel claim was brought in Federal habeas proceedings, and relief was denied upon that limited issue alone due to the great deference paid to strategy decisions by trial defense counsel (Appendix L, p. 19-22).

23. The Missouri Supreme Court also reminded about its 4 Judge majority opinion upon direct appeal, and in reliance thereupon characterized as “substantial” certain circumstantial evidence offered against Mr. Barton at his trial (Appendix A, p. 5). *State v. Barton*, 696-699. However, account is not given for the inherent weaknesses in that circumstantial evidence which were made part of the record in Missouri Courts through the companion dissenting opinion issued by the other 3 Missouri Supreme Court Judges. *State v. Barton*, 713-716.

24. Certainly, the 4 Judges in majority found significance in the circumstances that, about six hours before Gladys Kuehler’s body was found, Mr.

Barton was admittedly at the home of Ms. Kuehler, but gave differing accounts about when he left Ms. Kuehler's home, and was seen washing his hands immediately after that visit to Ms. Kuehler (Appendix A, p. 5). However, those circumstances had little if any significance since Ms. Kuehler's time of death was unknown and scientific testing of that sink established that no traces of blood were found there. *State v. Barton*, 714.

25. Additionally, the 4 Judges in majority found significance in the circumstance that Carol Horton perceived a mood change for Mr. Barton, from "happy-go-lucky" earlier in the day of October 9, 1991, to "distant" and "in a hurry" later after visiting Ms. Kuehler and asking to borrow money (Appendix A, p. 5). However, contrary to any adverse inference drawn, all of the witnesses, including Ms. Horton, testified that Mr. Barton stayed at the trailer park for hours thereafter; therefore, whatever "hurry" that Ms. Horton detected, Mr. Barton was never "in a hurry" to leave the trailer park; instead, Mr. Barton stayed close to, and not "distant" from, the residents, doing odd jobs, conversing and socializing, and eventually being asked by Debbie Selvidge, Ms. Kuehler's granddaughter, to go into the trailer and check on the well-being of Ms. Kuehler (Fifth Trial Transcript, Section 5-B, p. 464-465, 466-469, 535). *State v. Barton*, 697-698.

26. As well, the 4 Judges in majority found significance in the circumstance that a fifty dollar check, payable to Mr. Barton, signed by Ms. Kuehler, and noted

in her check register, was found three days later, discarded along a nearby highway. *State v. Barton*, 699. However, the 3 Supreme Court dissenters were hard pressed to see that an adverse inference would be reasonable for reasons including that Mr. Barton was quite open that day about needing to borrow money and there was a likelier, favorable counter-inference that, had Mr. Barton been the person who received the check, he would not have discarded it, but instead would have immediately gone to cash it (Fifth Trial Tr. 456-457). *State v. Barton*, 716, 719.

27. Finally, the 4 Judges in majority found significance in “the undisputed presence of blood on his (Barton’s) clothes, whether from spatter or otherwise” (Appendix A, p. 5). However, to the contrary, the 3 Judges determined that the evidence offered at trial at best had “contradictions and gaps” which “call the validity of that evidence in question” and at worst was “utterly inconclusive”. *State v. Barton*, 714.

28. Plus, in light of new evidence presented to the Missouri Supreme Court in the 2020 habeas proceedings, it is now a certainty that the jury considered as “compelling” evidence, not the mere presence of the blood on the clothes, which Mr. Barton had explained, but rather because of the conclusions of the State’s blood spatter expert contrary to Mr. Barton’s explanation, which Mr. Barton’s

defense lawyers never endeavored to explain (Appendix K; Appendix U; Appendix V).

29. What the Missouri Supreme Court did not acknowledge is the new evidence about Lawrence Renner's conclusions is, in the words of the Fifth Trial juror they heard from, and now two others besides, "compelling" because it counters the only evidence of real moment which was brought against Mr. Barton (Appendix K; Appendix U; Appendix V).

30. The Missouri Supreme Court faulted that the new evidence from expert Renner "would not require the jury to find he (Barton) was actually innocent" (Appendix A, p. 4). This places a greater burden upon Mr. Barton than that required under the law; the lawful burden is to show that it is more likely than not that no reasonable juror would convict in light of the new evidence. *Schlup v. Delo*, 327.

31. More importantly, the standard employed by the Missouri Supreme Court does not allow to Mr. Barton the benefits to which he is entitled when the *Schlup* probabilistic standard is employed, including the assumption that the new evidence is true. *Schlup v. Delo*, 331. Juror Bauernfeind, and the other two Jurors who have now gone on the record, found Mr. Renner's expert opinions "compelling", in the context of all of the evidence presented at trial, and even though they were not told that they had to presume that new evidence was true

(Appendix K; Appendix U; Appendix V). Therefore, in Mr. Barton's case, like in *Schlup*, if the new evidence is presumed to be true, "...it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict." *Schlup v. Delo*, supra. Thus, Mr. Barton has justified opening the gateway to the claims which were defaulted by his state Court attorneys. And, the strength of those claims is immense.

32. The Missouri Supreme Court accurately accounted, but did not address the moment of, the issue which Mr. Barton's state court defense counsel defaulted: Sixth and Fourteenth Amendment violations due to the State's fifth trial discovery failures and use of perjury as described in subparagraphs 8-11 (Appendix A, p. 3). The strength of that claim is immense. The very same errors committed in connection with Mr. Barton's fourth trial caused Circuit Judge John Sims to find constitutional violations so intense that there was "a reasonable probability that the result of the proceedings would have been different" (Appendix J, p. 21 22). There is no reason to think that rulings upon the same errors in connection with the fifth trial would be any different. That is especially true since the Missouri Supreme Court, the United States Supreme Court, and the Third and Tenth Circuit United States Courts of Appeals have all held that, in cases in which the evidence against the defendant was not overwhelming, the failure to confront a key witness with a benefit received by the witness in return for testimony constituted prejudice

sufficient to warrant setting aside a conviction. *Taylor v. State*, 262 S.W.3d 231, 244-248 (Mo.banc 2008); *Banks v. Dretke*, 540 U.S. 668, 702 (2004); *Grant v. Lockett*, 709 F.3d 224, 237-238 (3rd Cir. 2013); *Cargle v. Mullin*, 317 F.3d 1196, 1214-1216 (10th Cir. 2003).

WHEREFORE, or the reasons set forth in the record before the Missouri Supreme Court, and described in the subparagraphs, as well as new evidence developed, it is prayed that this Honorable Court find that it is more likely than not that no reasonable juror would convict in light of the new evidence presented by Mr. Barton. It is further prayed that this Court, in light of the aforementioned finding, and in keeping with the principles set forth by the United States Supreme Court in *Schlup v. Delo*, supra, fully consider, as if not procedurally defaulted, the Constitutional rights claim as described in the subparagraphs above and in Mr. Barton's pleadings before the Missouri Supreme Court (Appendix D, E, G, H, J).

J. REQUEST FOR HEARING

In light of the foregoing, and per the dictates of Rule 8 of the Rules governing Section 2254 cases, it is request that this Court grant an evidentiary hearing upon these matters.

Respectfully submitted

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Verification by Counsel and Signature by Petitioner

I Frederick A. Duchardt, Jr. do hereby declare (or certify, verify, or state) under penalty of perjury that I am the appointed counsel for Walter Barton, that I have conducted a thorough examination of the records and information related to Walter Barton's cases, and that, based upon my knowledge, I believe the foregoing is true and correct. Since I believe that Walter Barton, as a result of mental disease or defect, does not understand the proceedings against him, I make this verification on his behalf pursuant to the dictates of 28 U.S.C. 2242. I have attempted to explain the contents of this Petition to Mr. Barton, though I do not believe that he understands that explanation. Mr. Barton's and my signatures appear hereupon.

Dated this 4th day of May, 2020.

/s/Frederick A. Duchardt, Jr.
FREDERICK A. DUCHARDT, JR.

/s/Walter Barton
WALTER BARTON

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was e-mailed to the following this 4th day of May 2020 to

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/s/Frederick A. Duchardt, Jr.
FREDERICK A. DUCHARDT, JR.