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

WALTER BARTON, Petitioner,	)	
v.	)	Case No. 20-8001-CV-W-BCW
WILLIAM STANGE Respondent	)	

PETITIONER'S TRAVERSE

Comes now Walter Barton, by attorney, and does offer reply and traverse to the issues raised by Respondent in his response to order to show cause (Doc. 7).

I. The Parties generally agree upon applicable standards of review

Respondent has acknowledged what Mr. Barton stated in his petition, that relief is to be granted if the state court decision was contrary to or involved an unreasonable application of clearly established United States Supreme Court precedent (Doc. 1, p. 10, 16; Doc. 7, p. 2-3). 28 U.S.C. 2254(d)(1) and (2); ***Williams v. Taylor***, 529 U.S. 362, 405-410, 120 S.Ct. 1495, 1520-1522 (2000); ***Holman v. Kemna***, 212 F.3d 413, 417-418 (8th Cir. 2000); ***Carter v. Bowersox***, 265 F.3d 705, 712-713 (8th Cir. 2001). Mr. Barton would add that, with respect to allegations of unreasonable application of Supreme Court precedent, while the holdings of the United States Supreme Court must be used for determining the controlling legal principle, the holdings of other courts may be used in determining

whether the state court's application of the controlling principle was reasonable. ***Copeland v. Washington***, 232 F.3d 969, 974 (8th Cir. 2000); ***Long v. Humphrey***, 184 F.3d 758, 761 (8th Cir. 1999).

Likewise, Respondent has also agreed with what Mr. Barton stated in his petition, that a Federal Habeas Petitioner is entitled to relief if the state court determination is based upon findings of fact which are shown to be unreasonable; Respondent has gone on to clarify, and Mr. Barton agrees, that such a level of error must be established by clear and convincing evidence (Doc. 1, p. 10, 17, 28; Doc. 7, p. 4). 28 U.S.C. 2254(e); ***Holman v. Kemna***, 212 F.3d 413, 417-418 (8th Cir. 2000).

Respondent has, in addition, cited to other principles of law which frankly have no bearing here (Doc. 7, p. 3).

II. AS TO COUNT ONE EXECUTION INCOMPETENCE CONTENTION, RESPONDENT'S EFFORTS TO DEFEND THE MISSOURI SUPREME COURT'S UNREASONABLE ERRORS OF LAW AND FACT ARE UNAVAILING

A. The Petition alleges what the record shows, that the Missouri Supreme Court finding of execution competence was based upon notions of law contrary to United States Supreme Court precedent and notions of fact contrary to the record

As explained in Mr. Barton's petition, proof positive about Mr. Barton's execution incompetence was brought to the Missouri Supreme Court through the expert reporting of Dr. Patricia Zapf (Doc. 1, p. 11-14). Mr. Barton went on about

how the Missouri Supreme Court, nevertheless, unreasonably found execution competence; first, that Court employed the wrong legal standard for competence, one suggested in dicta from one United States Supreme Court Justice, but later rejected by the Court as a whole (Doc. 1, p. 16-17); then, the Missouri Supreme Court teased out a portion of Dr. Zapf's conclusions and a handful of prison health reportings, found that the chosen portions of the record satisfied the wrong legal standard being employed, and ignored all of the rest of the records which demonstrated Mr. Barton's incompetence (Doc. 1, p. 17). Mr. Barton concluded that the Missouri Supreme Court finding should count for naught as contrary to United States Supreme Court precedent and relying upon an unreasonable determination of the facts in light of the record (Doc. 1, p. 18).

B. Respondent follows the Missouri Supreme Court's misconceptions about execution competence

Respondent concedes, as he must, that though the Missouri Supreme Court began its opinion by citing to established United States Supreme Court precedent, that Court ultimately judged the matter relying upon the standard suggested in dicta by Justice Powell in his concurrence in ***Ford v. Wainwright***, 477 U.S. 399, 422 (1986) (Doc. 7, p. 3). Then, *sans* attribution to any source, Respondent proclaimed, in lockstep with Justice Powell's dicta, that "precedent dictates no more" than a showing "that Barton has a factual and rational understanding that he is to be executed for the murder he was convicted of committing" (Doc. 7, p. 5).

This is an attempt to whittle down the proper standard too narrowly by not fully stating it, and by ignoring explanatory holdings by the lower Federal Courts.

C. Understanding about competence for execution flows from understanding about competence to proceed to trial

Every worthwhile discussion of execution competence, and particularly each one engaged by the United States Supreme Court, begins with a firm understanding about principles of competence to proceed to trial. While there are many sorts of mental diseases and defects, the simple fact that a defendant has such a disease or defect does not automatically render him incompetent; rather, a finding of incompetence is to be made if the defendant is insane, that is if the defendant's mental disease or defect undermines either the ability to understand the nature and consequences of the legal proceeding or the ability to properly assist in the defense. ***Dusky v. United States***, 362 U.S. 402, 403 (1960); ***Drope v. Missouri***, 420 U.S. 162, 171 (1975); ***State v. Moon***, 602 S.W.2d 828, 834-835 (Mo.App.W.D. 1980); ***State v. Tilden***, 988 S.W.2d 568, 574-575 (Mo.App.W.D. 1999); ***Newman v. Harrington***, 726 F.3d 921, 928 (7th Cir. 2013); ***United States v. Salley***, 246 F.Supp.2d 970, 976 (N.D.Ill. 2003).

Unfortunately, when a Court is called upon to decide the issue of competence, "there are no fixed or immutable signs" which can be looked for. ***State v. Tilden***, 578, 579. The defendant who is incompetent might be young. ***Newman v. Harrington***, 932 (defendant sixteen years old at time of pretrial

proceedings). Or, he might be well into adulthood. ***State v. Tilden***, 571 (defendant forty years old at the time presentence report was completed). A defendant's debilitating mental disease or defect can be based in congenital retardation. ***Newman v. Harrington***, supra; ***State v. McCurry-Bey***, 298 S.W.3d 898, 899 (Mo.App.E.D. 2009). Or, a debilitating mental disease or defect can exist due to traumatic brain damage. ***State v. Tilden***, 570; ***Odle v. Woodford***, 1089. Sometimes, a defendant is found incompetent to proceed because his bizarre behavior screams out about the lack of competence. ***Drope v. Missouri***, 166 (suicide attempt during trial by defendant with history of intermittent incompetence); ***State v. Moon***, 833-834 (tangential and bizarre trial testimony and statements to the Court by defendant with mental illness history); ***Woods v. State***, 994 S.W.2d 32, 38-39 (Mo.App.W.D. 1999) (suicide attempt prior to sentencing by defendant with prior history of intermittent incompetence). More often though, a defendant's incompetence is hidden behind his compliance and concrete answers to questions, but nonetheless requires that the law "protect" him "from being put to trial and being sentenced" in that condition. ***State v. Tilden***, 575, 579-580; ***Newman v. Harrington***, 933-934; ***United States v. Salley***, 977-979; ***Odle v. Woodford***, 1088-1089.

Thus, in all of the cases in which incompetence to proceed has been found, there is wide variance upon the facts, with the only common denominator being

that, in each case, there was a particular constellation of facts which was deemed to show either the inability to understand court processes or the inability to rationally assist with the defense. All of these principles have found their way into the discussions about execution competence, and will be important here.

D. The standards for execution incompetence employ the principles applicable to trial competence, and offer robust protections despite continuing attempts to whittle them down

From the first time that execution competence was addressed, right through the present, the United States Supreme Court has always held 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); ***Madison v. Alabama***. 139 S.Ct. 718, 728 (2019). In the beginning, the high Court did not have to decide the question of whether, in the execution competence context, the meaning of the term "insane" should be considered different from that in the trial competency context, and if so how different; nevertheless, Justice Powell, in a concurrence, saw fit to set forth dicta about his personal thoughts, that there should be a lesser standard at play for execution competence, to wit 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. That is precisely the standard which the Missouri Supreme Court employed in deciding the question of Mr.

Barton's execution competence (Appendix A, p. 7, fn. 5). And, that is the standard which Respondent also embraces (Doc. 7, p. 5).

However, it is well-known that "(b)reath spent repeating dicta does not infuse it with life" because such observations in dicta "are neither authoritative nor persuasive." ***Metropolitan Stevedore Co. v. Rambo***, 515 U.S. 291, 300 (1995). Worse still, in ***Panetti***, the United States Supreme Court directly confronted and rejected an attempt to do precisely what the Missouri Supreme Court has done, that is follow as authoritative Justice Powell's lower standard; instead, the Court held that the standard is far broader such that one would be incompetent for execution if his mental conditions make him unable to "reach a rational understanding of the reason for the execution." ***Panetti v. Quarterman***, 958-959; ***Madison v. Alabama***, 726.

This last year, the Supreme Court yet again had to intervene to thwart a different attempt to incorrectly read the precedent made in ***Ford***; that case involved the insistence by the State of Alabama that only mental illnesses with the component of delusions, a component present in ***Ford***, could constitute grounds for execution incompetence. ***Madison v. Alabama***, 725-726. The Court patiently explained that, as in the realm of trial competence, the standard "has no interest in establishing any precise cause", that attention should instead be paid to "whether a mental disorder has had a particular effect", and that a Court, deciding the question

of execution competence, "must therefore look beyond any given diagnosis to a downstream consequence." ***Madison v. Alabama***, 728-729.

The lower Federal Courts have also discharged their proper roles by following the Supreme Court's broad precedent, and identifying unreasonable applications of that precedent. ***Copeland v. Washington***, supra; ***Long v. Humphrey***, supra. Particularly, those Courts have held that lack of competence for execution includes 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).

E. Dr. Zapf determined execution incompetence based upon prevailing professional norms and, as it turns out, in keeping with legal standards

As explained in the petition, Dr. Zapf diagnosed Mr. Barton as suffering from Major Neurocognitive Disorder due to traumatic brain injury; that conclusion was solidly based upon her expertise, her review of the records, her testing, and her in-person sessions with Mr. Barton (Doc. 1, p. 13; Appendix B, p. 10). Consequently, Dr. Zapf found 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; specifically, Dr. Zapf attributed Mr. Barton's incompetence for execution to "… 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" (Doc. 1, p. 13; Appendix B, p. 14-15). Dr. Zapf went on to explain that these findings and conclusions are in keeping with prevailing professional norms on the subject (Appendix B, p. 15). These findings clearly demonstrate a level of incompetence satisfying the standards for execution incompetence as set forth by the United States Supreme Court, and as refined by the lower Federal Courts. ***Panetti v. Quarterman***, 958-959; ***Madison v. Alabama***, 726; ***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).

It is important to note that the Missouri Supreme Court never questioned these professional conclusions by Dr. Zapf, and never took issue with Dr. Zapf's qualifications or methods (Appendix A, p. 6-9).

F. The Missouri Supreme Court, and now Respondent, reach contrary conclusions by employing a legal standard rejected by the United States Supreme Court

The Missouri Supreme Court, and now Respondent, start by relying upon the standard for execution competence suggested by Justice Powell in his ***Ford*** concurrence; then, they tease out what they deem to be magic words from an aside offered by Dr. Zapf, 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" (Doc. 7, p. 4-5; Appendix A, p. 7-8; Appendix B, p.

14-15). For the Missouri Supreme Court and Respondent, that is enough to fully support a finding of execution competence (Doc. 7, p. 4-5; Appendix A, p. 7-8).

To the contrary, as explained above, the Justice Powell thoughts are nothing but dicta, and in fact dicta which has been rejected by the Supreme Court. ***Panetti v. Quarterman***, 958-959; ***Madison v. Alabama***, 726. Moreover, as Dr. Zapf observed, the mental health professional community has roundly rejected, as flawed and incomplete, Justice Powell's simplistic notions about execution competence (Appendix B, p. 15).

The Missouri Supreme Court touts that Dr. Zapf "admits" that her findings did not meet the ***Ford*** and ***Panetti*** standard (Appendix A, p. 7-9). Actually, what Dr. Zapf has "admitted" is that Mr. Barton's "rudimentary and non-delusional understanding of the punishment he is about to receive and the reasons for it", while not satisfying prevailing professional standards for execution competence, would satisfy the standard set forth in Justice Powell's ***Ford*** concurrence (Appendix B, p. 15). However, as already noted above, that standard, embraced by the Missouri Supreme Court, has been rejected (Appendix A, p. 7, fn. 5). ***Panetti v. Quarterman***, 958-959; ***Madison v. Alabama***, 726.

The Missouri Supreme Court also points out Dr. Zapf's finding that Mr. Barton does not suffer from "delusional thinking" or "psychotic disorders" (Appendix A, p. 8). However, as noted above, the United States Supreme Court

has directed Courts to not get hung up on the existence or non-existence of any particular mental malady, and concentrate, instead, on any "downstream consequence" from the condition which does exist. ***Madison v. Alabama***, 728-729. Dr. Zapf provided detailed explanations about of the downstream consequences of Mr. Barton's condition (Appendix B, p. 14-15). To repeat, Major Neurocognitive Disorder has saddled Mr. Barton with "… 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).

The Missouri Supreme Court then paraphrases Dr. Zapf findings, omitting critical portions of those findings, and faults that the findings, as so paraphrased, are "insufficient" (Appendix A, p. 9). The Missouri Supreme Court also criticizes that Dr. Zapf "does not say Barton's cognitive dysfunction meets the standard set out in ***Panetti***" (Appendix A, p. 9). Of course, these conclusions are based, not only on a truncated version of Dr. Zapf's opinions, but also upon the Missouri Supreme Court's unreasonable notions about the standard for execution competence (Appendix A, p. 7, fn. 5). When Dr. Zapf's findings and conclusions are fully and fairly stated, and not truncated as the Missouri Supreme Court has done, they well meet the applicable legal standards for execution incompetence.

Panetti v. Quarterman, 958-959; ***Madison v. Alabama***, 726; ***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).

Unquestionably, the Missouri Supreme Court decided this matter using a standard which is contrary to or involves an unreasonable application of United States Supreme Court precedent. That hurts because use of that improper standard allowed for an incompetent man to be found competent.

G. The Missouri Supreme Court, and now Respondent, employ unreasonable conclusions of fact in light of the state court record

In addition, the Missouri Supreme Court has plucked a few facts from a voluminous record to claim support therefrom for their finding of execution competence (Appendix A, p. 9-10). Respondent, for his part, urges that these Missouri Supreme Court findings of fact and law are owed deference (Doc. 7, p. 5). Respondent further claims that Mr. Barton has presented no evidence to rebut the Missouri Supreme Court findings, and instead "only disagrees with the result the court reached" (Doc. 7, p. 5).

There is certainly a presumption of correctness owed to factual determinations by a state court, but such factual determinations, and the concomitant presumption of correctness, can be overcome with clear and convincing contrary evidence from that same record. 28 U.S.C. 2254(d)(2) and (e)(1); ***Miller-El v. Dretke***, 545 U.S. 231, 240-265 (2005); ***Holman v. Kemna***,

212 F.3d 413, 417-418 (8th Cir. 2000). As for legal conclusions drawn from the factual determinations, those are subject to independent, *de novo* review as to their reasonableness in a process akin to application of the standard of clear error. ***Holman v. Kemna***, supra; ***Van Tran v. Lindsey***, 212 F.3d 1143, 1153-54 (9th Cir. 2000). When the state court record is clearly contrary to the factual findings made by that state court, and when that state court uses those erroneous factual findings in deciding a matter involving United States Supreme Court precedent, that wrong-facts-based decision constitutes an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. ***Holman v. Kemna***, supra. And, a state court determination cannot be trusted when it is tainted by legal error. ***Madison v. Alabama***, 729.

The Missouri Supreme Court's selectively chosen facts, when examined carefully, do not actually support a finding of competence. Also, the Missouri Supreme Court's selectivity caused them to not account the overwhelming other evidence in the record demonstrating incompetence. And, contrary to Respondent's claims, Mr. Barton has not only disagreed with the result of that selectivity, but has also presented the overwhelming facts from the record which rebut that result.

The Missouri Supreme Court reads out of context, and dismisses as not supportive of execution incompetence, Mr. Barton's statement to Dr. Zapf's that

"they're going to execute me if I can't prove my innocence" (Appendix A, p. 10). The trouble is that no one, least of all Dr. Zapf, has ever claimed that this statement supports a finding of incompetence. Dr. Zapf viewed the statement as at best demonstrating the same, minimal level of concrete level of thinking she had acknowledged Mr. Barton could conjure, and at worst, in context of her discussions with Mr. Barton, "demonstrating some illogical thought process" (Appendix B, p. 10).

The Missouri Supreme Court strongly relied upon a handful of reports, written by those who provided prison medical treatment for Mr. Barton, that Mr. 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). But this brings things back to principles of law, cited earlier, related to determinations of competence for trial. Some folks give certain superficial signs of competence which hide underlying incompetence. ***State v. Tilden***, 575, 579-580; ***Newman v. Harrington***, 933-934; ***United States v. Salley***, 977-979; ***Odle v. Woodford***, 1088-1089. These are the understandings in the law which must guide consideration of the reports singled out and relied upon so heavily by the Missouri Supreme Court.

In those reports, it is reported that Mr. Barton is not displaying particularized, overt symptoms, like delusions or psychosis. But, as fully

explained by Dr. Zapf, and repeated many times above, incompetence caused by Major Neurocognitive Disorder does not generate symptoms which are obvious on the surface, like delusions or psychosis. Therefore, the lack of such symptoms in Mr. Barton is meaningless. Never is it reported that these professionals leveled queries at Mr. Barton so as to determine his competence for anything other than to "make a good institutional adjustment". What is more, a complete search of those prison records show that those records do not contain Dr. Zapf's report or any of the mountain of reports generated by imaging, neuropsychological and other testing which established Mr. Barton's brain damage and consequent mental illness (Appendix B. p.12). Thus, the persons who wrote the reports referred to by the Missouri Supreme Court cannot be faulted for not knowing the true extent of Mr. Barton's condition, and for not taking that into account in making their limited findings. However, under the circumstances, it is unreasonable for the Missouri Supreme Court to give the undue weight they have to these conclusions.

Standing in stark contrast to this meaningless handful of prison reports there are the expert findings by Dr. Zapf and all of the medical imaging, neuropsychological and psychiatric experts about Mr. Barton's brain damage, mental illness and their sequelae. Never once did the Missouri Supreme Court utter one word against the legitimacy of these experts or their findings. The Missouri Supreme Court simply ignored the imaging and other medical and

psychiatric conclusions by this host of experts.

The Missouri Supreme Court certainly endeavored to belittle the conclusions from Dr. Zapf, but only by illicit means, unfairly recounting Dr. Zapf's conclusions by omitting key components of the findings, and then comparing the truncated version of the opinions against a debunked standard of review. This is contrary to and an unreasonable application of United States Supreme Court precedent, and also an unreasonable determination of the facts in light of clear and convincing contrary evidence from the record of the state court proceedings. ***Holman v. Kemna***, supra.

H. Comparisons to other cases support Mr. Barton, not Respondent

Respondent advances a final argument in support of the Missouri Supreme Court finding, that the facts in this case are somehow akin to those in ***Cole v. Roper***, 783 F.3d 707 (8th Cir. 2015), an instance in which execution competence was found (Doc. 7, p. 5). It would have been difficult for Respondent to find a case more clearly distinguishable from the case at bar.

Mr. Cole faced execution, and presented an expert finding by William Logan, M.D. that Cole, due to mental-illness-generated psychosis and hallucinations, was not competent for execution. ***Cole v. Roper***, 709. The opinions of Dr. Logan were addressed directly by a prison psychologist, Dr. Allyn Whitehead; in a fifteen minute interview with Dr. Whitehead, Mr. Cole "denied

any hallucinatory experiences"; in that fifteen minutes, Dr. Whitehead specifically looked for but did not find the overt symptom of the psychosis reported by Dr. Logan. ***Cole v. Roper***, supra. Also, there was other evidence in direct contravention of Dr. Logan's conclusions about execution incompetence, and those were recordings of phone conversations in which Mr. Cole expounded upon legal issues related to the execution procedures to be used against him as well as the execution protocols from other states. ***Cole v. Roper***, supra. On top of all of that, Dr. Logan was deemed not credible in light of the Court's prior, untoward experiences with questionable methods employed by Dr. Logan. ***Cole v. Roper***, 719, fn. 6. On these bases, it was found that Mr. Cole failed to meet his burden to make a threshold showing of execution incompetence. ***Cole v. Roper***, 713-714.

At the heart of things, whereas the expert supporting Cole's incompetence was deemed not credible, the expertise, methods and diagnoses by Dr. Zapf were never doubted by the Missouri Supreme Court. Whereas Mr. Cole was specifically and independently assessed and found free of the conditions which Dr. Logan purportedly found, no one has tried to claim that Mr. Barton has somehow been cured of his brain damage and the resultant mental illness; all that has been contended is the irrelevant, that Mr. Barton's condition still leaves him able to be compliant with the conditions of his incarceration. And no one has claimed that Mr. Barton has ever carried on the sort of sophisticated discussion about execution

dynamics like that overheard from Mr. Cole.

It would have been more forthright, but admittedly far less helpful to his espousals, for Respondent to focus instead on the facts and outcome in ***Madison v. Alabama***. Mr. Madison suffered a series of strokes, and as a result developed disorientation, confusion, cognitive impairment and memory loss. ***Madison v. Alabama***, 723. Mr. Madison's expert observed that Mr. Madison had lost all memory of the underlying criminal event; that expert also opined that Madison's condition caused significant cognitive decline, allowing him to concretely understand the nature of execution, but not the reasoning behind the state's efforts to execute him. ***Madison v. Alabama***, 724. The State's expert acknowledged Mr. Madison's strokes-induced cognitive decline and loss of memory regarding the event of the crime, but noted that Mr. Madison still had a grasp on his case and his legal situation; the State's expert did not address the impact of the strokes-induced cognitive decline upon Mr. Madison's competence, but instead emphasized that Mr. Madison did not show signs of psychosis, paranoia or delusion. ***Madison v. Alabama***, supra. In making findings of execution competence, the Alabama Court, like the State' expert, highlighted the absence of psychosis and delusion without addressing the consequences of the strokes-induced cognitive decline. ***Madison v. Alabama***, 724-725. The United States Supreme Court found that the state court was so focused on conditions that Mr. Madison did not have that that court failed

to consider the impact wrought by the serious condition which Mr. Madison did have; consequently, the matter was returned to the state court for that court to properly consider the impact of Mr. Madison's actual condition upon his competence for execution. ***Madison v. Alabama***, 731.

Mr. Barton's situation is akin to that confronted in ***Madison***. Mr. Barton, like Mr. Madison, has a brain-damage-condition which has not created psychosis or delusions, and leaves him with some capabilities, but has inflicted profound deficits. To say it one more time, Major Neurocognitive Disorder has saddled Mr. Barton with "… 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). The Missouri Supreme Court, like the Alabama Court, concentrated on the lack of psychosis and delusions, and the limited capabilities, and paid no attention to Mr. Barton's deficits and their impact on Mr. Barton's execution competence. Actually, the Missouri Supreme Court took one wrong step more than the Alabama Court, unreasonably employing the wrong legal standard to judge the matter. Therefore, it would seem that Mr. Barton, just like Mr. Madison, would be entitled, at the very least, to a return of this matter to state Court for what the United States Supreme Court aptly termed "a do-over". ***Madison v. Alabama***, 730.

I. Conclusion

In light of the foregoing, it is clear that the Missouri Supreme Court's determination of execution competence must be set aside as contrary to and an unreasonable application of United States Supreme Court precedent, and based upon an unreasonable determination of the facts in light of the state court record. It is suggested to the Court that the record presented, particularly the part about the conclusions of Dr. Zapf repeatedly cited, is sufficient for this Court to determine execution incompetence, and this Court should so find. At the very least, this Court should determine that Mr. Barton has made a threshold showing of execution incompetence, and should be entitled to a full and fair hearing upon the matter. ***Panetti v. Quarterman***, 958-959; ***Madison v. Alabama***, 726.

III. AS TO COUNT TWO, RESPONDENT FAILS TO RECOGNIZE AND RESPOND TO ISSUES AND FACTS PLAINLY RAISED, AND MISPERCEIVES THE LAW TO BOOT

A. The Petition alleges what the record shows, that Mr. Barton has come forward with "compelling" new evidence which undermines confidence in his conviction and death sentence, that this new evidence provides a gateway to consideration of an otherwise defaulted claim of tremendous merit, and that the Missouri Supreme Court unreasonably denied relief

In his Petition, it was incumbent upon Mr. Barton to set forth all of the essential pieces of what is a complex Federal habeas corpus claim regarding actual innocence. Thus, the Petition needed to include

- a detailed claim of actual innocence,

- a defaulted constitutional claim which could be raised through the "gateway" provided by a proven actual innocence claim,
- a showing that this gateway claim of actual innocence, in the first instance, was presented to and ruled by the State Court of last resort, including a separate showing that the matter was not raised in previous Federal habeas proceedings,
- detailed explanations how the rulings by the State Court were unreasonable as to fact and law, and
- detailed explanations that the issues presented warrant Federal habeas relief.

Mr. Barton's Petition addressed all of these matters in turn.

1. The details of the "compelling" actual innocence claim

Mr. Barton began by describing just how very close was the case against him which brought about his conviction and death sentence, a razor-thin 4-3 margin in the Missouri Supreme Court (Doc. 1, p. 18-20). Mr. Barton went on to explain that there were two key pieces of evidence which were essential to these results.

One was testimony from a blood spatter expert; this expert was used to counter Mr. Barton's explanation that the few, small blood stains found on his clothing happened in a mishap when he, the victim's granddaughter and a neighbor discovered the victim's body; the State's expert opined that, through his

examination of the patterns of the small stains, he believed that the stains could not have been deposited in the fashion described by Mr. Barton, and instead would have gotten there when spattered by a violent force impacted upon the source of the blood (Doc. 1, p. 19-20). The other was testimony from a jailhouse informer who claimed that Mr. Barton made incriminating statements to her (Doc. 1, p. 23).

Mr. Barton then set forth new evidence of actual innocence, which debunked these essential pieces of the state's case, but which the jury who convicted and sentenced Mr. Barton never heard.

As against the State's blood spatter expert testimony, there is now another expert who explodes the myths told at trial, and who, by himself, proves Mr. Barton's actual innocence; this is not a new expert, for he had originally been identified by Mr. Barton's trial defense counsel, but had not been properly queried, understood, prepared and used; completely new, however, were the findings and conclusions which this expert reached when he was finally given a chance to perform a proper analysis of the evidence; this expert not only made findings the polar opposite of the State's expert, he chided that one stain the state's expert claimed to find simply did not exist and that the small stains that were present were so clearly a result of transfer, as explained by Mr. Barton, that no expert worth his salt could have found otherwise; and, this expert dropped a bombshell of actual innocence, concluding that the clothes taken from Mr. Barton could not have been

the clothes worn by the killer because the stains on the clothes were few and miniscule, whereas the killer's clothing would have been soaked in blood in light of the wounds' number (over fifty) and severity (ear-to-ear slicing of the throat to cut the jugular, and x-shaped slicing of the abdomen so deep to create evisceration) (Doc. 1, p. 21-23; Appendix I).

As against the jailhouse informer, the evidence was known at the time of Mr. Barton's trial, but it is new because the jury who convicted and sentenced Mr. Barton never heard the evidence; at a prior trial, the informer perjured herself, minimizing as "six" her number of prior convictions, and denying that she had received a dismissal of a charge against her in return for her testimony; it was established that the informer actually had a whopping twenty-nine convictions and had made a *quid pro quo* deal, trading her testimony for a dismissal of a criminal charge against her; the State knowingly presented the informer's perjury, unchanged, before the jury who convicted and sentenced Mr. Barton, and that jury was never informed about the perjury or about the true facts; that this perjury was significant enough to undermine confidence in a jury's findings of guilt and sentence was found when the perjury was used the first time around (Doc. 1, p. 23-25).

Finally, it was explained that further support has been developed that the new evidence is "compelling", since that is the very word used by the Jurors who

decided guilt and punishment when given the opportunity to review the new evidence (Doc. 1, p. 27, 29).

2. The momentous, but defaulted, constitutional claim which can now pass through the actual innocence gateway

The Petition also specified, in detail, the violation of the Sixth and Fourteenth Amendments which was defaulted, but which would be given new life in light of the actual innocence claim; that is the prosecutor's knowing use of the informer's perjured testimony at trial, and the prosecutor's failure to reveal the intention to use such perjury prior to trial (Doc. 1, p. 37). It was observed in the Petition that precisely the same conduct in Mr. Barton's earlier trial generated a finding of "a reasonable probability that the result of the proceedings would have been different" had the perjury not been used, and the truth been told instead (Appendix J, p. 21 22). It can be added that the United States Supreme Court, some sixty years ago, dynamically held that prosecution-suborned perjury, denying that a benefit was given in return for testimony when that benefit was actually given, requires a new trial. ***Napue v. Illinois***, 360 U.S. 264, 266-267, 269 (1959).

3. Explanation that, while claims of ineffective assistance of counsel were previously raised in connection with this new evidence, the claim of actual innocence was raised, for the first time, earlier this year before the Missouri Supreme Court

It was explained that challenges about defense counsel failures to raise these pieces of evidence were defaulted in state post-conviction proceedings, but were

raised in Federal habeas proceedings, with relief denied due to procedural default and deference to defense counsel decisions (Doc. 1, p. 21, 25).

It was then detailed that in February of this year, before the Missouri Supreme Court, a never-before-considered gateway claim of actual innocence was raised based upon this new evidence (Doc. 1, p. 25, 26-27). Also accounted was additional evidence about the moment of the claim, which was the opinion by one of the jurors that the new evidence is "compelling" (Doc. 1, p. 27). And, there was set forth, with particularity, the underlying constitutional rights violations claim which would be brought through the gateway of actual innocence, that the State knowingly presented the perjured testimony of their informer, and never disclosed that intent to present perjured testimony prior to actually presenting it (Doc. 1, p. 36-37).

4. In the Petition, there were given detailed explanations and arguments as to how the findings of fact by the Missouri Supreme Court were unreasonable, and as to why Mr. Barton is entitled to relief from this Court, and those explanations will be referred to, but not simply repeated back, here

Mr. Barton noted that the Missouri Supreme Court denied this actual innocence gateway claim, and in so doing applied the proper legal standards, but also unlawfully relied upon unreasonable determinations of the facts in light of the record made in state court (Doc. 1, p. 27-28). Mr. Barton then took the Missouri Supreme Court findings, one by one, and explained how each of those findings was unreasonable in light of the record made in the State's Courts, and in light of the

legal principles applicable to each; Mr. Barton as well explained how and why he was entitled to relief from this Court because of the power of the arguments (Doc. 1, p. 28-37). Undersigned counsel cannot currently think of a way to add to or improve upon those already copiously detailed explanations. Besides, as will be noted below, Respondent has chosen to not mention anything contained in those ten pages of the Petition in their answer to the Court's Order to show cause. Therefore, reliance is placed upon those explanations as they are stated in the Petition.

B. Respondent claims, wrongly, that the new evidence is not new enough

Respondent begins by falsely alleging that "there is nothing new here" and that there is support for that allegation from several Federal and State cases, as well as, supposedly, the finding by the Missouri Supreme Court in this case (Doc. 7, p. 6-7, 8).

Taking last things first, though the Missouri Supreme Court noted that Respondent raised this question of procedural nicety, the Court did so in passing, without ruling upon the matter (Appendix A, p. 3, fn. 4), and instead proceeded to address, on the merits, all of the issues related to Count Two (Appendix A, p. 4-6).

Had the Missouri Supreme Court actually intended to give a definitive judgment on the subject, it would have had to grapple with a contrary ruling on the subject from its own Western District Court of Appeals. In ***McKim v. Cassady***,

457 S.W.3d 831, 846 (Mo.App.W.D. 2015), the State made exactly the same claim made now by Respondent, and the Court of Appeals turned the claim down flatly, simply and elegantly holding that new evidence for a claim of actual innocence includes any evidence that was not presented at trial. Interestingly, Respondent has cited ***McKim*** for another purpose, but without candidly bringing up the aforementioned aspect of the holding which is obviously contrary to Respondent's positions.

Respondent then goes on a spree of cherry-picking attractive words from a host of cases without understanding, much less explaining, how the chosen words are inapposite when placed into a context like that present in this case.

Start with Respondent purporting that the ***McKim*** Court decided that new evidence used to impeach or rebut other testimony can never be considered sufficient to show actual innocence (Doc. 7, p. 6). Actually, in ***McKim v. Cassady***, 847-849, petitioner came forward with new opinions from pathologists which countered a critical trial expert's contention about cause of death; the ***McKim*** Court decided that the new evidence was not sufficient to show actual innocence, but not because it was used to impeach or rebut another expert, but because other evidence in the case, including unrefuted witness testimony, supported the trial expert's opinion about cause of death. Thus, a proper accounting of the holding in ***McKim*** would be that the significance of new evidence of any kind must be judged

in the context of the other evidence in the case.

Even worse is Respondent's reliance, for the same general proposition, upon ***Moore-El v. Luebbers***, 446 F.3d 890, 902-903 (8th Cir. 2006). In that case, after the Presiding Magistrate had already issued a preliminary ruling, Moore-El conjured up the affidavit of a witness named Petty. In that affidavit, Petty claimed to have witnessed the shooting for which Moore-El was convicted, and said for certain Moore-El was not the shooter. The trouble was that Petty suffered from strong credibility problems, not the least of which was that she had invoked her Fifth Amendment privilege when state defense counsel tried to interview her prior to trial. Besides, other witnesses at trial had already testified the same as Petty would have, and so her testimony would have been cumulative. Thus, in light of this peculiar set of facts, the Eighth Circuit found that a "swearing match" involving Petty, and all of her baggage, would clearly not rise to the level of a cognizable actual innocence claim. Thus, this limited holding does not extrapolate to the broader context claimed by Respondent.

Then, there is Respondent's inference that the Eighth Circuit, in ***Pitts v. Norris***, 85 F.3d 348, 350-351 (8th Cir. 1996), somehow restricted the types of appropriate new evidence to "credible declarations of guilt by another, trustworthy eyewitness accounts, and exculpatory scientific evidence"; actually, that passage only endeavored to provide "(e)xamples" which would "include" the items quoted

by Respondent.

As well, Respondent cites ***Meadows v. Delo***, 99 F.3d 280, 282 (8th Cir. 1996) for its proposition that new evidence "means evidence the factual basis of which could not previously have been discovered through due diligence" (Doc. 7, p. 6). Actually, as Respondent acknowledges later on page 7 of his suggestions, the ***Meadows*** case was dismissed because it was a free-standing claim of actual innocence. ***Meadows v. Delo***, 283. As a courtesy, the ***Meadows*** Court still engaged an analysis of the actual innocence claim, which was based on an affidavit from a codefendant exonerating Meadows; in that regard, the Court found only that, since the codefendant had not testified at time of trial, evidence from him, by nature, could not be considered newly discovered. ***Meadows v. Delo***, 282. At that point in that case, citation was also made to ***Cornell v. Nix***, 976 F.2d 376, 380 (8th Cir. 1992). However, the restriction employed in ***Cornell*** was appropriate in ***Meadows***, as it had been in ***Cornell***, because those petitioners had failed to raise their claims, in the first instance, in state court. That ***Cornell*** restriction would not apply in Mr. Barton's case because this matter was brought, in the first instance, in the Missouri Supreme Court.

Finally, Respondent sounds the warnings about a possible "mockery of justice" pronounced in ***Weeks v. Bowersox***, 119 F.3d 1342, 1352 (8th Cir. 1997); except that the mockery of justice which was stopped in Weeks' case was an

attempt to go forward with an actual innocence claim in support of which "Weeks submitted precisely one affidavit--his own." The only mockery now is for Respondent to bring up that case in this setting.

C. Respondent has missed that this is not a free-standing claim of actual innocence, and so spends much ink on the subject

Respondent takes pains to emphasize that a free-standing claim of actual innocence is not cognizable in Federal Habeas (Doc. 7, p. 7). One must assume that Respondent failed to note Mr. Barton's explanation that he was not raising such a claim (Doc. 1, p. 28, fn. 1).

D. Respondent has also missed the constitutional rights claim actually raised

At pages 36-37 of his Petition, Mr. Barton clearly stated the defaulted issue of constitutional dimension which the actual innocence gateway would be used to revive: the prosecution's knowing use of perjured testimony from their jailhouse informer and failure to disclose intention to do same. The Missouri Supreme Court clearly understood that this was the constitutional claim to be revived by the actual innocence claim, though that Court never addressed the moment of the claim, likely realizing its inherent power (Appendix A, p. 3).

Respondent has said nothing about that constitutional claim. Instead, Respondent has erected two straw men, issues of ineffectiveness of counsel, which Respondent proceeded to knock down with the argument that both of those issues were raised and addressed in prior habeas proceedings (Doc. 7, p. 8-9).

Since Respondent has not addressed the issue raised by Mr. Barton, Mr. Barton stands on the arguments made in that regard in the Petition and in this Traverse.

E. Respondent, like the Missouri Supreme Court, wants to unreasonably decide the significance of the actual innocence claim without considering the whole state court record, ignoring entirely Juror conclusions that the new evidence is "compelling"

Respondent reminds about the findings made by the Missouri Supreme Court related to the actual innocence claim (Doc. 7, p. 9). In so doing, Respondent does not bother to address the arguments, made in the Petition, about the unreasonable errors and omissions of fact committed by the Missouri Supreme Court, and how the record, when corrected, fully supports the relief sought (Doc. 1, 28-32). Since Respondent has chosen to not object to these points, Mr. Barton continues reliance upon them as they are.

Mr. Barton would, however, specifically remind about the proof-positive presented to the Missouri Supreme Court that the new evidence is "compelling", the affidavit from a Juror who decided the case, Ashleigh Bauernfeind. Ms. Bauernfeind has made clear that, at time of trial, 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; having now seen expert Lawrence Renner's affidavit regarding his analysis of the evidence, Ms. Bauernfeind 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). Despite COVID-19-generated delays, affidavits to the same effect have been obtained from two other Jurors, one of whom was the Foreperson (Appendix U; Appendix V). Respondent has made his arguments without addressing any of this critical evidence.

It should be remembered that such an opinion of just one juror is significant, by itself, since the law in capital cases invests in a single juror the ability to stop a death penalty result. ***Ring v. Arizona***, 536 U.S. 584, 589, 602 (2002); ***State v. Whitfield***, 107 S.W.3d 253, 258-263 (Mo.banc 2003); ***State v. Wood***, 580 S.W.3d 566, 582-588 (Mo.banc 2019).

F. Respondent claims the circumstantial evidence was strong, but addresses none of the weaknesses of that evidence pointed out by Mr. Barton, and as shown in the state court record, and particularly in the dissenting opinion against the judgment and sentence

Respondent goes through the list of circumstantial evidence, and contends that evidence is "strong" (Doc. 7, p. 9-10). However, Respondent does not trouble to address any of the evidence about inherent weaknesses of that evidence, all highlighted by Mr. Barton, all drawn from the State Court record, and for the most part drawn from the dissenting opinion from the three Missouri Supreme Court Judges who would have thrown out Mr. Barton's conviction and death sentence (Doc. 1, p. 32-34). ***State v. Barton***, 240 S.W.3d 693, 713-716, 719 (Mo.banc

2007). Here again, Mr. Barton will rely upon the unanswered evidence and arguments advanced in the Petition.

G. Conclusion

In light of the premises set forth in the Petition, coupled with the arguments set forth above, it has been established that the Missouri Supreme Court's unreasonable determinations of the fact robbed Mr. Barton of a proper finding that he had made his case for actual innocence. Consequently, it is incumbent upon this Court to exercise the power it has to stay the scheduled execution for Mr. Barton, and to cause briefing and hearing upon Mr. Barton's previously defaulted constitutional claim, either by returning the matter to the Missouri Supreme Court or by conducting that process itself.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was e-mailed to the following this 11th day of May, 2020

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