CAPITAL CASE

No. 18A1289

IN THE SUPREME COURT OF THE UNITED STATES

WALTER BARTON

Petitioner

v.

CYNTHIA GRIFFITH, et al

Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

FREDERICK A. DUCHARDT, JR.
COUNSEL OF RECORD
Mo.Bar Enrollment Number 28868
P.O. Box 216
Trimble MO 64492
Phone: 816-213-0782
Fax: 816-635-5155
e-mail: fduchardt@yahoo.com

MICHAEL W. WALKER

MO Bar Enrollment Number 29425
5545 North Oak Trafficway, Suite 8
Kansas City MO 64118
Ph. 816-455-6511
Fax 816-455-6595
e-mail: mwwalk@sbcglobal.net

ATTORNEYS FOR PETITIONER

CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

Question One

As to the violation of Mr. Barton's right to be free from double jeopardy

whether the Eighth Circuit has imposed upon Mr. Barton an improper and unduly burdensome standard for the granting of a certificate of appealability in his Federal habeas corpus case

- **when debatability among reasonable jurists upon the issue is established by the fact that, at the time the issue was considered on direct appeal, three dissenting state Judges would have granted relief upon the issue,**
- **when the Second, Sixth and Seventh Circuits have held that such a direct appeal dissent should warrant issuance of a habeas corpus case certificate of appealability as a matter of "routine",**
- **when one Eighth Circuit Judge registered a dissent against the Eighth Circuit's adverse determination, and**
- **when the dictates of 28 U.S.C.A. § 2253(c)(1) and the practice by the Third, Fourth, and Ninth Circuits is to grant a certificate of appealability anytime that one Circuit Judge is in favor.**

Question Two

As to the issue concerning dismissal of Mr. Barton's amended Petition

whether the Eighth Circuit has imposed upon Mr. Barton an improper and unduly burdensome standard for the granting of a certificate of appealability in his Federal habeas corpus case

- **when debatability among reasonable jurists upon the issue is established by the fact that the District Court conceded that its decision ran counter to Eighth Circuit precedent on the matter,**
- **when one Eighth Circuit Judge registered a dissent against the Eighth Circuit determination, and**
- **when the dictates of 28 U.S.C.A. § 2253(c)(1) and the practice by the Third, Fourth, and Ninth Circuits is to grant a certificate of appealability anytime that one Circuit Judge is in favor.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Supreme Court Cases

Federal Circuit Court Cases

Federal District Court Cases

State Court Cases

Federal Statutes and Rules

PETITION FOR A WRIT OF CERTIORARI
DEATH PENALTY CASE
INTRODUCTION

Petitioner Walter Barton, having been convicted and sentenced to death by the State of Missouri, brought an action, seeking relief pursuant to 28 U.S.C.A. §2254, in the United States District Court for the Western District of Missouri (Doc.[1] 18, 33, 36, 56). The District Court denied relief and denied Mr. Barton's requests for certificates of appealability (Doc. 59). Mr. Barton then sought certificates of appealability from the United States Court of Appeals for the Eighth Circuit, and the Eighth Circuit denied that request. Mr. Barton respectfully requests from this Court a writ of certiorari for review of the Eighth Circuit's denial of certificates of appealability.

CITATION OF THE OFFICIAL REPORTS OF OPINIONS IN THIS CASE

The decision by a three judge panel of the Court of Appeals for the Eighth Circuit, denying certificates of appealability, is reported on the Eighth Circuit electronic case filing system, and a copy is provided at Appendix B. The refusal by the Eighth Circuit to grant *en banc* rehearing, with one dissent, is likewise reported on that Court's electronic case filing system, and a copy is provided at

[1] The term "Doc." refers to the District Court's electronic case filing system listing of documents filed in the case.

Appendix C. The underlying decision of the United States District Court for the Western District of Missouri regarding Mr. Barton's 28 U.S.C.A. § 2254 petition is reported on that Court's electronic case filing system at Docket entry 59, and a copy is provided at Appendix A. The Missouri Supreme Court has issued six different opinions with respect to Mr. Barton's case, which are, in chronological order, ***State v. Barton***, 936 S.W.2d 781 (Mo.banc 1996), ***State v. Barton***, 998 S.W.2d 19 (Mo.banc 1999), ***Barton v. State***, 76 S.W.3d 280 (Mo.banc 2002) ***State v. Barton***, 240 S.W.3d 693 (Mo.banc 2007), ***Barton v. State***, 432 S.W.3d 741 (Mo.banc 2014), and ***Barton v. State***, 486 S.W.3d 332 (Mo.banc 2016).

STATEMENT OF JURISDICTION

On December 21, 2018, a panel of the United States Court of Appeals for the Eighth Circuit denied certificates of appealability related to the judgment of the United States District Court for the Western District of Missouri as to Mr. Barton's petition pursuant to 28 U.S.C.A. § 2254 (Appendix B). On March 20, 2019, Mr. Barton's request for rehearing by the Court *en banc* was overruled, with one dissent (Appendix C). On June 11, 2019, Justice Gorsuch extended to August 16, 2019 the time for filing Mr. Barton's petition for writ of certiorari to this Court (Case #18A1289). This Petition has been filed within that time limit. This Court has jurisdiction to consider the Eighth Circuit denial of certificates of appealability

pursuant to 28 U.S.C.A. § 1254(1). ***Hohn v. United States***, 524 U.S. 236, 253 (1998).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Constitutional Provisions

Amendment V to the Constitution of the United States, in relevant part, is as follows:

> … nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb….

Amendment VI to the Constitution of the United States, in relevant part, is as follows:

> In all criminal prosecutions, the accused shall enjoy the right…to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Amendment VIII to the Constitution of the United States is as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV to the Constitution of the United States, in relevant part, is as follows:

> …nor shall any State deprive any person of life, liberty or property, without due process of law….

Statutes

28 U.S.C.A. § 2244(d) is as follows:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C.A. § 2253 is as follows:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255.
(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Rules

F.R.A.P 22(b) is as follows:

> **(1)** In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.
> **(2)** A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.
> **(3)** A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

Rule 11(a) of the Rules governing §2254 cases is as follows:

> The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

Third Circuit Rule 22.3 is as follows:

> An application for a certificate of appealability will be referred to a panel of three judges. If all the judges on the panel conclude that the certificate should not issue, the certificate will be denied, but if any judge of the panel

> is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue.

Fourth Circuit Rule 22(a)(3) is as follows:

> A request to grant or expand a certificate, including a brief filed pursuant to Subsection (1)(B) of this Rule or a brief and statement filed pursuant to Subsection (2)(B), shall be referred to a panel of three judges. If any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue.

Ninth Circuit General Order 6.3(g) is as follows:

> The following motions may be presented to 2 judges rather than the full panel if only 2 are participating. Any judge participating may vote to grant relief and so order. If all judges present agree that relief will not be granted, they shall so order:
> i. request for certificate of appealability;
> ii. for leave to proceed in forma pauperis in civil cases;
> iii. for temporary injunctive relief pending further consideration by the panel; and
> iv. for transcripts at government expense.

STATEMENT OF THE CASE

The Missouri state court prosecution of Walter Barton began nearly twenty-eight years ago after the death of eighty-year-old Gladys Kuehler as a result of a fifty-stab-wound attack in her Ozark, Missouri mobile home; Mr. Barton was well-acquainted with the victim, as he lived for a time in the same mobile home park; Mr. Barton was present at the mobile home park on that day, and was one of three persons who found the victim's dead body in her blood-soaked bedroom; Mr. Barton became a suspect when, at the time he was questioned, small stains were

seen on his shirt, and believed to possibly be blood; Mr. Barton explained how, at the time the body was discovered, a mishap occurred in the blood-stained room which accounted for the small stains on his shirt; then, and for the entirety of the time since, Mr. Barton has persistently denied his guilt (Appendix A, p. 1-5). ***State v. Barton***, 240 S.W.3d 693, 696-699. Twenty-four of the last twenty-eight years were taken up with what the District Court aptly described as "complex" state court proceedings, consisting of five jury trials and enough direct appeal and post-conviction matters to require six separate Missouri Supreme Court decisions (Appendix A, p. 5-6).

At the fifth trial, Mr. Barton was convicted and sentenced to death based primarily upon testimony from a jailhouse informer, who claimed that Mr. Barton made incriminating statements to her, and from a blood spatter expert, who opined that the stains on Mr. Barton's shirt were consistent with "high impact spatter" and not consistent with Barton's explanation of the deposit of the stains; there were also presented various bits of circumstantial evidence (Appendix A, p. 1-5). ***State v. Barton***, 240 S.W.3d 693, 696-699 (Mo.banc 2007). That fifth trial result was upheld by the Missouri Supreme Court, but by only the narrowest of margins, 4 Judges in affirmation, and 3 Judges in vigorous dissent (Appendix A, p. 6). ***State v. Barton***, 711-719. And, the Missouri Supreme Court dissenters were harsh in their assessment of what transpired previously in the Missouri courts, openly lamenting

that those proceedings "… taken together, reflect poorly on the criminal justice system." ***State v. Barton***, 712.

The issue which divided the Missouri Supreme Court concerned Mr. Barton's challenge that his right to be free from double jeopardy had been violated because, at Barton's very first trial, the very experienced lead prosecutor goaded a mistrial request by Barton's counsel so as to cause the putting off of a trial which the prosecutor did not think would go his way. On the one hand, four Missouri Supreme Court Judges found that the issue had been raised and finally determined after Mr. Barton's third trial, and further expressed their belief that the facts in the record did not support Barton's claim. ***State v. Barton***, 711. On the other hand, three Missouri Supreme Court Judges found that, since Barton had never even been allowed a hearing on the question of prosecutorial goading, the issue was still very much alive, and further found that, what facts were present in the record tended to support Barton's claim, and therefore at the very least a hearing was needed to receive evidence from all sources on the matter, including the offending prosecutor himself. ***State v. Barton***, 718-719.

After the 2007 4-3 decision by the Missouri Supreme Court, it took seven years for the state post-conviction proceedings addressing the fifth trial to be completed (Appendix A, p. 5). ***Barton v. State***, 432 S.W.3d 741 (Mo.banc 2014). The reason for that inordinate delay came to light during the investigation

conducted by undersigned counsel in 2014 and 2015, with much critical information provided by secondary state appointed post-conviction counsel; as it turned out, Mr. Barton's lead and learned state post-conviction defense counsel was mentally ill throughout the time of his representation of Mr. Barton; that discovery, along with the identifying of a host of major issues which mentally ill counsel failed to raise for Mr. Barton, caused the bringing of yet another state court action for post-conviction relief (Appendix A, p. 5; Doc. 36, Appendix B[2]). ***Barton v. State***, 486 S.W.3d 332 (Mo.banc 2016). Specifically, Mr. Barton sought a finding that Mr. Barton's appointed lead state post-conviction counsel, due to counsel's own serious mental illness, had abandoned Barton, and then in turn also sought, as a consequence of the finding of abandonment, allowance of late supplementation of Barton's original state post-conviction petition to add the multiple issues of substance which mentally ill abandoning counsel had failed to properly raise (Doc. 36, Appendix P[3]). ***Barton v. State***, 486 S.W.3d 332, 334 (Mo.banc 2016). Ultimately, the request for finding of abandonment was determined adversely to Mr. Barton's position, and the Missouri Supreme Court

[2] Doc. 36 is the accounting of suggestions in support of Mr. Barton's Amended Petition filed with the District Court. Appendix B to those suggestions is the affidavit of Amy Bartholow, secondary state post-conviction counsel for Mr. Barton; the affidavit details the mental illness issues of lead state post-conviction counsel.

[3] Doc. 36 is the accounting of suggestions in support of Mr. Barton's Amended Petition filed with the District Court. Appendix P to those suggestions is a copy of the state 2015 post-conviction case record.

disposed all pending motions and issued its mandate on June 24, 2016. ***Barton v. State***, 332, 338-339.

On June 9, 2015, less than one year after Missouri State Court post-conviction proceedings related to Barton's fifth trial were finalized, Mr. Barton's original 28 U.S.C.A. § 2254 petition was filed, setting forth twelve grounds challenging Barton's conviction for murder and sentence of death (Doc. 18). On that same day, Mr. Barton also filed the Missouri state request for finding of abandonment by mentally ill counsel, referred to just above (Doc. 36, Appendix P). The District Court stayed the 2254 proceedings pending the outcome of the state post-conviction abandonment of counsel petition (Doc. 26). As mentioned above, on May 24, 2016, the Missouri state post-conviction abandonment of counsel petition was finally determined adversely to Mr. Barton's position, by issuance of the mandate from the Missouri Supreme Court. ***Barton v. State***, supra. Also on May 24, 2016, relying upon the tolling provisions of 28 U.S.C.A. § 2244(d)(2), Mr. Barton filed his amended 2254 petition, reiterating the twelve grounds already raised, and adding additional grounds, particularly grounds 13 and 14, which were uncovered and developed in the interim (Doc. 33). Thereafter, the District Court lifted the stay, received further suggestions from Mr. Barton (Doc. 36), retorts from Respondent (Doc. 45), and a traverse from Mr. Barton (Doc. 56).

On April 9, 2018, as to certain issues raised in Mr. Barton's original petition, including Mr. Barton's double jeopardy argument, the District Court addressed those issues on their merits and denied relief (Appendix A, p. 18-42). As to grounds newly raised in the amended petition, the District Court dismissed those, opining that Mr. Barton's state court petition seeking a finding of abandonment by state post-conviction counsel should not be found, per the dictates of 28 U.S.C.A. § 2244(d)(2), to have stayed the running of the one year Federal limitations period, and that consequently those grounds, brought after the year-long state abandonment proceedings concluded, should be deemed untimely (Appendix A, p. 9-14). The District Court so ruled despite acknowledging that the decision being made ran contrary to the prior holding by the Eighth Circuit in ***Streu v. Dormire***, 57 F.3d 960, 963-965 (8th Cir. 2009) (Appendix A, p. 13-14).

Having ruled the issues in these fashions, the District Court denied certificates of appealability (Appendix A, p. 42). Mr. Barton timely petitioned to the Eighth Circuit Court of Appeals for certificates of appealability, Appellee's responded, Mr. Barton made reply, and on December 21, 2018, an Eighth Circuit panel denied Mr. Barton's request without explanation (Appendix B, p. 44). Mr. Barton then sought rehearing *en banc*, and that request was denied, with exception taken by Judge Kelly, who would have granted the motion (Appendix C, p. 45).

REASONS IN SUPPORT OF GRANTING THE WRIT

28 U.S.C.A. § 2253(c)(2) specifies that, though the right to appeal an adverse District Court judgment in a habeas corpus case is not automatic, in order to justify the grant of a certificate of appealability, the petitioner needs only to make a "substantial showing of the denial of a constitutional right." And, 28 U.S.C.A. § 2253(c)(1) calls for such a certificate of appealability to issue upon the vote of a single Circuit Justice.

Three times before, this Court has had to tear down higher barriers to habeas corpus appeal erected by Circuit Courts of Appeals; each time, this Court found it necessary to clarify that a petitioner's burden is a "straightforward" one, that is to "…demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." ***Slack v. McDaniel***, 529 U.S. 473, 484 (2000); ***Miller-El v. Cockrell***, 537 U.S. 322, 337 (2003); ***Buck v. Davis***, 137 S.Ct. 759, (2017). In Mr. Barton's habeas corpus case, the Eighth Circuit has, as to two different issues, and in two different fashions, placed unlawful, too-great restrictions upon the right to appeal a habeas corpus decision, and in the process has created splits with decisions and practices from other Circuits.

One issue upon which Mr. Barton sought, and was denied, certificate of appealability involved challenge that Mr. Barton's conviction and sentence violated Mr. Barton's Fifth Amendment right to be free from double jeopardy. Mr.

Barton urges first that the Eighth Circuit's implicit determination that the issue is not debatable among jurists of reason is clearly erroneous because debatability of the matter has been established by the fact that, upon state court direct appeal, the matter gave rise to a 4 Judge majority opinion against Mr. Barton's position, and a three Judge dissent in favor of Mr. Barton's position. ***State v. Barton***, 711-718. The Eighth Circuit's determination is not only wrong, it also runs contrary to holdings by the Seventh, Sixth and Second Circuits, who all have granted certificates of appealability under similar circumstances. In addition, the Eighth Circuit's adverse determination of the matter came over the dissent of Circuit Justice Jane Kelly; while that outcome was consistent with Eighth Circuit past practice, it failed to give force and effect to Circuit Justice Kelly's vote in favor of Mr. Barton's position, and that Eighth Circuit practice diverges from the letter of 28 U.S.C.A. § 2253(c)(1) and the Rules and practices of the Third, Fourth, and Ninth Circuits, all of which call for giving force and effect to the determination in favor of a certificate of appealability by a single Circuit Justice.

A separate issue about which Mr. Barton sought, but was denied, a certificate of appealability was the District Court's procedural dismissal of two of Mr. Barton's claims. As to this matter as well, Mr. Barton advances similar arguments to brand the Eighth Circuit ruling as unlawful. The facts show that the underlying procedural ruling by the District Court was at least debatable in that the

ruling was contrary to Eighth Circuit precedent on the subject. And, as to this issue as well, the Eighth Circuit's adverse determination of the matter came over the dissent of Circuit Justice Jane Kelly; again, while that was consistent with Eighth Circuit past practice, it failed to give force and effect to Circuit Justice Kelly's vote in favor of Mr. Barton's position, and that Eighth Circuit practice diverges from the plain language of 28 U.S.C.A. § 2253(c)(1) and the Rules and practices of the Third, Fourth, and Ninth Circuits, all of which give force and effect to the determination in favor of a certificate of appealability by a single Circuit Justice.

ARGUMENT-QUESTION ONE

As to the issue concerning violation of Mr. Barton's right to be free from double jeopardy

whether the Eighth Circuit has imposed upon Mr. Barton an improper and unduly burdensome standard for the granting of a certificate of appealability in his Federal habeas corpus case

- **when debatability among reasonable jurists upon the issue is established by the fact that, at the time the issue was considered on direct appeal, three dissenting state Judges would have granted relief upon the issue,**
- **when the Second, Sixth and Seventh Circuits have held that such a direct appeal dissent should warrant issuance of a habeas corpus case certificate of appealability as a matter of "routine",**
- **when one Eighth Circuit Judge registered a dissent against the Eighth Circuit's adverse determination, and**
- **when the dictates of 28 U.S.C.A. § 2253(c)(1) and the practice by the Third, Fourth, and Ninth Circuits is to grant a certificate of appealability anytime that one Circuit Judge is in favor.**

1. The law requires that a certificate of appealability be granted if the issue being appealed is "debatable among jurists of reason"

Per the terms of 28 U.S.C.A. § 2253(c)(2) and (3), a Federal habeas appellant, like Mr. Barton, must be granted a certificate of appealability (COA) upon each and every issue raised by him for which it is found that he has made "a substantial showing of denial of a constitutional right." ***Miller-El v. Cockrell***, 537 U.S. 322, 336 (2003). Just two years ago, this Court clarified that a substantial showing "is not coextensive with a merits analysis"; rather, to obtain a COA, all that an appealing habeas litigant needs to demonstrate is "that his petition involves issues which are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are adequate to deserve encouragement to proceed further." ***Buck v. Davis***, 137 S.Ct. 759, 773 (2017).

Multiple courts, including the Seventh, Sixth and Second Circuit Courts of Appeals, have found that proof of debatability of an issue by jurists of reason, and hence justification for issuance of a habeas corpus case certificate of appealability, is clearly shown when the underlying determination of that issue on direct appeal generated a dissent. ***Jones v. Basinger***, 635 F.3d 1030, 1039-1040 (7th Cir. 2011); ***Shields v. United States***, 698 Fed.Appx. 807, 813 (6th Cir. 2017); ***Tankleff v. Senkowski***, 135 F.3d 235, 242 (2nd Cir. 1998); ***Waddell v. Keller***. 2011 WL 3897725, *16 (W.D.N.C. 2011); ***Story v. Kindt***, 970 F.Supp. 435, 465 (W.D.Pa. 1997).

2. The record shows that the double jeopardy issue raised by Mr. Barton is "debatable among jurists of reason", and yet the Eighth Circuit denied a certificate of appealability without explanation

Mr. Barton's first trial ended in a defense-requested mistrial directed just after the swearing of the jury; the mistrial was necessitated by the failure of the prosecution to endorse any witnesses for trial; ever since, Mr. Barton has ceaselessly argued that this failure by a very-experienced prosecutor was a calculated one, designed to goad the defense mistrial request with the intent to gain advantage, and therefore Barton could not be tried again without violating his right to be free from double jeopardy, per the holding by this Court in ***Oregon v. Kennedy***, 456 U.S. 667, 676 (1982). ***State v. Barton***, 240 S.W.3d 693, 718-718 (Mo.banc 2007). Four Judges of the Missouri Supreme Court rejected the claim. ***State v. Barton***, 711. The District Court has also denied the claim as brought in Mr. Barton's 2254 petition, and has denied a certificate of appealability on the subject, with the District Court employing precisely the same reasoning advanced previously by the four Judges of the Missouri Supreme Court (Appendix A, p. 34-41). ***State v. Barton***, 711.

However, the District Court never accounted that three Judges of the Missouri Supreme Court would have granted Mr. Barton relief upon this ***Oregon v. Kennedy*** based double jeopardy claim. ***State v. Barton***, 718-719. Those three Judges of the Missouri Supreme Court observed that, in the record of the case to

that point in time, there were reasons aplenty to strongly suspect prejudicial, malevolent intent on the part of the prosecution to goad the mistrial request. ***State v. Barton***, 716-717, 718-719. Moreover, those three Missouri Supreme Court Judges observed that Mr. Barton has never been granted an evidentiary hearing upon the subject of prosecutorial intent, and concluded that it is fundamentally unfair to rule the matter against Mr. Barton without at least granting him such a hearing. ***State v. Barton***, 719.

In addition, though the District Court did not grant an evidentiary hearing, Mr. Barton was still able to augment the state court record by noting multiple instances of prosecutorial misconduct engaged in other cases by the suspect prosecutor (Doc. 36, p. 50; Doc. 56, p. 47). The District Court never accounted this additional record made by Mr. Barton in deciding the double jeopardy ground, or in denying the grant of a certificate of appealability.

The District Court did claim, quoting language from the Missouri Supreme Court majority opinion, that lack of ill-motive by the state prosecutor could be inferred because surely the state prosecutor would not have "designed a discovery violation in advance of a trial that, for his relevant purposes, seemed to be going well" (Appendix A, p. 41). However, such an inference "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254(d)(2).

Such an inference might have been appropriate if the prosecutor's violation happened years later, in advance of the third, or fourth or fifth of Mr. Barton's trials, when prosecutors had at their disposal informers and blood spatter experts, and through those means obtained convictions and death sentences. ***State v. Barton***, 936 S.W.2d 781, 782 (Mo.banc 1996); ***State v. Barton***, 998 S.W.2d 19, 23-24 (Mo.banc 1999); ***State v. Barton***, 240 S.W.3d 693, 699 (Mo.banc 2007). However, the record of the case clearly shows that things were very different when the prosecutor's offense took place, on the eve of the first trial, when no blood spatter experts had been developed, and the Judge for that first trial was prepared to force the prosecutor to proceed without the lone jailhouse informer who had been developed at the last minute (Doc. 36, Appendix F[4], p. 99-100, 102, 105). Even at the second trial, when the prosecutor was allowed to use that one informer, the prosecutor still could not muster a unanimous verdict on guilt. ***State v. Barton***, 240 S.W.3d 693, 712 (Mo.banc 2007). Without informers and experts, the case against Mr. Barton has rightly been termed "meager". ***State v. Barton***, 240 S.W.3d 693, 712 (Mo.banc 2007). Thus, during the lead up to the first trial, when the prosecutor's violation occurred, the record plainly demonstrates, contrary to the inference drawn by the District Court, that the case was certainly not going well.

[4] Doc. 36 is the accounting of suggestions in support of Mr. Barton's Amended Petition filed with the District Court. Appendix F to those suggestions is the transcript of Mr. Barton's first trial.

In fact, at that point in time, and under those circumstances, it would have been proper to infer just the opposite, as courts in other cases have in similar circumstances, that the prosecutor had the motive to goad a mistrial so as to delay until his case got better. ***United States v. Curtis***, 683 F.2d 769, 777 (3rd Cir. 1982).

Per the dictates of Rule 11(a) of the Rules governing § 2254 cases, the District Court took up, in the first instance, the question of whether to issue or deny certificates of appealability. Since the District Court denied the request, Mr. Barton made motion to the Eighth Circuit, per the dictates of F.R.A.P. 22(b)(1), urging that, in light of the three Judge Missouri Supreme Court dissent, there is obvious, vigorous debate among reasonable jurists upon this subject, and so a certificate of appealability should be granted (Request for Certificate of Appealability, p. 9). In support of that contention, Mr. Barton also cited to the holdings by the Seventh and Second Circuits that, when a Constitutional question has engendered a split decision in the state court of first resort, there is proof-positive that the issue is "debatable among jurists of reason", and therefore a certificate of appealability about a District Court decision on the same subject should be granted as a matter of "routine". ***Jones v. Basinger***, 635 F.3d 1030, 1039-1040 (7th Cir. 2011); ***Tankleff v. Senkowski***, 135 F.3d 235, 242 (2nd Cir. 1998). Despite the arguments made by Mr. Barton, a Panel of the Eighth Circuit denied the request without explanation (Appendix B). Then, also without

explanation, Mr. Barton's motion for rehearing *en banc* was denied; however, that decision was dissented against by Eighth Circuit Judge Jane Kelly (Appendix C).

3. The Eighth Circuit has split from the holdings and compelling logic of the Seventh, Sixth and Second Circuit

The Seventh, Sixth and Second Circuits have all recognized the obvious, that the quintessential example of an issue in a case which is debatable among reasonable jurists is an issue which actually has given rise to vigorous debate to the point of issuance of formal opinions on both sides. ***Jones v. Basinger***, supra; ***Tankleff v. Senkowski***, supra; ***Shields v. United States***, supra. That is why the Seventh Circuit observed that granting of a certificate of appealability upon an issue which gave rise to such debate, and hence is so obviously debatable, should be "routine". ***Jones v. Basinger***, supra. In Mr. Barton's case, the point is accentuated by the fact that the debate was so close, a mere 4-3 margin. Thus, by refusing to grant Mr. Barton's request for certificate of appealability, the Eighth Circuit has created a Circuit split, and is, by definition of the terms, on the wrong side of that split.

4. By passing over a dissent within their ranks, the Eighth Circuit has failed to follow the dictates of 28 U.S.C.A. § 2253 and has deepened another Circuit split, due to the fact that the vote of a single Circuit Judge should justify a COA grant

The Eighth Circuit has also chosen to give no credit to one more confirmation about the debatability of Mr. Barton's double jeopardy issue among jurists of reason; Eighth Circuit Judge Jane Kelly dissented from the Eighth

Circuit's decision (Appendix C). At the very least, Judge Kelly's dissent should have been seen to further demonstrate debatability and thereby countersink the argument in favor of a grant of a certificate of appealability. But Judge Kelly's vote has even more moment.

28 U.S.C.A. § 2253(c)(1) commands that a certificate of appealability is to be granted upon the say-so of "a circuit justice", that is just one circuit justice. Judge Kelly is such a Circuit Justice. Nevertheless, it the practice of the Eighth Circuit to not grant a certificate of appealability unless a majority of the Judges considering the matter so rule. ***Vang v. Hammer***, 673 Fed.Appx. 596, 598 (8th Cir. 2016). The Fifth Circuit does things similarly. ***Jordan v. Epps***, 756 F.3d 395, 413 (5th Cir. 2014). On the other hand, by Rule, the Third, Fourth and Ninth Circuits follow the letter of 28 U.S.C.A. § 2253(c)(1), and mandate the issuance of a COA upon the vote of a single Circuit Judge. *Rule 22.3, Third Circuit Rules of Appellate Procedure*; *Rule 22(a)(3), Fourth Circuit Rules of Appellate Procedure*, *Ninth Circuit General Order 6.3(g)(i)*. Therefore, the rules of the Third, Fourth and Ninth Circuits give force and effect to the 28 U.S.C.A. § 2253(c)(1) command that a certificate of appealability is to issue upon the directive of "a circuit justice". On the other hand, the Eighth Circuit's contrary practice, as put into effect in Mr. Barton's case by the devaluing of Judge Kelly's dissent, violates the terms of 28 U.S.C.A. § 2253(c)(1), and constitutes a split from Rules and practice in the Third,

Fourth and Ninth Circuits. For these additional reasons, this Court should intervene, and grant certiorari to address the matters.

5. Conclusion

Because Mr. Barton has so clearly met his burden of showing that his double jeopardy issue is debatable among jurists of reason, and because the Eighth Circuit decision to the contrary violates the clear dictates of the law, and in one respect runs contrary to the holdings by the Seventh, Sixth, and Second Circuits, and in another respect runs contrary to the rules and practices of the Third, Fourth and Ninth Circuits, this Court should grant its writ of certiorari so that these Circuit splits can be resolved and so that Mr. Barton can ultimately vindicate his rights to appeal under the law.

ARGUMENT-QUESTION TWO

As to the issue concerning dismissal of Mr. Barton's amended Petition

whether the Eighth Circuit has imposed upon Mr. Barton an improper and unduly burdensome standard for the granting of a certificate of appealability in his Federal habeas corpus case

- **when debatability among reasonable jurists upon the issue is established by the fact that the District Court conceded that its decision ran counter to Eighth Circuit precedent on the matter,**
- **when one Eighth Circuit Judge registered a dissent against the Eighth Circuit determination, and**
- **when the dictates of 28 U.S.C.A. § 2253(c)(1) and the practice by the Third, Fourth, and Ninth Circuits is to grant a certificate of appealability anytime that one Circuit Judge is in favor.**

1. When a certificate of appealability is sought as to a habeas corpus issue which was rejected on procedural grounds, and not considered on the merits, the petitioner must show debatability that the underlying constitutional claims are valid and debatability regarding the procedural determination

In ***Slack v. McDaniel***, 529 U.S. 473, 484 (2000), this Court explained that, when a District Court denies a petitioner relief on procedural grounds, without addressing the merits of the petitioner's claim, petitioner is to receive a certificate of appealability if

> …jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

2. Grounds Thirteen and Fourteen, brought in Barton's amended petition, are unquestionably "valid", brought in the same fashion as other grounds fully considered and decided by the District Court, but were rejected as supposedly untimely

Ground Thirteen of Mr. Barton's amended petition concerns the state prosecutor's detailing in his fifth trial opening statement the alleged accounts by jailhouse informers about grisly admissions purportedly made by Mr. Barton "that he killed an old lady by cutting her throat, stabbing her and cutting an X on her", that his (Barton's) stabbing of the victim caused blood to splatter on his (Barton's) face, that he (Barton) enjoyed the taste of licking the blood off his (Barton's) face, and that he (Barton) would kill one of the informers because the informer intended

to testify about his (Barton's) admissions (Doc. 36, Appendix K[5], p. 441-442). Ground Thirteen challenged that Mr. Barton's constitutional rights, under the Sixth, Eighth and Fourteenth Amendments, to due process of law, to counsel, to presentation of evidence and to freedom from cruel and unusual punishment, were abridged through the ineffectiveness of Barton's fifth-trial-counsel in failing to seek mistrial when these ghastly opening statement accusations by the prosecution against Barton went unproven at trial (Doc. 33, p. 52-53). Because this issue was defectively raised in state court by mentally ill state post-conviction counsel, the matter had to be brought to the attention of the District Court via the exception to the exhaustion requirement allowed under ***Martinez v. Ryan***, 132 S.Ct. 1309 (2012) (Doc. 33, p. 54-57).

Ground Fourteen deals with misinstruction of Barton's jury upon the issue of whether the state had proven the aggravating circumstance of prior serious assaultive convictions; the erroneous pattern instruction which was used called for jurors to only decide the basic fact about the occurrences of the convictions, whereas the proper instruction should have also required jury determinations about whether the particular convictions were of a serious assaultive character (Doc. 33, p. 57-58). Mr. Barton has challenged that his constitutional rights, under the Sixth,

[5] Doc. 36 is the accounting of suggestions in support of Mr. Barton's Amended Petition, and Appendix K to those suggestions is the transcript of Mr. Barton's fifth jury trial.

Eighth and Fourteenth Amendments, to due process of law, to counsel, and to freedom from cruel and unusual punishment, were abridged through the ineffectiveness of Barton's fifth-trial-counsel in failing to object to penalty phase misinstruction of the jury concerning statutory aggravating circumstances (Doc. 33, p. 57). And, since this issue was raised not at all by mentally ill state post-conviction counsel, this issue was also brought to the District Court by employing the ***Martinez v. Ryan*** exception to the exhaustion requirement (Doc. 33, p. 58-60).

Each of these two grounds raised an issue of constitutional dimension, and was brought in a form similar to that employed for ***Martinez***-type constitutional claims set forth under Grounds Five, Seven, Eleven and Twelve-A of Mr. Barton's original Petition, with the differences in certain specifics of various grounds owing to the different trial errors by trial counsel being addressed (Doc. 33, p. 15-19, 25-30, 43-52). The District Court considered as valid, and therefore fully addressed, Grounds Five, Seven, Eleven and Twelve-A (Appendix A, p. 18-54). Therefore, there can be no question that Grounds Thirteen and Fourteen, brought in the same form, meet the minimal standard of being "valid" in the estimation of reasonable jurists, and therefore should have been considered by the District Court but for that Court's procedural determination that the issues were brought in an untimely fashion. ***Martinez v. Ryan***, supra.

3. The District Court's legal reasoning for dismissal of Grounds Thirteen and Fourteen runs contrary to the holding of the Eighth Circuit in ***Streu v. Dormire*** and therefore is, at the very least, debatable among jurists of reason

The District Court dismissed Grounds Thirteen and Fourteen on the procedural ground that the matters were supposedly advanced after the running of the one year limitations period for the bringing of actions under 28 U.S.C. § 2254 (Appendix A, p. 13-14). 28 U.S.C. § 2244(d)(2). In so doing, the District Court correctly found that, prior to the running of the Federal habeas limitations period, Mr. Barton brought a motion seeking first a finding that Barton had been abandoned in state post-conviction proceedings by his mentally ill appointed counsel, and seeking second an opportunity to supplement his previously-filed petition under V.A.M.R. 29.15 setting forth issues missed by mentally ill counsel (Appendix A, p. 9-10). The District Court further acknowledged that, so long as Mr. Barton's state abandonment of counsel petition was "properly filed", that filing would have tolled the running of the limitations period, per the dictates of 28 U.S.C. § 2244(d)(2), and so Mr. Barton's amended petition, filed on the same day that the state matter was finally decided, and newly containing Grounds Thirteen and Fourteen, would have to be considered timely (Appendix A, p. 10).

However, the District Court, in a first-of-its-kind ruling, decided that, even though Mr. Barton's state court motion went through a nearly one year process of being filed, heard, considered, appealed and finally decided, because the request

for finding of abandonment was ultimately unsuccessful, and thus Mr. Barton was not actually permitted to supplement his original Rule 29.15 petition, it should be deemed that the motion for abandonment of counsel was not a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim", and consequently did not toll the running of the Federal habeas limitations period (Appendix A, p. 11-14). The District Court's reasoning critically depended upon a novel broadening of this Court's decision in ***Pace v. DuGuglielmo***, 544 U.S. 408 (2005).

Pace involved the late-filing of a state post-conviction petition, offered by Mr. Pace without prefatory explanation or justification for the lateness; the state court dismissed the bare petition as untimely; this Court ruled that the time for processing Pace's late-filed state court petition did not toll the Federal habeas corpus limitations period. ***Pace v. DuGuglielmo***, 413, 415. The District Court ballooned this simple holding, deciding that, even though Mr. Barton presented to the Missouri Courts the claim of abandonment by mentally ill post-conviction counsel as the reason for the late filing of certain constitutional claims, that process could toll the limitations period only if the process ultimately resulted in the successful late filing of a state petition as to those constitutional claims (Doc. 59, p. 11-12). ***Pace v. DiGuglielmo*** never addressed this subject, and diligent search has

produced no other case in which any Court has interpreted ***Pace v. DuGuglielmo*** in this fashion.

This decision by the District Court conflicts with the holdings by the Eighth Circuit in ***Streu v. Dormire***, 57 F.3d 960 (8th Cir. 2009) and ***Bishop v. Dormire***, 526 F.3d 382, (8th Cir. 2008). In those cases, panels of the Eighth Circuit found that motions which seek expansion or reconsideration of previously filed state post-conviction petitions are themselves the sorts of actions which trigger the tolling under 28 U.S.C. § 2244(d)(2), regardless of how the motion was ultimately ruled by the state court. ***Streu v. Dormire***, 963-965; ***Bishop v. Dormire***, 384. The District Court did acknowledge that the ***Streu*** and ***Bishop*** decisions are clearly contrary to the District Court's own, novel logic (Appendix A, p. 13-14). The District Court did not account that the 2009 ***Streu*** and the 2008 ***Bishop*** decisions both came years after, and therefore with full cognizance of, and no pause taken about, the 2005 ***Pace v. DuGuglielmo*** decision. The District Court also did not account that it is the role of the District Court to follow Circuit precedent, and a District Court errs when it usurps the role of the Circuit Court by reconsidering, and deciding contrary to, Circuit precedent. ***United States v. Montgomery***, 635 F.3d 1075, 1098-1099 (8th Cir. 2011).

It can certainly be argued by opponents to Mr. Barton that, by denying a certificate of appealability, without explanation, Eighth Circuit has impliedly

chosen to simply overlook the District Court's gaffe in failing to follow Circuit precedent. However, because the Eighth Circuit has offered no explanation for its bare order, that Court has left intact the conflict between the decision by the District Court and the holdings in ***Streu v. Dormire*** and ***Bishop v. Dormire***. Those disparate points of view, one in favor of and one against the arguments about the timeliness of Barton's Amended Petition, plainly show that the matter remains debatable, and in fact debated, among jurists of reason, and therefore worthy of issuance of a certificate of appealability. ***Buck v. Davis***, 773.

On top of that, the Eighth Circuit denied the certificate of appealability over the dissent of Circuit Justice Jane Kelly.

4. By passing over a dissent within their ranks, the Eighth Circuit has failed to follow the dictates of 28 U.S.C.A. § 2253 and has caused a Circuit split, due to the fact that the vote of a single Circuit Judge should justify a COA grant

The Eighth Circuit has also chosen to give no effect to the dissent of Eighth Circuit Judge Jane Kelly (Appendix C). 28 U.S.C.A. § 2253(c)(1) commands that a certificate of appealability is to be granted upon the say-so of "a circuit justice", that is just one circuit justice. Judge Kelly is such a Circuit Justice. Nevertheless, it the practice of the Eighth Circuit to not grant a certificate of appealability unless a majority of the Judges considering the matter so rule. ***Vang v. Hammer***, 673 Fed.Appx. 596, 598 (8th Cir. 2016). The Fifth Circuit does things similarly. ***Jordan v. Epps***, 756 F.3d 395, 413 (5th Cir. 2014). On the other hand, by Rule, the

Third, Fourth and Ninth Circuits follow the dictates of 28 U.S.C.A. § 2253(c)(1), and mandate the issuance of a COA upon the vote of a single Circuit Judge. *Rule 22.3, Third Circuit Rules of Appellate Procedure*; *Rule 22(a)(3), Fourth Circuit Rules of Appellate Procedure*, *Ninth Circuit General Order 6.3(g)(i)*. Therefore, the rules of the Third, Fourth and Ninth Circuits give force and effect to the 28 U.S.C.A. § 2253(c)(1) command that a certificate of appealability is to issue upon the directive of "a circuit justice". On the other hand, the Eighth Circuit's contrary practice, as put into effect in Mr. Barton's case by the devaluing of Judge Kelly's dissent, violates the terms of 28 U.S.C.A. § 2253(c)(1), and constitutes a split from Rules and practice in the Third, Fourth and Ninth Circuits. For these reasons, this Court should intervene, and grant certiorari to address the matters.

5. Conclusion

The Eighth Circuit should have granted a certificate of appealability regarding the District Court's procedural dismissal of grounds 13 and 14 of Mr. Barton's amended petition, not only because the matter was clearly debatable among jurists of reason, but also because one Eighth Circuit Justice dissented from the Eighth Circuit ruling on the subject, and in the latter respect runs contrary to the rules and practices of the Third, Fourth and Ninth Circuits. Thus, this Court should grant its writ of certiorari to resolve this Circuit split and to allow Mr. Barton to lawfully advance his appeal on this issue.

CONCLUSION

WHEREFORE, based upon each and both of the aforementioned grounds, Mr. Barton prays that this Honorable Court enter its Order in this case granting to Mr. Barton its writ of certiorari to the Eighth Circuit Court of Appeals, and granting any further relief which this Court deems just and proper under the circumstances.

Respectfully submitted

/s/Frederick A. Duchardt, Jr.
FREDERICK A. DUCHARDT, JR.
COUNSEL OF RECORD
Mo.Bar Enrollment Number 28868
P.O. Box 216
Trimble MO 64492
Phone: 816-213-0782
Fax: 816-635-5155
e-mail: fduchardt@yahoo.com
ATTORNEY FOR MR. BARTON

/s/Michael W. Walker
MICHAEL W. WALKER
MO Bar Enrollment Number 29425
5545 North Oak Trafficway, Suite 8
Kansas City MO 64118
Ph. 816-455-6511
Fax 816-455=6595
e-mail: mwwalk@sbcglobal.net
ATTORNEY FOR MR. BARTON

CERTIFICATE OF SERVICE AND COMPLIANCE

It is hereby certified

- that required privacy act redactions have been made to the foregoing,
- that this document complies with the typeface requirements of Supreme Court Rule 34.1(g) because the document was prepared in Microsoft Word using Times New Roman 14 font style and typesize,
- that, this document contains less than 40 pages, and therefore complies with the dictates of Supreme Court Rule 33.2(b),
- that, this item was converted to pdf format for electronic filing and was properly scanned for viruses, with none being found, and
- that, copies of the foregoing were e-mailed to the following on this 12th day of August, 2019

Caroline Coulter
Assistant Attorney General
P.O. Box 899
Jefferson City, Mo. 65102
caroline.coulter@ago.mo.gov

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