No. 19-5570

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

WALTER BARTON,
Petitioner,

v.

CINDY GRIFFITH, et al.,
Respondents.

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

Brief in Opposition

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QUESTIONS PRESENTED

CAPITAL CASE

1) Did the Eighth Circuit err in denying a certificate of appealability on a double jeopardy claim adjudicated on the merits in state court under 28 U.S.C. § 2254(d), when the state court reasonably applied this Court's double jeopardy precedent, and the state court record supports the state court's factual finding that the prosecutor's failures that prompted the mistrial were inadvertent and not done to intentionally "goad" the defendant to seek a mistrial?

2) Did the Eighth Circuit err in denying a certificate of appealability on the district court's determination that claims raised after the one-year statute of limitations under 28 U.S.C. § 2244(d) expired were untimely and not entitled to tolling, given the state court's finding that a prisoner failed to establish that he satisfied an exception to Missouri's procedural filing requirements to allow him to file a late postconviction motion and was thus not a "properly filed" application?

PARTIES TO THE PROCEEDING

Walter Barton, the petitioner, is incarcerated at the Potosi Correctional Center under a death sentence.

Respondents Cindy Griffith and Troy Steele, former Wardens of the Potosi Correctional Center, were both named as Respondents below. Neither Griffith nor Steele is now Warden. William Stange is Warden and should be substituted as the Respondent. 28 U.S.C. § 2254 Rule 2(a); Fed. R. App. P. 43(c)(2)

Respondent Chris Koster, former Missouri Attorney General, was named as a Respondent below. Eric S. Schmitt, the current Missouri Attorney General, should be substituted as Respondent. Fed. R. App. P. 43(c)(2)

RELATED CASES

This petition for a writ of certiorari asks this court to review the denial of a certificate of appealability by the United States Court of Appeals for the Eighth Circuit and United States District Court for the Western District of Missouri to a capital habeas petitioner. The district court denied Barton's petition for a writ of habeas corpus under 28 U.S.C. § 2254, after a Missouri court sentenced Barton to death for the brutal murder of 81-year-old Gladys Kuehler.

The following is a list of challenges in state and federal trial and appellate courts to Barton's criminal conviction or sentence.

- **Criminal Trial and Sentencing.** Circuit Court of Christian County, CR 291-679FX, *Missouri v. Barton* (sentenced to death on June 22, 1994).
- **Motion to Vacate or Set Aside Judgment under Missouri Rule 29.15**. Christian County Circuit Court, No. 194-890CC, *Barton v. Missouri* (motion denied October 13, 1995).
- **Consolidated Appeal.** Missouri Supreme Court, No. SC77147, *Missouri v. Barton* (reversed and remanded for new trial November 19, 1996).
- **Criminal Trial and Sentencing.** Circuit Court of Benton County, No. CV197-4F, *Missouri v. Barton* (sentenced to death on June 10, 1998).
- **Direct Appeal.** Missouri Supreme Court, No. SC80931, *Missouri v. Barton* (affirming conviction and sentence August 3, 1999).
- **Petition for a Writ of Certiorari in this Court.** United States Supreme Court, No. 99-6985, *Barton v. Missouri* (denied January 18, 2000).

- **Motion to Vacate or Set Aside Judgment under Missouri Rule 29.15.** Circuit Court of Benton County, No. CV199-453CC, *Barton v. Missouri* (motion denied December 20, 2000).
- **Post-Conviction Appeal.** Missouri Supreme Court, No. SC83615, *Barton v. Missouri* (reversing and remanding for entry of new findings and conclusions in 29.15 proceeding June 11, 2002).
- **Motion to Vacate or Set Aside Judgment under Missouri Rule 29.15.** Circuit Court of Benton County, No. CV199-453CC, *Barton v. Missouri* (motion granted, vacating prior conviction and sentence, January 30, 2004).
- **Criminal Trial and Sentencing.** Circuit Court of Cass County, No. 05CA-CR00877, *Missouri v. Barton* (sentenced to death July 6, 2006).
- **Direct Appeal.** Missouri Supreme Court, No. SC87859, *Missouri v. Barton* (conviction and sentence affirmed December 18, 2007).
- **Petition for a Writ of Certiorari in this Court.** United States Supreme Court, No. 07-10920, *Barton v. Missouri* (denied October 6, 2008).
- **Motion to Vacate or Set Aside Judgment under Missouri Rule 29.15.** Circuit Court of Cass County, Nos. 08CA-CV01371 and 08CA-CV01371-01, *Barton v. Missouri* (motion denied February 14, 2013).
- **Post-Conviction Appeal.** Missouri Supreme Court, No. SC93371, *Barton v. Missouri* (affirming denial of post-conviction relief May 13, 2014).

- **Request for Abandonment of Post-Conviction and Permission to Supplement Amended Rule 29.15 Motion.** Circuit Court of Cass County, No. 08CA-CV01371-01, *Barton v. Missouri* (motion overruled June 30, 2015).
- **Request for Abandonment Appeal.** Missouri Supreme Court, No. SC95139, *Barton v. Missouri* (affirmed May 3, 2016).
- **Petition for a Writ of Habeas Corpus in Federal Trial Court.** United States District Court for the Western District of Missouri, No. 14-08001-CV-W-GAF, *Barton v. Steele* (petition and certificate of appealability denied April 9, 2018; motion to alter or amend judgment denied June 6, 2018).
- **Denial of Petition for a Certificate of Appealability in Federal Appellate Court.** United States Court of Appeals for the Eighth Circuit, No. 18-2241, *Barton v. Griffith* (petition denied by panel December 21, 2018; petition for rehearing en banc denied March 20, 2019).

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STATUTES AND RULES INVOLVED

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable

written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Missouri Supreme Court Rule 29.15 (2008)

(a) Nature of Remedy--Rules of Civil Procedure Apply. A person convicted of a felony after trial claiming that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure to be followed for motions filed pursuant to this Rule 29.15 is governed by the rules of civil procedure insofar as applicable.

(b) Form of Motion--Cost Deposit Not Required--Time to File--Failure to File, Effect of. A person seeking relief pursuant to this Rule 29.15 shall file a motion to vacate, set aside or correct the judgment or sentence substantially in the form of Criminal Procedure Form No. 40.

No cost deposit shall be required.

If an appeal of the judgement or sentence sought to be vacated, set aside or corrected was taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming such judgment or sentence.

If no appeal of such judgment or sentence was taken, the motion shall be filed within 180 days of the date the person is delivered to the department of corrections.

If:

(1) an appeal of such judgment or sentence is taken;

(2) the appellate court remands the case resulting in entry of a new judgment or sentence; and

(3) an appeal of the new judgment or sentence is taken, the motion shall be filed within 90 days after the date the mandate of the appellate court is issued affirming the new judgment or sentence.

If no appeal of such new judgment or sentence is taken, the motion shall be filed within 180 days of the later of:

(1) the date the person is delivered to the custody of the department of corrections; or

(2) the date the new judgment or sentence was final for purposes of appeal.

Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15 and a complete waiver of any claim that could be raised in a motion filed pursuant to this Rule 29.15.

(c) Clerk's Duties. Movant shall file the motion and two copies thereof with the clerk of the trial court. The clerk shall immediately deliver a copy of the motion to the prosecutor. Upon receipt of the motion, the clerk shall notify the sentencing judge and shall notify the court reporter to prepare and file the complete transcript of the trial if the transcript has not yet been prepared or filed. If the motion is filed by an indigent pro se movant, the clerk shall forthwith send a copy of the motion to the counsel who is appointed to represent the movant.

(d) Contents of Motion. The motion to vacate shall include every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence. The movant shall declare in the motion that the movant has listed all claims for relief known to the movant and acknowledging the movant's understanding that the movant waives any claim for relief known to the movant that is not listed in the motion.

(e) Pro Se Motion--Appointment of Counsel--Amended Motion, Required When. When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and

sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims. If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the pro se motion and (2) all claims known to the movant are alleged in the pro se motion. The statement shall be presented to the movant prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

(f) Withdrawal of Counsel. For good cause shown, counsel may be permitted to withdraw upon the filing of an entry of appearance by successor counsel. If appointed counsel is permitted to withdraw, the court shall cause new counsel to be appointed. If an indigent movant is seeking to set aside a death sentence, successor counsel shall have at least the same qualifications as required by Rule 29.16 as the withdrawing counsel.

(g) Amended Motion--Form, Time for Filing--Response by Prosecutor. Any amended motion shall be signed by movant or counsel. The amended motion shall not incorporate by reference material contained in any previously filed motion. If no appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within 60 days of the earlier of the date: (1) the date both a complete transcript has been filed in the trial court and counsel is appointed or (2) the date both a complete transcript has been filed in the trial court and an entry of appearance if filed by any counsel that is not appointed but enters an appearance

on behalf of movant. If an appeal of the judgment sought to be vacated, set aside, or corrected is taken, the amended motion shall be filed within sixty days of the earlier of: (1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days. Any response to the motion by the prosecutor shall be filed within thirty days after the date an amended motion is required to be filed.

(h) Hearing Not Required, When. If the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held. In such case, the court shall issue findings of fact and conclusions of law as provided in Rule 29.15(j).

(i) Presence of Movant--Record of Hearing--Continuance of Hearing--Burden of Proof. At any hearing ordered by the court the movant need not be present. The court may order that testimony of the movant shall be received by deposition. The hearing shall be on the record and shall be confined to the claims contained in the last timely filed motion. The court may continue the hearing upon a showing of good cause. The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence.

(j) Findings and Conclusions--Judgment. The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. If the

court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of the rights given movant by the constitution of Missouri or the constitution of the United States as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the movant or resentence the movant or order a new trial or correct the judgment and sentence as appropriate.

(k) Appeal--Standard of Appellate Review. An order sustaining or overruling a motion filed under the provisions of this Rule 29.15 shall be deemed a final judgment for purposes of appeal by the movant or the state. If the court finds that a movant allowed an appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost a record of all proceedings for appellate review. When the appeal is taken, the circuit court shall order the official court reporter to promptly prepare the transcript necessary for appellate review without requiring a letter from the movant's counsel ordering the same. If the sentencing court finds against the movant on the issue of indigence and the movant so requests, the court shall certify and transmit to the appellate court a transcript and legal file of the evidence solely on the issue of indigence so as to permit review of that issue by the appellate court. Appellate review of the trial court's action on the motion filed under this Rule 29.15 shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous.

(l) Successive Motions. The circuit court shall not entertain successive motions.

(m) Schedule. This Rule 29.15 shall apply to all proceedings wherein sentence is pronounced on or after January 1, 1996. If sentence was pronounced prior to January 1, 1996, postconviction relief shall continue to be governed by the provisions of Rule 29.15 in effect on the date the motion was filed or December 31, 1995, whichever is earlier.

STATEMENT OF THE CASE

Walter Barton was sentenced to death for brutally murdering 81-year-old Gladys Kuehler. *State v. Barton,* 240 S.W.3d 693 (Mo. 2007). He stabbed Kuehler over fifty times, including twice through her open right eye, eleven times in the left side of the chest, three times in the right side of the chest, twice in the neck, and twenty-three times in the back. He cut her throat from ear to ear and made two X-shaped slash wounds to the abdomen through which her intestines protruded. She was also sexually assaulted. *Id.* at 699.

This petition concerns whether the Eighth Circuit should have issued a certificate of appealability to Barton on his Section 2254 petition challenging his murder conviction and death sentence.

I. Factual Background

Gladys Kuehler was the manager of a mobile home park in Ozark, Missouri, and lived there. *Id.* at 697. Barton frequented the park, but had not been around for about a week before the murder.

Around noon on the day of the murder, Barton came to the trailer of Carol Horton, another resident of the park. *Id.* He was in a "happy-go-lucky" mood, talking and dancing to music on the radio. *Id.* Around 2:00 p.m., he left Horton's trailer to see if Kuehler would lend him $20.00. *Id.* He returned about ten to fifteen minutes later, still in a good mood. *Id.* at 696–97.

Between 2:00 and 3:00 p.m. several people visited Kuehler. Former residents Teddy Bartlett and Sharon Strahan visited Kuehler at 2:00 p.m. and left around 2:45.

Id. Dorothy Pickering, co-owner of trailer park with Bill Pickering, stopped by to pick up rent payments. Debbie Selvidge, Kuehler's granddaughter, also called around 2:30. *Id.* Kuehler told the visitors she was not feeling well and would take a nap. *Id.*

Around 3:00 p.m., Barton told Horton he was going back to Kuehler's trailer to pick up a check that she would write for him. *Id.* At around 3:15 p.m., Bill Pickering called Kuehler to talk with her. *Id.* A man answered the telephone, and Pickering asked to speak with Kuehler. *Id.* The man hesitated and then said, "She's in the bathroom." *Id.*

Around 4:00 p.m., Barton returned to Horton's trailer and asked to use her restroom. *Id.* She noticed Barton had been in there a long time, probably ten minutes, but never heard the toilet flush. *Id.* Horton went to check on him and saw Barton washing his hands at the sink. *Id.* He told Horton he had been working on a car. *Id.* Horton noticed Barton's mood changed, he was distant and seemed in a hurry. *Id.*

After he washed his hands, Barton asked Horton to take him to his car, but she said she could not because she was going to Kuehler's trailer. *Id.* Barton urged her not to go, stating in a "very strong," definite voice, "No, don't ... Gladys is lying down taking a nap." *Id.* Horton went anyway, and knocked on Kuehler's door around 4:15 p.m. *Id.* There was no answer. *Id.*

Selvidge called Kuehler around 4:00 p.m. so the two could watch their daily television program together on the phone. *Id.* When she did not answer, Selvidge went to Kuehler's trailer to check on her. *Id.* She knocked for some time but she, too, received no answer. *Id.* Selvidge then left the park to get help from her mother. *Id.*

Horton went back to Kuehler's trailer to check on her around 4:30. *Id.* She again received no answer to her knocking. *Id.*

Selvidge returned to the park around 6:00, and went to Horton's trailer, asking about Kuehler. *Id.* The two went to Selvidge's mother's house to try to call Kuehler. *Id.* After they did not succeed, they went back to the park and asked Barton, who had been at a neighbor's trailer, to help them. *Id.* The three took turns knocking on the door and calling out Kuehler's name. *Id.* Barton went over to the end of the trailer where Kuehler's bedroom was located and knocked on the side of the trailer. *Id.* at 697–98. Again, there was no response. *Id.*

Horton and Selvidge then contacted the police. *Id.* at 698. The officer called for a locksmith when he could not open Kuehler's door, and left to take care of another call. *Id.*

Once the locksmith opened the door, Selvidge, Horton, and Barton entered Kuehler's home. *Id.* Once inside, Selvidge began to walk down the hallway leading to Kuehler's bedroom when Barton said, "Ms. Debbie, don't go down the hall." *Id.*

Selvidge noticed that Kuehler's clothes were in the bathroom and the toilet lid was up, which was unusual. *Id.* She then entered Kuehler's bedroom and found the victim lying, "practically nude," on the floor between her bed and closet. *Id.* Kuehler had been stabbed many times, with her throat cut ear-to-ear and with her intestines protruding out of her wounds. *Id.*

Upon finding the victim, Selvidge bent down to touch her, but Horton told her not to do so. *Id.* Selvidge then went back into the hall and pushed past Horton and

Barton, who was following Horton, and went back to the living room. *Id.* Barton then said, "Let me see," and looked over Horton's shoulder into the bedroom at Kuehler. *Id.*

Barton never got close to the body or the blood in the bedroom. *Id.* Barton did not get upset when he saw Kuehler, did not show any emotion, and went back to comfort Selvidge, telling her that he was "so sorry." *Id.*

The officer returned soon after, cleared the scene, called for help, and began questioning everyone present. Barton told the officer the only time he saw Kuehler that day was between 2:00 and 2:30 that afternoon, when he asked to borrow money and she told him she would write him a check later that day. *Id.*

Barton later spoke with a highway patrol investigator and admitted he was the man who answered the telephone call in Kuehler's trailer around 3:15. *Id.* The investigator took Barton into custody. *Id.*

At that point, the officer noticed what appeared to be blood on Barton's shirt. *Id.* Barton said he got blood on him when he slipped while pulling Selvidge away from Kuehler's body. *Id.* Selvidge reported she had not gone in the room past Kuehler's feet, that nobody had fallen in the room, and Barton and Horton remained behind her while she was in the room. *Id.* Police noticed neither Selvidge nor Horton had blood on them, and there was no wet blood to slip on where the witnesses were standing. *Id.* The police discovered blood on Kuehler's bathroom sink and table. *Id.* at 698–99.

The police also found Kuehler's checkbook, which was missing a check in its log entry. *Id.* at 699. Although Kuehler often entered every check she wrote in her

check register, there was no entry for check # 6027, and that check was missing. *Id.* That check was found three days later in a ditch at nearby highway. *Id.* It was dated the same day as the murder and made payable to Barton for $50.00. *Id.* Kuehler had written everything on the check. *Id.*

The police also seized several knives from the scene, as well as a knife later found in a drainage ditch. *Id.* Tests could neither identify—nor exclude—any of the knives as the murder weapon. *Id.*

Tests conducted on Barton's clothing revealed the blood on his shirt, blue jeans, and boots was human blood. *Id.* DNA tests showed the blood on Barton's shirt was Kuehler's. *Id.* A blood spatter expert testified that some of the blood found on Barton's shirt and two spots on Barton's jeans, fit with stains created by a "medium-to-high-energy impact," meaning the blood was ejected from the source by a blow or "transfer of energy" and not by simply rubbing up against already-present blood. *Id.*

At some point after the murder, Barton was incarcerated in the Lawrence County jail, where inmate Katherine Allen was serving meals and doing laundry. *Id.* Allen served Barton his meals. *Id.* Many times the two got into arguments, and Barton would threaten Allen, asking her if she knew what he was in jail for and saying that he would kill her "like he killed that old lady." *Id.*

II. Procedural Background

Since his arrest in 1991, the State of Missouri has initiated five trials against Barton. He has been repeatedly convicted of this murder and repeatedly sentenced to death. The case has generated six published opinions from the Missouri Supreme

Court. *State v. Barton,* 936 S.W.2d 781, 782 (Mo. 1996) (*Barton I*); *State v. Barton,* 998 S.W.2d 19 (Mo. 1999) (*Barton II*); *Barton v. State,* 76 S.W.3d 280 (Mo. 2002) (*Barton III*); *State v. Barton,* 240 S.W.3d 693 (Mo. 2007) (*Barton IV*); *Barton v. State,* 432 S.W.3d 741 (Mo. 2014) (*Barton V*); *Barton v. State,* 486 S.W.3d 332 (Mo. 2016) (*Barton VI*).

The first trial ended in a mistrial after the defense waited until after voir dire to point out that the State had not filed a witness endorsement. *Barton V,* 432 S.W.3d at 748; *see also* Pet. App. 35a–39a (quoting Doc. 45–10[1] at 94, 96–99, 103–07). The second trial ended in a mistrial because of a hung jury. *Barton V,* 432 S.W.3d at 748. The third trial ended in a conviction and death sentence, which the Missouri Supreme Court reversed on direct appeal because the trial court erred in sustaining an objection to the defense's closing argument. *Id.* The fourth trial ended in a conviction and death sentence, which was overturned during a state post-conviction relief proceeding because the State did not disclose all prior convictions of Katherine Allen or correct her testimony on this point, and did not disclose a letter conveying that Allen received a dismissal of another case because of her cooperation here. *Id.*; *Barton IV*, 240 S.W.3d at 701. The trial giving rise to this petition was the fourth completed trial (and fifth attempted trial)—and the third where Barton was convicted and sentenced to death. *Barton V,* 432 S.W.3d at 748.

In the final trial, which gave rise to the appellate opinions in *Barton IV* and *Barton V*, the jury found Barton guilty of first-degree murder. *Barton IV*, 240 S.W.3d

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[1] Respondents cite documents filed in the district court but not included in Barton's Appendix by their district court document number.

at 699–700. The jury found three statutory aggravating circumstances—the murder was outrageously wanton and vile, and Barton had two prior assaultive criminal convictions. *Id.* The jury recommended a death sentence, which the trial court imposed. *Id.*

On direct appeal of this final conviction and sentence, Barton raised two claims under the Double Jeopardy Clause, claiming that this clause barred his retrial under the principles of *Oregon v. Kennedy*, 456 U.S. 667 (1982). *Barton IV,* 240 S.W.3d at 701–02, 711. That case holds that where a defendant moves for and obtains a mistrial, double jeopardy bars a second trial only if the conduct giving rise to the mistrial was prosecutorial or judicial conduct intended to provoke defendant into moving for a mistrial. *Kennedy*, 456 U.S. at 673–78.

But on direct appeal, in a four-to-three decision, the Missouri Supreme Court affirmed his conviction and death sentence and rejected both double jeopardy claims, as well as other claims he raised that are not at issue in this petition. *Barton IV*, 240 S.W.3d at 701–02, 711.

In the first double jeopardy claim urged on direct appeal, he alleged his retrial was precluded under the Double Jeopardy Clause because of prosecutorial misconduct in the previous trial that led to a reversal of his conviction and a remand: the failure to disclose information about the jailhouse informant Allen and failure to correct Allen's testimony. *Id.* at 701–02. But the state court found Barton's claim about Allen's testimony was based on an expansion of this Court's precedent, and it held that he ultimately he failed to show prosecutorial intent. *Id.* at 702. Even if

Kennedy could be extended to cases which ended in a reversed conviction, rather than mistrial, the state court held that the extension still required prosecutorial intent to "subvert double jeopardy protection." *Id.* at 701–02. And the court found any extension inapplicable to Barton's case because there was no evidence the prosecutor "intended to subvert double jeopardy protection" through his errors. *Id.* at 702.

In the second double jeopardy claim on direct appeal, Barton argued that his retrial was precluded because of the mistrial in 1993 caused by the state's failure to endorse witnesses. *Id.* at 711. But the state court rejected this claim on two grounds. First, it held that his claim was barred by collateral estoppel because the precise issue was raised and rejected in Barton's first appeal. *Id.* at 711. The court had remanded the matter for a new trial based on a different trial court error in that appeal, which necessarily means that in its view the Double Jeopardy Clause did not preclude a new trial. *Id.* And, second, in an alternative holding, the state court found that the double jeopardy claim was meritless, concluding, "there is no evidence that the mistrial was caused by prosecutorial misconduct. Instead, all the evidence points to the fact that the failure to endorse witnesses was merely inadvertent." *Id.*

While critical of the majority opinion, the dissent did not reach the merits of either double jeopardy claim. *Id.* at 712, 718–19 (Wolff J., dissenting). Instead, the dissent believed the matter should be remanded for a hearing on prosecutorial intent. *Id.* at 719.

At the time, Barton petitioned for a writ of certiorari in this Court seeking review of the Missouri Supreme Court's rejection of his double jeopardy claims on his

direct appeal. Docs. 45–70, 45–71, 45–72, 45–73, 45–74. But this Court denied his petition on October 6, 2008, *Barton v. Missouri,* No. 07-10920, 555 U.S. 842 (2008), exhausting Barton's direct appeal.

Barton next moved for post-conviction relief under Missouri Supreme Court Rule 29.15 on April 11, 2008. Doc. 45–76 at 1. His counsel raised 48 claims of error within six broad grounds for relief. *Barton VI,* 486 S.W.3d at 334. The motion court denied relief in February 2013, and the Missouri Supreme Court unanimously affirmed the judgment and issued its mandate on June 24, 2014. *Barton V,* 432 S.W.3d at 764; Pet. App. 6a.

On June 9, 2015, sixteen days before the one-year statute of limitations under 28 U.S.C. § 2244(d) expired, Barton filed a counseled federal habeas corpus petition in the United States District Court for the Western District of Missouri raising twelve claims. Pet. App. 6a. Among other claims, he individually raised both double jeopardy claims the state court rejected on direct appeal. Doc. 18 at 10–12 (claim one pertained to the 1993 mistrial); Doc. 18 at 12–14 (claim two pertained to Allen's testimony).

On that same day, Barton's habeas attorneys filed a pleading in the state court, arguing that Barton's previous post-conviction counsel had abandoned him during the Rule 29.15 proceedings because one counsel suffered mental illness. He also asked to supplement his prior post-conviction motion with new claims. Pet. App. 6a–7a; Doc. 36–29.

The district court stayed its proceedings while Barton's state court motion was pending. Pet. App. 7a; Doc. 26. The motion court overruled Barton's motion, and the

Missouri Supreme Court affirmed on May 24, 2016. *Barton VI,* 486 S.W.3d 332. The Missouri Supreme Court found that Barton's assertions were really claims of ineffective assistance of post-conviction counsel, not abandonment, and were not reviewable by Missouri courts. *Id.* at 334, 338–39.

That same day, and 334 days after the limitations period expired under § 2244(d), Barton filed an amended habeas petition in federal court, asserting three new claims not included in his original petition. Doc. 33. He also withdrew his double jeopardy claim related to Allen's testimony and two other unrelated grounds for relief. Pet. App. 7a.

The district court denied habeas relief and denied a certificate of appealability. Pet. App. 1a–43a.

The district court found that Barton's new claims raised in the amended petition were untimely. Pet. App. 9a–14a. The district court found that Barton's June 9, 2015 state court motion did not constitute a "properly filed" application that tolled the limitations period under § 2244(d). Pet. App. 9a–14a. The district court relied on this Court's decision in *Pace v. DiGuglielmo,* 544 U.S. 405 (2005), the procedural requirements of Missouri Supreme Court Rule 29.15, and the Missouri Supreme Court's finding that Barton's "request" did not fall within Missouri's abandonment exception and was not cognizable in Missouri courts. Pet. App. 12a–14a. Thus, Barton had filed an untimely post-conviction motion under state procedural Rule 29.15.

The district court also found, on the merits, that the Missouri Supreme Court's rejection of Barton's double jeopardy claim related to the 1993 mistrial was consistent with and a reasonable application of this Court's precedent. Pet. App. 34a–41a. The district court agreed with the state court's finding that the prosecutor's error was inadvertent and independently found it "doubtful that the [prosecutor] designed a discovery violation in advance of a trial that, for his relevant purposes, seemed to be going well." Pet. App. 41a. The district court also found Barton had not shown that the state court's factual finding was objectively unreasonable given the record or overcome that finding by clear and convincing evidence. Pet. App. 35a–39a, 40a.

Barton then moved to alter or amend the judgment challenging the district court's determination that the new claims were untimely. Doc. 61. The district court denied the motion. Doc. 66.

Barton later sought a certificate of appealability from the United States Court of Appeals for the Eighth Circuit on the district court's adjudication of his double jeopardy claim and the timeliness of two claims first raised in his amended petition. A panel of the Eighth Circuit denied the certificate of appealability without opinion after a careful review of the file. Pet. App. 44a. Barton unsuccessfully sought rehearing en banc and rehearing by the panel. Pet. App. 45a. One judge dissented without opinion, stating she would have granted rehearing en banc. Pet. App. 45a.

SUMMARY OF THE ARGUMENT

This Court should deny the petition. Barton has not shown a real, substantial conflict between courts on an important issue. He alleges only a purported

misapplication of the well-settled standard for granting a certificate of appealability. But this Court should not exercise its rarely invoked power of error-correction here because the courts below appropriately applied the standard for granting a certificate of appealability and the courts below came to the correct conclusion under the standard.

REASONS FOR DENYING THE WRIT

I. Barton has shown no circuit split or important issue worthy of this Court's review.

Barton does not allege the district court's decision on the reasonableness of the state court's adjudication of Barton's double jeopardy claim or the timeliness of the new claims conflicts with a decision of another court of appeals, with a decision of a state court of last resort, or with a decision of this Court. Sup. Ct. R. 10. He does not allege that the district court's decision has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's supervisory power. *Id.* And he does not allege that the district court decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 10.

Instead, Barton alleges the lower courts erred in denying a certificate of appealability because there was a state court dissent on the double jeopardy claim and one Eighth Circuit judge would have granted rehearing en banc. He suggests, based on the dissent and a single vote for rehearing, that other circuits would have granted a certificate of appealability. Pet. 13–14, 15, 20–21, 29–30.

But as discussed below, the cases on which Barton relies are factually distinguishable from his case. The different outcomes were caused by different facts not present here. Notably, none of the cases relied on had a dissenting opinion that did not reach the merits of the disputed claim. Here, the dissent did not find that Barton established a constitutional violation; but instead found that a hearing should occur to determine if he could show a violation. The majority disagreed. This is not changed because one Eighth Circuit judge would have granted his petition for rehearing en banc. Barton's argument is also inconsistent with this Court's guidance in *Miller–El v. Cockrell,* 537 U.S. 322 (2003), because it ignores that the district court was required to evaluate the state court's majority opinion's resolution of his double jeopardy claim under AEDPA's highly deferential lens. The district court could not simply review the adjudicated claim de novo.

Under Barton's theory, this Court should impose a per se rule that requires a certificate of appealability to be issued any time a dissent occurs at any level, for any reason. But this is not consistent with this Court's practice. *See Taylor v. Bowersox,* No. 13A857 (U.S. Feb. 24, 2014) (Court denied certificate of appealability in capital case even though two Eighth Circuit judges found they would have granted certificate and three state court judges would have granted relief on the claim in dissent). And this Court should decline to do so. A per se rule requiring full briefing and argument in every case with a dissent or reversal in state or federal court, or where at least one judge en banc would have granted a certificate of appealability, is not required by the plain text of AEDPA. It would be a standard subject to abuse and manipulation, and,

even if applied in good faith, it would dramatically slow the pace of the resolution of criminal post-conviction proceedings to the detriment of the public and the victims' interest in a prompt conviction and execution of sentence.

In any event, Barton really alleges a misapplication of the law, not a circuit split about the standards for a certificate of appealability. But this Court rarely grants certiorari petitions when the asserted error consists of misapplications of a properly stated rule of law, and it should not do so here. Sup. Ct. R. 10. The record reflects that the lower courts properly applied this Court's precedent to evaluate Barton's request for a certificate of appealability, as detailed below. Pet. App. 42a; 44a; 45a.

Barton also alleges the district court's timeliness decision conflicts with two prior Eighth Circuit decisions in *Streu v. Dormire,* 557 F.3d 960 (8th Cir. 2009) and *Bishop v. Dormire,* 526 F.3d 382 (8th Cir. 2008). Pet. 26. But there is no real conflict. Neither *Streu* nor *Bishop* examined the dispositive question here: whether a petitioner's request is a "properly filed" application under AEDPA when a state court has affirmatively found that the petitioner has not satisfied an exception to the late post-conviction filing requirements.

But even if they did, this Court generally allows intra-circuit splits to be resolved within the circuit (such as by rehearing en banc) and rarely grants certiorari petitions to resolve the split. *See, e.g.*, Sup. Ct. R. 10; Stephen M. Shapiro, et al., Supreme Court Practice ch. 6.37(i), at 505 (10th ed. 2013); *Joseph v. United States,* 135 S. Ct. 705, 707 (Kagan J., statement) (discussing that the Court "usually allow[s]

the courts of appeals to clean up intra-circuit divisions on their own, in part because their doing so may eliminate any conflicts with other courts of appeals") (brackets added). Barton thus does not allege a division of authority on an important issue warranting this Court's review.

II. Barton did not meet the standard for a certificate of appealability on the district court's conclusion that the state court reasonably applied this Court's precedent to reject his double jeopardy claim, and he did not overcome the state court's factual finding by clear and convincing evidence.

The lower courts correctly held that Barton did not meet the standard for a certificate of appealability on his double jeopardy claim. In his first question, Barton disputes the district court's resolution of his double jeopardy claim involving the 1993 mistrial. But the record supports the Missouri Supreme Court's factual finding that the prosecutor's failure to file the witness endorsement was inadvertent and reasonably applied this Court's precedent to deny the claim in its alternative holding.

None of Barton's arguments are persuasive reasons to grant his petition. And he has not shown that reasonable jurists would disagree with the district court's resolution of the claim under the deferential lens of AEDPA.

First, Barton criticizes the district court for purportedly not considering facts he pointed to in the state court record that he believed rebutted the state court's factual finding that the prosecutor's actions were inadvertent not intentional. Pet. 17.

But the district court *did* consider Barton's contrary facts and found he did not establish the state court's factual finding was unreasonable under AEDPA.

Second, Barton claims he should receive a certificate of appealability on this issue because dissenting judges in state court "would have granted Mr. Barton relief" on his double jeopardy claim. Pet. 16. He alleges that Second, Sixth, and Seventh Circuit cases and two district court cases show that other courts would have allowed him an appeal. Pet. 13, 15, 20. But those cases are factually distinguishable and do not dictate a different outcome here.

Third, he alleges the Eighth Circuit had to grant a certificate of appealability because one judge would have granted rehearing en banc. He claims the Third, Fourth, and Ninth Circuit operating rules require the Eighth Circuit to grant him a certificate at the en banc stage. Pet. 20–21. But other circuits' operating rules, which do not address en banc dissents, do not show the lower courts erred in denying a certificate of appealability here and this Court has not imposed such a rule.

A. The district properly analyzed the state court's majority opinion under the highly deferential lens of AEDPA and reasonable jurists would not disagree with the district court's resolution of the claim.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner must show "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the

issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 326 (*citing Slack v. McDaniel,* 529 U.S. 473, 484 (2000)). This standard is not whether reasonable jurists could disagree on the merits of a petitioner's claims reviewing them de novo, but whether reasonable jurists could disagree with the district court's denial of the writ under AEDPA's highly-deferential standard. *Miller-El*, 537 U.S. at 336. It is an objective standard, not subjective. *See Williams v. Taylor,* 529 U.S. 362, 377–78 (2000) (Conner, J. concurring) (appellate court misapplied § 2254(d)'s unreasonable application analysis by applying subjective, not objective, inquiry); *see also Moore v. Johnson,* 225 F.3d 495, 500 n.1 (2000) (5th Cir. 2000) (applying *Williams* to require an objective standard to evaluate a certificate of appealability). To obtain a certificate on claims denied on procedural grounds, the petitioner must also show "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack,* 529 U.S. at 484.

Under AEDPA, the availability of federal habeas relief is narrow for claims "adjudicated on the merits" in state-court proceedings. *Harrington v. Richter,* 562 U.S. 86, 92 (2011). To obtain relief, a state prisoner must show that the state court decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). AEDPA imposes a "difficult" and highly deferential standard for evaluating state-court rulings. *See Harrington,* 562 U.S. at 102; *Cullen v. Pinholster,* 563 U.S. 170, 182 (2011); *White v. Woodall,* 572 U.S. 415, 419 (2014); *Woods v. Donald,* 135 S.

Ct. 1372, 1376 (2015); *Virginia v. LeBlanc,* 137 S. Ct. 1726, 1727, 1728 (2017). AEDPA demands that state court decisions "be given the benefit of the doubt" and reviewed solely on the record before the state court. *Pinholster,* 563 U.S. at 181–82.

A factual determination is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). Even the existence of some contrary evidence in the record does not show the factual determination was unreasonable. *Id.* at 302. If the record supports a state court's factual determinations, the prisoner cannot make that showing. *See, e.g.*, *Burt v. Titlow,* 571 U.S. 12, 18–21 (2013); *Rice v. Collins,* 546 U.S. 333, 341–42 (2006). State-court factual determinations are presumed correct and the petitioner can only obtain habeas relief by rebutting that presumption by clear and convincing evidence. *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

The state court and district court both found this Court's decision in *Oregon v. Kennedy*, 456 U.S. 667 (1982) controlled Barton's claim. Pet. App. 34a–35a, 39; *Barton IV*, 240 S.W.3d at 711. In *Kennedy,* this Court held that the Fifth Amendment Double Jeopardy Clause bars retrial when a defendant's motion for mistrial is granted after the jury is empaneled if the prosecution commits misconduct with the intent to "goad" the defendant into moving for a mistrial. *Kennedy's* analysis focuses on the intent of the prosecutor. *Kennedy*, 456 U.S. at 679. "Absent intent to provoke a mistrial, a prosecutor's error in questioning a witness, improper remark in a closing statement, and even extensive misconduct do not prevent reprosecution." *United States v. Beeks,* 266 F.3d 880, 882 (8th Cir. 2001) (per curiam); *see also United States v. Valadez-*

Camarena, 163 F.3d 1160, 1163 (10th Cir. 1998); *Fugitt v. Lemacks,* 833 F.2d 251, 252 (11th Cir. 1987) (per curiam). Applying *Kennedy* and the facts in Barton's case, the state court found the prosecutor's failure to endorse the witnesses to be inadvertent. *Barton IV*, 240 S.W.3d at 711.

The district court properly analyzed the state court's majority decision under AEDPA's highly deferential lens and concluded the state court reasonably applied this Court's decision in *Kennedy* to Barton's case and the state court's factual finding—that the prosecutor's actions were inadvertent not intentional—was reasonable and supported by the record. Pet. App. 34a–41a. Contrary to Barton's argument, the district court did consider his attempts to rebut the state court fact finding, but found Barton failed to overcome the state court's fact finding by clear and convincing evidence. Pet. App. 40a–41a. The district court properly found this fact finding was reasonable on the record. Reasonable jurists would not disagree given the record.[2]

When Barton's counsel announced they did not receive the state's endorsements, the court permitted both parties to discuss the omissions at length, both on and off the record. Doc. 45–10 at 94, 96–99, 103–07. The prosecutor believed he did endorse the witnesses by sending the relevant documents to the court clerk and to opposing counsel. The prosecutor produced his own file copy of the documents,

[2] He also criticizes the district court's de novo finding that it did not believe the prosecutor would have designed a discovery violation in advance of trial that seemed to be going well for the State. Pet. 17–19; *see* Pet. App. 41a. But the district court's de novo finding was plausible in light of the record viewed in its entirety and would not render the state court's findings to be unreasonable under AEDPA.

complete with a certificate of service showing they had been sent, and stated he was "flabbergasted" to learn that they had not been received by counsel or the clerk. *Id.* at 96–99, 103–04. The prosecutor also had in his records signed confirmation from Barton's counsel that he received the State's discovery and the state believed it produced its disclosures. *Id.* at 99. The prosecutor also stated he had several communications with defense counsel and, based on those conversations, the prosecutor believed counsel had received the endorsements. *Id.* at 106. The prosecutor also explained that if he was aware of the omission, he would have immediately corrected the inadvertence. *Id.*

The record also revealed that Barton's counsel took no action before trial to alert the State to the oversight. In his state proceedings, Barton conceded his counsel knew the prosecution had not endorsed witnesses before trial. Doc. 45–66 at 140. Rather than take immediate action to seek the identities of witnesses (most of which had been learned through discovery and deposition and were, in fact, part of the defense's endorsement), counsel waited until after the jury had been empaneled to move for a mistrial, and then sought discharge immediately following the mistrial which the court granted at his request. Doc. 45–10 at 103–07. Barton's counsel sandbagged the State to get a mistrial, rather than point out the error when it was first noticed. Such tactics should not be rewarded. *See, e.g.*, *Ohio v. Johnson*, 467 U.S. 493, 502 (1984) (defendant is not "entitled to use the Double Jeopardy Clause as a sword.").

Barton has not shown that reasonable jurists would have resolved the petition differently than the district court given the deference due to the majority decision of the Missouri Supreme Court. And Barton has not shown that reasonable jurists would disagree with the district court's finding that the Missouri Supreme Court's decision was not based on "an unreasonable determination of the facts," or that Barton had not overcome the state court's fact finding by clear and convincing evidence.

B. The dissenting opinions in state court and the Eighth Circuit do not establish that reasonable jurists would debate the district court's resolution of the claim under the deferential lens of 28 U.S.C. § 2254(d).

Barton does not allege a conflict between any court and the district court's resolution of the double jeopardy issue under AEDPA or the state court's majority opinion reviewing the claim de novo. This Court also denied Barton's attempt to seek certiorari review from the Missouri Supreme Court's rejection of both double jeopardy claims on direct appeal. Instead, Barton tries to manufacture a conflict by pointing to a dissent in state court and the Eighth Circuit. His arguments fail for two reasons. *First,* they misapply the standard under *Miller-El* and ignore the deferential review of an adjudicated claim under § 2254(d). *Second,* they do not comport with the state court record.

The relevant question under *Miller-El* is whether reasonable jurists would disagree with the district court's finding that the state court decision and its factual

findings were objectively reasonable under AEDPA's highly deferential lens. *See Miller-El*, 537 U.S. at 336. The question is not whether reasonable jurists would disagree with the state court's decision and fact findings if the claim was reviewed de novo. But even if the claim were reviewed de novo, the state court dissent did not find that Barton successfully showed a double jeopardy violation. *Barton IV,* 240 S.W.3d at 718–19 (Wolff, J. dissenting). Instead, the dissent found only that remand would be appropriate for a hearing on prosecutorial intent. Implicit in this decision is that the evidence currently before the court did not prove Barton's claim.[3] Thus, even under the cases that Barton relies on, a certificate of appealability is not warranted on his claim. Indeed, the different outcomes reached in those cases turned on different facts not present here.

The Seventh Circuit's decision in *Jones v. Basinger,* 635 F.3d 1030, 1035 (7th Cir. 2011) is distinguishable. In *Jones,* a state prisoner alleged the state court's rejection of his claim was an unreasonable application of this Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004) under AEDPA. *Id.* at 1035. The trial court permitted two detectives to testify in detail about an informant's double-hearsay statement accusing Jones of being the leader of the robbery and murders on the theory that the evidence was offered to show later police conduct, not for the truth of the matter asserted. *Id.* at 1035. The state court issued a divided decision where the majority and dissent reached opposite conclusions on the merits of the claim. *Id.*

[3] The district court was bound by the record before the Missouri Supreme Court. *Pinholster,* 563 U.S. at 181–82, 186. Barton would have had to overcome the requirements of § 2254(d)(1) and § 2254(e)(2) to expand the factual record in the federal court. *Id.* at 186. This only further highlights why this case would be a poor vehicle for certiorari review.

at 1038–39. The district court denied relief, but the Seventh Circuit reversed and remanded the matter after granting a certificate of appealability. *Id.* at 1035. The Seventh Circuit explained that "[w]hen a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine." *Id.* at 1040. Similarly, the district courts in *Waddell v. Keller,* No. 3:10CV532, 2011 WL 3897725 (W.D. N.C. Sept. 6, 2011) (unpublished) and *Story v. Kindt,* 970 F. Supp. 435 (W.D. Pa. 1997) granted certificates of appealability when the state court dissenting opinions reached the merits of the underlying claim, and the adjudication of the claim or procedural issue was debatable. *Kindt,* 970 F. Supp. at 447, 465 (state court dissenting opinion would have granted relief on issue of first impression and majority opinion noted "we do not believe the dissent's analysis and conclusion to be free from doubt"); *Waddell,* 2011 WL 3897725 at *4, 16 (state court dissent reached the opposite conclusion on the merits of the claim and district court found reasonable jurists may disagree with the district court's procedural finding because other circuits resolved that issue differently). Here, however, the Missouri Supreme Court's dissent did not reach the merits of Barton's double jeopardy violation. Instead, the dissent believed that a hearing should occur on prosecutorial intent. Thus, while the dissent believed that more evidence was needed to adjudicate Barton's claim, the majority did not. And Barton has not pointed to any case which conflicts with the Missouri Supreme Court's majority opinion.

The Second Circuit's decision in *Tankleff v. Senkowski,* 135 F.3d 235 (2d Cir. 1998) is also unavailing. AEDPA did not govern the petition in *Tankleff*, so the court

held the petitioner did not have to obtain a certificate of appealability to obtain review under § 2253(c), but issued a certificate of probable cause under similar standards. *Tankleff,* 135 F.3d at 241–42. And like the courts discussed above, the Second Circuit found the petitioner showed that the issues were debatable, noting the state court split three-to-two on the merits of two issues and the district court believed another issue was a "close call." *Id.* at 242.

The Sixth Circuit's unpublished decision in *Shields v. United States,* 698 Fed. Appx. 807 (6th Cir. 2017) is also distinguishable. In *Shields,* the court reviewed a petition under 28 U.S.C. § 2255 and granted a certificate of appealability on an ineffective assistance of counsel claim the court reviewed de novo. *Shields,* 698 Fed. Appx. at 808–09, 813. The district court originally denied a certificate of appealability, but the appellate court concluded otherwise. *Id.* at 813. In so doing, the appellate court discussed that the offender's conviction was affirmed by a prior panel over a judge's dissent on whether the offender's *Miranda* waiver was knowing and intelligent, and therefore relevant to whether counsel was ineffective for failing to make that argument. *Id.* at 813; *see United States v. Shields,* 480 Fed. Appx. 381, 390–94 (6th Cir. 2012) (Clay, J., dissenting) (counsel's decision to challenge only the voluntary nature of the offender's confession, and not the knowing or intelligent nature of the confession despite the evidence of the offender's mental retardation was "incomprehensible," and the trial court should have considered the knowing and intelligent nature of the confession sua sponte despite counsel's inadequate assistance).

Barton asks this Court to adopt a per se rule that requires the grant of a certificate of appealability on every claim adjudicated in state court that generates a dissent regardless of the basis of the dissent. Barton's rule is unwise, unworkable, and unnecessary under the law. His argument ignores the deferential requirements under AEDPA. The Court should not adopt this per se rule. This Court has not felt itself bound by such a per se rule. *See Taylor v. Bowersox,* No. 13A857 (U.S. Feb. 24, 2014) (certificate of appealability denied by the Court in capital case); *Taylor v. Bowersox,* 14-1239 (8th Cir. Feb. 24, 2014) (Bye, J., dissenting) (Judge Bye, joined by Judge Kelly, disagreed with the denial of petition for rehearing en banc and expressed they would have granted a certificate of appealability and stayed execution); *State ex rel. Taylor v. Steele,* 341 S.W.3d 634 (Mo. 2011) (Stith, J., dissenting) (Judge Stith, joined by Judge Teitelman, and Judge Wolff, disagreed with the majority's rejection of Taylor's Sixth Amendment judge imposed death sentence claim). For this same reason, the Eighth Circuit's failure to grant a certificate in light of a single dissent does not conflict with § 2253(c) or the other circuits operating rules governing a panel's consideration of a certificate of appealability. In short, he does not present a real conflict worthy of this Court's review.

III. Barton did not meet the standard for a certificate of appealability on the district court's finding that Barton's new claims were not timely.

In question two, Barton asks this Court to review the denial of a certificate of appealability on the district court's resolution that claims thirteen and fourteen were untimely. Although Barton disputes the district court's timeliness decision, he does

not allege the district court's decision conflicts with this Court or any other circuit court's decision. Instead, he argues this Court should grant certiorari review because Barton believes the district court's decision conflicts with two other Eighth Circuit decisions and because one Eighth Circuit judge dissented from the denial of his petition for rehearing en banc. Pet. 28–30. But Barton has not established a real conflict warranting review under Supreme Court Rule 10. And he has not shown that reasonable jurists would disagree with the district court's decision, which gave proper deference to the Missouri Supreme Court's finding that Barton failed to satisfy an exception to permit a belated post-conviction motion and is consistent with this Court's decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005). He also suggests that certiorari should be granted because he may ultimately prevail on his claims if timeliness could be overcome. Pet. 23–25. He cannot. Even if the claims were timely, habeas relief is not warranted because both claims are procedurally defaulted and without legal merit.

A. The district court properly relied on the Missouri Supreme Court's decision and Missouri law to conclude that Barton's request was not a "properly filed" application.

In *Artuz v. Bennett,* this Court held that time limits on post-conviction petitions are "condition[s] to filing," such that an untimely petition would not be deemed "properly filed." 531 U.S. 4, 8, 11 (2000). In *Pace,* this Court addressed the question left open in *Artuz* – whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed.

Pace, 544 U.S. at 413. The Court held that "a petition filed after a time limit, and which does not fit within any exceptions to that limit, is no more 'properly filed' than a petition filed after a time limit that permits no exception." *Id.* Under *Pace,* if a state court determines that an untimely state post-conviction petition does not satisfy an exception to the time limits the filing is not "properly filed" under AEDPA. *Id.* at 414. This is what occurred here.

Missouri Supreme Court Rule 29.15 sets forth mandatory procedures that movants must follow to obtain post-conviction relief after trial. *Francis v. Miller,* 557 F.3d 894, 899 (8th Cir. 2009). Rule 29.15 establishes the time limits for filing an original motion and any amended motions. *See* Mo. Sup. Ct. R. 29.15(b) and (g) (2008). Untimely amendments are prohibited by Rule 29.15(g). *Oglesby v. Bowersox,* 592 F.3d 922, 924–25 (8th Cir. 2010). Missouri courts have no discretion to grant extensions beyond that provided for in the rule. *McMullan v. Roper,* 599 F.3d 849, 853 n.5 (8th Cir. 2010). Arguments raised for the first time after the time limits are barred from consideration. *Stanley v. State,* 420 S.W.3d 532, 540–41 (Mo. 2014). Similarly, successive post-conviction motions are also barred. *See* Mo. Sup. Ct. R. 29.15(l) (2008). "A motion is successive if it follows a previous post-conviction relief motion addressing the same conviction." *Zeigenbein v. State,* 364 S.W.3d 802, 804 (Mo. App. S.D. 2012). The time limits under Rule 29.15 are valid and mandatory. *Oglesby,* 592 F.3d at 925.

Rule 29.15 does not create any exception to its mandatory requirements. But, since 1991, Missouri courts have recognized a narrow, equitable exception known as "abandonment," to Rule 29.15(g)'s mandatory time limits on the filing of an *initial*

amended motion. *Barton VI,* 486 S.W.3d at 337–38. In 2014, the Missouri Supreme Court clarified that "abandonment" is limited to two circumstances: (1) when post-conviction counsel failed to *timely* file an *initial* amended post-conviction motion or (2) filed no amended motion. *Id.* at 337–38. Thus, under Missouri law, the abandonment doctrine only excuses failure to follow Rule 29.15(g)'s time requirement when counsel has failed to timely file an *initial* amended motion. *Price v. State,* 422 S.W.3d 292, 300 (Mo. 2014); *see also Eastburn v. State,* 400 S.W.3d 770, 774 (Mo. 2013) (movant failed to show a threshold showing of abandonment because her counsel timely filed an amended motion which was adjudicated). Missouri courts have never allowed a belated amendment or successive post-conviction motion after an amended motion is timely filed. Missouri courts have repeatedly rejected defendants' attempts to expand "abandonment" to claims of ineffective assistance of post-conviction counsel, recognizing that such claims are "categorically unreviewable" and "not cognizable." *See, e.g., Barton VI,* 486 S.W.3d at 338; *Eastburn,* 400 S.W.3d at 774; *Gehrke v. State,* 280 S.W.3d 54, 58 (Mo. 2009); *Winfield v. State,* 93 S.W.3d 732, 739 (Mo. 2002).

In state court, Barton's amended post-conviction motion was due July 21, 2008. Mo. Sup. Ct. R. 29.15(g) (2008). Barton's post-conviction counsel timely filed the motion on July 21, 2008, asserting 48 claims for relief. Doc. 45–76 at 11; *Barton VI,* 486 S.W.3d at 335. That motion was denied. Doc. 45–76 at 20. The Missouri Supreme Court affirmed the denial on May 13, 2014. Doc. 45–92 at 66. The mandate was issued

June 24, 2014, concluding Barton's post-conviction review. *Barton V,* 432 S.W.3d at 764; *Payne v. Kemna,* 44 F.3d 570 (8th Cir. 2006).

Barton declined to follow this well-settled precedent and returned to the post-conviction motion court on June 9, 2015, nearly seven years after the time for filing an amended motion expired and nearly one year after the Missouri Supreme Court issued its mandate. In his request, he belatedly sought to add new claims to his previously filed amended motion based on Barton's theory that he was "abandoned," even though his post-conviction counsel timely filed an amended post-conviction motion, asserting 48 claims for relief. Doc. 24–2; *Barton VI,* 486 S.W.3d at 335. The motion court overruled Barton's request and the Missouri Supreme Court affirmed. In so doing, the Missouri Supreme Court recognized that Barton's argument was no more than a claim of ineffective assistance of post-conviction counsel and held that Barton's "claim does not fit within Missouri's definition of 'abandonment' and is not cognizable in Missouri courts." *Barton VI,* 486 S.W.3d at 339. The district court properly deferred to the Missouri Supreme Court's interpretation and application of Missouri law on this point. *Estelle v. McGuire,* 502 U.S. 62, 67–68 (1991); *see Pace,* 544 U.S. at 414 ("When a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2).").

Because Barton's post-conviction counsel timely filed a Rule 29.15 motion and those claims were adjudicated, his belated request was really an untimely or successive Rule 29.15 motion. That was not changed simply because Barton placed a different title on his pleading. The law in Missouri was clear well before Barton filed

his belated request. *See, e.g.*, *Eastburn,* 400 S.W.3d at 775; *Price,* 422 S.W.3d at 300; *Gehrke,* 280 S.W.3d at 58; *Winfield,* 93 S.W.3d at 739. Because Barton failed to show he fell within the "abandonment" exception to Missouri's post-conviction filing requirements, *Barton VI,* 486 S.W.3d at 339, he did not satisfy the narrow exception that allowed for consideration of an untimely Rule 29.15 motion. Because the Missouri Supreme Court found that Barton's request did not fall within the abandonment exception, his pleading "is no more 'properly filed' than a petition filed after a time limit that permits no exception." *Pace,* 544 U.S. at 413; *see also McMullan,* 599 F.3d at 853 and n.5. Essentially, Barton faults the state courts for evaluating whether he met "a condition for filing" an untimely Rule 29.15. Under Barton's argument, a state prisoner could toll AEDPA's one-year statute of limitations at will simply by filing untimely Rule 29.15 motions under the auspices of "abandonment," turning § 2244(d)(2) into a de facto extension mechanism. This Court warned against this abusive delay tactic. *Pace*, 544 U.S. at 413.

The district court properly determined that Barton's June 2015 request was not a "properly filed" application and did not toll the statute of limitations under § 2254(d)(2). Barton has not shown that reasonable jurists would disagree with the district court's reliance on the Missouri Supreme Court's finding that Barton failed to establish that he satisfied an exception to Missouri's post-conviction filing requirements to conclude that Barton's motion was not a "properly filed" application.

B. The district court's decision did not create an intra-circuit conflict and Judge Kelly's dissent did not create a conflict worthy of certiorari review.

Barton argues the district court's denial conflicts with the Eighth Circuit's decisions in *Streu* and *Bishop*. Pet. 26. But there is no intra-circuit split. The district court's decision is not contrary to prior Eighth Circuit precedent because neither case examined whether an offender's untimely application was a "properly filed" application under the facts present here.

In *Streu,* the Eighth Circuit examined whether a motion to reopen qualified as "application[s] for State post-conviction or other collateral review" within § 2244(d)(2)'s tolling provisions. *Streu,* 557 F.3d at 961–62. The court did not address whether the motion to reopen was "properly filed." *Id.* at 961–62, 964. In *Bishop,* the Eighth Circuit examined whether a motion to recall the mandate was a qualifying application "with respect to the pertinent judgement or claim." *Bishop,* 526 F.3d at 383–84. The court did not examine whether the motion was "properly filed" because it was not disputed between the parties. *Id.*

Because neither *Streu* nor *Bishop* addressed the litigated issue here, the district court's decision and the Eighth Circuit's denial of a certificate of appealability does not create an intra-circuit conflict.[4] The Eighth Circuit also implicitly found there was no conflict when it denied Barton's en banc petition for rehearing. There is

[4] Contrary to Barton's argument, the district court did not find that its decision was contrary to *Streu.* Pet. 11. Instead, the district court questioned whether the Eighth Circuit's decision in *Streu* remained good law in light of subsequent Missouri cases in addressing Respondent's argument. Pet. App. 13a.

thus no real intra-circuit conflict for this Court to review. *See generally* Sup. Ct. R. 10. And for the same reasons discussed above, Barton has not shown that the denial of certificate of appealability was improper because one judge would have granted rehearing en banc.

C. Even if Barton's state action could be tolled under AEDPA, habeas relief could not be granted on remand because his claims are procedurally barred and without legal merit.

Even if this Court granted certiorari on this point and reversed on the question presented, habeas relief would still be denied on alternative grounds not yet reached by the lower courts.

Respondents argued in the district court that claims thirteen and fourteen should be denied because they were untimely, procedurally barred, and without legal merit. Doc. 45 at 34–35, 38–46, 95–104. The district court denied the claims on timeliness alone without addressing the other arguments. This was proper. But if further consideration of these claims was required, Barton cannot establish he is entitled to relief.

In claim thirteen, Barton argued that trial counsel was ineffective because he (a) failed to object and (b) failed to request a mistrial in response to the prosecutor's comments during opening that Larry Arnold, Rick Ellis, and Allen, inmates at the Christian County jail, would testify that Barton told them he murdered Kuehler, but only presented Allen's testimony. Doc. 33 at 52; *see* Doc. 53 at 441–42; Doc. 56 at 930–53. Barton unsuccessfully argued that counsel was ineffective for not objecting to

these statements in his amended post-conviction motion. Doc. 78 at 319–20, 322–23, 324–26; Doc. 87 at 1027–28, 1054, 1092; *Barton V,* 432 S.W. 3d at 756 n.5. But Barton failed to advance the same claim on appeal. Instead, he argued counsel was ineffective for not requesting a mistrial. Doc. 88 at 149–55. The Missouri Supreme Court rejected that claim on procedural grounds because Barton's claim on appeal was not the same claim raised in the motion court.[5] *Barton V,* 432 S.W. 3d at 756. Thus, both parts of claims thirteen are procedurally barred.

Barton invokes *Martinez v. Ryan,* 566 U.S. 1 (2012) to overcome his procedural default. Pet. 24. But *Martinez* does not permit review of either claim. *First,* Barton cannot overcome his defaulted failure-to-object claim under *Martinez* because initial post-conviction counsel raised the claim. The default occurred when post-conviction appellate counsel chose not to advance the claim on appeal. *Martinez* is not applicable to this scenario. *Martinez,* 566 U.S. at 9, 10, 12, 16–17; *Arnold v. Dormire,* 675 F.3d 1082, 1087 (8th Cir. 2012); *Norris v. Brooks,* 794 F.3d 401, 405 (3rd Cir. 2015); *Johnson v. Warden of Broad River Corr. Inst.,* No. 12-7270, 2013 WL 856731, * 1 (4th Cir. March 8, 2013) (unpublished); *see also Davila v. Davis,* 137 S. Ct. 2058, 2065–67 (2017) (declining to expand *Martinez* to defaulted claims of ineffective assistance of direct appeal counsel). *Second,* Barton cannot show that the defaulted failure-to-request-a-mistrial claim was substantial or that post-conviction counsel was ineffective to overcome the default under *Martinez.* Counsel's request for a mistrial

[5] Because both claims were raised in the post-conviction proceedings Barton offers no plausible explanation as to why the claims could not have been timely raised in his original federal habeas petition.

would have been denied based on the record. The complained of witnesses testified against Barton in his prior trials and the prosecutor testified in the post-conviction proceeding that he intended to call these witnesses at the time of opening argument and only later made the decision not to call these witnesses, which the motion court found credible. Doc. 87 at 1027–28; Doc. 8 at 778–82, 804–06, 808–16; Doc. 27 at 727–43; Doc. 28 at 743–78; *see also Barton I,* 936 S.W.2d at 782; *Barton II,* 998 S.W.2d at 23–24; Doc. 54 at 710–34. Nor can Barton establish he was prejudiced from the alleged error. The jury was instructed that opening statements were not evidence and, generally, the State's failure to present evidence promised in the opening is detrimental to the State, not the defendant. Doc. 87 at 1027–28. Because Barton's claim is without merit, it is not substantial, and post-conviction counsel is not ineffective for failing to raise a meritless claim.

In ground fourteen, Barton argued counsel was ineffective for not objecting to penalty phase instruction thirteen because the instruction did not require the jury to make a factual determination that his prior convictions were "serious assaultive" convictions to support the jury's finding that his two assaultive convictions constituted statutory aggravating circumstances. Doc. 33 at 57–58; Doc. 36 at 118, 121. Barton did not raise this claim in his post-conviction proceedings.[6] He again invokes *Martinez* to overcome the default, but cannot satisfy the requirements to show cause. Missouri law allows the jury to receive a statutory aggravating

[6] Although the factual basis for his claim occurred at trial and is based on the face of the record, Barton offers no plausible explanation why this claim could not have been timely raised in his original federal habeas petition.

circumstance instruction when "[t]he offense was committed by a person who has one or more serious assaultive criminal convictions." Mo. Rev. Stat. §565.032.2(1) (2000). Under Missouri law, the determination of whether a prior offense is a "serious assaultive" conviction is not a question of fact, but a question of law for the court to decide. Once the court makes that determination, the jury is left to determine as a matter of fact whether the defendant indeed had the prior convictions. *See State v. McFadden*, 391 S.W.3d 408, 420 (Mo. 2013); *State v. Mayes*, 63 S.W.3d 615, 640 (Mo. 2001); *State v. Williams*, 97 S.W.3d 462, 474 (Mo. 2003); *State v. Johns*, 34 S.W.3d 93, 114 n.2 (Mo. 2000). This is what occurred here. Federal courts reviewing this claim are bound by Missouri's interpretation and application of its law. *Estelle,* 502 U.S. at 67–68. Thus, any objection by trial counsel would have been rejected as meritless. The claim is therefore not substantial. Post-conviction counsel was not ineffective for failing to assert a meritless claim.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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