CAPITAL CASE

No. 19-5570

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
REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY ARGUMENT-QUESTION ONE

1. 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.

2. Summary of Mr. Barton's arguments with respect to question one

The Eighth Circuit denied a certificate of appealability upon Mr. Barton's contention, which was supported by a three-Judge Missouri Supreme Court dissent, that Barton's conviction and sentence violated the Fifth Amendment right to be free from double jeopardy, in that Barton was never afforded a fair opportunity to fully establish that, at Barton's first of five trials, the prosecutor, in order to avoid a trial he was likely to lose, goaded Barton's request of a mistrial (Petition, p. 14-22). ***State v. Barton***, 240 S.W.3d 693, 718-718 (Mo.banc 2007).

Mr. Barton began by noting the statutory standard, per the terms of 28 U.S.C.A. § 2253(c)(2) and (3), that a Federal habeas appellant, like Mr. Barton, be granted a certificate of appealability (COA) if he makes "a substantial showing of denial of a constitutional right." ***Miller-El v. Cockrell***, 537 U.S. 322, 336 (2003); Mr. Barton added this Court's 2017 clarification that a substantial showing "is not coextensive with a merits analysis" and that 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) (Petition, p. 14-15).

Mr. Barton then urged that the Eighth Circuit's one sentence denial of Mr. Barton's COA request to proceed further with his double jeopardy claim was clearly erroneous for three reasons. First, upon state court direct appeal, the matter gave rise to a four Judge majority opinion against Mr. Barton's position, and a three Judge dissent in favor of Mr. Barton's position, and hence debatability of the issue, warranting a COA, was established beyond dispute (Petition, p. 15-16). ***State v. Barton***, 711-718. Second, the Eighth Circuit's determination conflicts with holdings by the Seventh, Sixth and Second Circuits, who all have granted certificates of appealability as a matter of "routine" when the issue gave rise to a lower court dissent (Petition, p. 15, 19-20). ***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). Third, the Eighth Circuit, by adversely determining the matter over the dissent of Eighth Circuit Justice Jane Kelly, diverged 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 COA by a single Circuit Justice (Petition, p. 20-21). *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).*

<u>3. Respondents offer to reword Mr. Barton's question into a merits determination, advance one-sided arguments in support of that merits determination, and suggest adding a "deferential lens" to the COA process, all of which run contrary to the holding by this Court in ***Buck v. Davis***</u>

Respondents begin their briefing with the proposition that the question presented by Mr. Barton should be recast in terms which would make the granting of a COA contingent upon the ultimate "merits" of the Constitutional issue itself (Respondents' Brief in Opposition, p. i). Then, Respondents repeat a number of their arguments made to the District Court and Eighth Circuit, touting perceptions about the worth of those arguments, but never mentioning, much less fairly addressing, Mr. Barton's contrary factual and legal arguments (Respondents' Brief in Opposition, p. 15-22). All the while, at six separate points, Respondents claim that, in addition to satisfying the statutory requirements of the certificate of appealability process, a petitioner like Mr. Barton, wishing to be allowed appeal upon an issue, must also pass through the optics of some sort of additional "deferential lens" supposedly called for by the "AEDPA" (Respondents' Brief in Opposition, p. 13, 15, 16, 19, 21, 22). At none of those six separate points do Respondents reference authority for adding any "lens" to the process.

Mr. Barton, before the Eighth Circuit, and now before this Court, has countered that some two years ago, in ***Buck v. Davis***, supra, this Court explained the requisite showing for the grant of a certificate of appealability, and rejected outright the very sort of merits analysis approach, as proposed by Respondents, for determining whether a COA should issue (Petition, p. 15; Eighth Circuit Request for COA, p. 9, 20). Respondents' tack, in briefing before the Eighth Circuit, and now in briefing before this Court, has been to never once mention ***Buck v. Davis***, apparently harboring the hope that plowing into a headwind with eyes closed might render the seas calm. All save Respondents well-understand that ***Buck v. Davis*** is the law, and therefore Mr. Barton's question, which follows the dictates of ***Buck v. Davis***, has been properly worded and should not be subjected to any additional "lens". As for Respondent's one-sided merits arguments, while ***Buck v. Davis*** obviates the need for a full response, and while the 15 pages allowed for this

Reply are not sufficient to fully address things here, Mr. Barton cannot help but to use a few pages to counter some of the most egregious errors of fact and law committed.

4. The state court record shows that the prosecutor had motive to goad a mistrial to save a floundering case

Respondents insist to this Court, as they did to the Eighth Circuit, that the Missouri Supreme Court majority, and the District Court thereafter, made a reasonable determination that Mr. Barton will never be able meet his burden of proving that the prosecutor intended to goad a mistrial because, supposedly, the case was "going well" for the state so that the prosecutor surely would not have wanted the trial ended by mistrial (Response in Opposition, p. 11; Respondents' Eighth Circuit Briefing, p. 32). Actually, as Mr. Barton explained in his Petition to this Court, such an inference amounts to an unreasonable determination of the facts in light of the evidence presented in the State court proceeding (Petition, p. 17). 28 U.S.C.A. § 2254(d)(2). Unfortunately, Respondents have not offered retort to this argument, and therefore a brief reminder is in order (Petition, p. 17-19).

An inference about lack of ill-motive 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 the prosecutor had at his 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 have the case go forward without the lone jailhouse informer who the prosecution developed at

the last minute (Doc. 36, Appendix F[1], 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 shows, contrary to the inference drawn by the District Court, that the case was NOT going well. At that point in time, and under those circumstances, it would have been proper to infer the opposite, as courts in other cases have in similar circumstances, that the prosecutor had reason to goad a mistrial to delay until his case got better. ***United States v. Curtis***, 683 F.2d 769, 777 (3rd Cir. 1982).

5. No "sandbagging" occurred since the prosecutor was given the opportunity to proceed with no consequence for his failures, but tellingly chose mistrial instead

Respondents remind about the prosecutor's first-trial-time insistence that he was supposedly "flabbergasted" to find that while forms for a statutorily required endorsement of witnesses were in his own file, those were missing from the defense file, and more importantly were missing from the Court's file (Response in Opposition, p. 19). Then, Respondents try to turn the tables, accusing Barton's trial counsel of "sandbagging" by not raising the failure to endorse until the morning that the first trial was to begin (Response in Opposition, p. 6, 20). These claims by Respondents beg three responses.

First, in light of the prosecutor's insistence about having proceeded properly, the trial court had a thorough search made, and determined that the prosecutor's multiple substantive claims about how he had, many times over, supposedly made the requisite witness endorsements

[1] 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.

were all false (Doc. 36, Appendix F, p. 97-101). Second, Barton's defense counsel brought to light the total failure to endorse witnesses, not as a gotcha moment, but as part of an objection to the prosecutor trying to make a last-minute endorsement of a brand new witness, an informer who had just been developed (Doc. 36, Appendix F, p. 94). Third, the colloquy between the parties and the Court ended up being, not a sandbagging, but the functional equivalent of a warning; though the prosecutor totally failed to establish that he provided a witness endorsement, the Trial Court still offered to rescue the prosecutor by deeming as endorsed all witnesses called at the preliminary hearing, and by letting the case go forward to trial with those witnesses; it was the prosecutor who chose to turn that offer down, and agree to mistrial (Doc. 36, Appendix F, p. 99-100, 102, 105). Far from being sandbagged, the prosecutor, was given the choice to have his failure forgiven, and chose mistrial, obviously to save his failing case for another day, when he could use his newly found informer. ***United States v. Curtis***, supra.

6. Findings of prosecutor "inadvertence" are at the very least debatable among reasonable jurists, especially since such findings do not account prosecutor's lengthy history of withholding discovery in this and other cases

According to Respondents, "the record supports", and "(r)easonable jurists would not disagree" with, the Missouri Supreme Court Majority finding that "the prosecutor's failure to file the witness endorsement was inadvertent" (Brief in Opposition, p. 15-17). Respondents give a passing nod that Mr. Barton presented contrary evidence, but go on that the District Court addressed Barton's contrary evidence, and found that the evidence did not sufficiently counter the Missouri Supreme Court finding of inadvertence (Doc. 59, p. 40-41; Brief in Opposition, p. 15-16, 19); Respondents then claim that reasonable jurists would not disagree with the District Court's conclusions, and that therefore a COA should not issue (Brief in Opposition, p. 21-22).

In point of fact, as already noted above, and also noted in the Petition at pages 16-17, three reasonable Missouri Supreme Court dissenters have already registered disagreement about the inadvertence finding, noting the very reasons cited by Mr. Barton as strong enough to suspect prosecution malevolent intent to goad the mistrial request. ***State v. Barton***, 716-717, 718-719.

There were two proven instances of the prosecutor's misconduct which occurred in Mr. Barton's case. One involved informer Katherine Allen, and the prosecutor's failure to disclose her criminal record and the existence of a deal made with her in exchange for her testimony; this misconduct by the prosecutor brought about the 2004 decision by Missouri Circuit Judge John Sims to set aside Mr. Barton's conviction and sentence handed down in Barton's fourth trial (Doc. 36, p. 51, Appendix A-1, p. 17-21). ***State v. Barton***, 718. Running a close second on the misconduct scale was the prosecutor's failure to reveal benefits he bestowed upon a different informer, Larry Arnold, in return for Arnold's testimony, those benefits amounting to lengthy, private visits regularly allowed between Arnold and his girlfriend, which visits Arnold was easily able to turn into conjugal visits (Doc. 36, Appendix Q, p. 22). ***Barton v. State***, 432 S.W.3d 741, 760 (Mo.banc 2014)[2.] The failure to reveal Arnold's benefits to Barton's defense team, termed "crooked stuff" by Arnold himself, did not garner relief for Barton, but only because, before Barton's fifth trial, Arnold recanted his testimony against Barton, and was therefore not called by the State to witness (Doc. 36, Appendix K, p. 719-720). ***Barton v. State***, supra.

As the three dissenting Missouri Supreme Court Judges emphasized, no one can claim that these other instances of misconduct, in and of themselves, goaded a mistrial in this case. ***State v. Barton***, 718. Rather, these other instances of misconduct amount to circumstantial

[2] While the state Courts refused to find that sex was part of the agreement between Arnold and the prosecutor, those Courts conceded that Arnold was able to turn the agreed-upon, lengthy private visits into sexual encounters. ***Barton v. State***, supra.

evidence of general malevolent intent supporting the contention that the prosecutor failed to endorse witnesses in advance of the April 1993 trial date, not by inadvertence, but as a means to goad a mistrial in a case he thought he would lose (Doc. 36, p. 48-52). ***State v. Barton***, 718-719. In effect, these three reasonable Missouri Supreme Court dissenters would have held that the underlying Missouri Supreme Court majority opinion 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)(2).

Though not granted an evidentiary hearing by the District Court, Mr. Barton was still able to muster additional circumstantial evidence about this prosecutor's history of malintent. In his suggestions to the District Court, Mr. Barton drew attention to ***Taylor v. State***, 262 S.W.3d 231, 242, fn. 5 (Mo.banc 2008) and ***Tisius v. State***, 183 S.W.3d 207, 211 (Mo.banc 2006)[3] each involving the setting aside of a defendant's sentence because of the same prosecutor's misconduct in not disclosing benefits provided to prosecution witnesses in return for testimony.[4]

Respondents are certainly correct in observing that all of this evidence did not sway the District Court. However, the question here is whether reasonable jurists could disagree. Clearly, that burden has been met.

7. Respondents' efforts to distinguish the holdings by other Circuits are unavailing

[3] As the Missouri Supreme Court noted in its footnote in ***Taylor***, the misconduct by the prosecutor in ***Tisius*** precipitated the remand for the new penalty phase, and it was then the new penalty phase which was extensively discussed in the 2006 decision regarding ***Tisius***.

[4] It should be noted, in passing, that the District Court questioned the propriety of considering any evidence advanced in a Traverse using the logic, normally applied in appellate proceedings, that arguments in a reply brief, which were not included in an initial appellate brief, should be disregarded (Doc. 59, p. 40, fn. 9). The District Court does not cite, and undersigned counsel has not found, authority that this appellate rule of procedure applies to District Court habeas proceedings. But even if the rule could be invoked, it does not apply here in that Mr. Barton made his points in his initial suggestions and in his traverse (Doc. 36, p. 50; Doc. 56, p. 47).

Respondents concede, as they must, that the Second, Sixth and Seventh Circuits would find debatability, and would therefore grant a certificate of appealability, for an issue presented to them which had given rise to a state court dissent (Brief in Opposition, p. 16, 22-24). However, Respondents insist that those other Circuit cases should be found distinguishable since the debate between the majority and dissenting opinions in those cases was over the merits of the Constitutional claim raised; on the other hand, according to Respondents, as to Mr. Barton's double jeopardy claim, the dissenters supposedly "did not reach the merits" and implicitly found that the evidence before the Court "did not prove Barton's claim" (Brief in Opposition, p. 8, 13, 16, 22-23). Respondents misapprehend the applicable law and a mischaracterize the words of the Missouri Supreme Court Dissenters.

As the Missouri Supreme Court dissenters observed, thanks to Justice Powell's concurrence in ***Oregon v. Kennedy***, it has long been understood that part and parcel of the right to be free from double jeopardy is the right to an opportunity to present "objective facts" which establish that a prosecutor, through his misconduct, was trying to abort a trial which was not going well for him, and that as a consequence a retrial would violate the constitutional right. ***State v. Barton***, 718-719 ***Oregon v. Kennedy***, 456 U.S. 667, 679-680 (1982). As the Missouri Supreme Court dissenters correctly put the matter, this is an application of the constitutional protections "in their most conservative form". ***State v. Barton***, supra. Other Courts have similarly confirmed that the right to be free from double jeopardy necessarily includes the right to demonstrate violation of the right. ***United States v. Oseni***, 996 F.2d 186, 189 (7th Cir. 1993); ***United States v. Cornelius***, 623 F.3d 486, 497 (7th Cir. 2010); ***People v. August***, 375 P.3d 140, 146-148 (Colo.App. 2016). Thus the debate in the Missouri Supreme Court was over the merits of Barton's constitutional claim. And opposite of Respondents' fact-based contention, the

Missouri Supreme Court dissenters found "clear-cut examples of prosecutorial misconduct", but held off from a final decision upon the matter for a constitutionally requisite, full hearing. ***State v. Barton***, 717, 719-720.

8. Mr. Barton has asked, not for a *per se* rule, but only for the certificate of appealability to which he is entitled under the law and the facts of his case

Respondents accuse Mr. Barton of advancing a "theory" that "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" (Brief in Opposition, p. 13). Respondents go on that such a *per se* rule "is not required by the plain text of the AEDPA" and would "dramatically slow" resolution of post-conviction cases (Brief in Opposition, p. 13-14).

Never once has Mr. Barton asked that a COA be granted "for any reason". Instead, Mr. Barton has shown that he is entitled, by the "plain text" of the law, to grant of a COA because his double jeopardy claim is debatable by jurists of reason, particularly three Judges of the Missouri Supreme Court and one Justice of the Eighth Circuit, and that amounts to "a substantial showing of denial of a constitutional right" (Petition, p. 15-21). 28 U.S.C.A. § 2253(c)(2) and (3); ***Buck v. Davis***, supra. Mr. Barton has gone on to show that the Federal Courts in most of the rest of the country, via rule or case holding, have agreed that debatability is properly shown in the manners employed by Mr. Barton (Petition, p. 20-22). Since most of the rest of the country already follows these rules, bringing the Eighth Circuit into line as to the unique sorts of cases like Mr. Barton's should not create the sort of drama or slowing about which Respondents fret.

9. This Court has never decided the question raised by Mr. Barton

Respondents add that, in ***Taylor v. Bowersox***, 13A857, this Court did not grant certiorari in a case wherein, similar to here, there was a three-judge-dissent in the Missouri Supreme Court over the constitutional issue and two Eighth Circuit Justices would have granted the certificate

(Brief in Opposition, p. 13, 25). Unfortunately, Respondents have chosen to not clarify that the points raised by Mr. Barton in this case were not raised in ***Taylor***. And, because Respondents never mention ***Buck v. Davis***, supra, they fail to note that the denial of certiorari in ***Taylor*** predated ***Buck*** by three years.

REPLY ARGUMENT-QUESTION TWO

1. 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**.**

2. Summary of Mr. Barton's arguments with respect to question two

Mr. Barton's question two urges that a certificate of appealability should issue since jurists of reason would find debatable the District Court's dismissal, as untimely, of Barton's amended habeas petition, and particularly dismissal of two new grounds raised therein (Petition, p. 22-30). Mr. Barton noted that the District Court engaged a novel reading of this Court decision in ***Pace v. DuGuglielmo***, 544 U.S. 408 (2005) to theorize that Mr. Barton's state court petition seeking a finding of abandonment of counsel was not properly filed because the petition was not sustained on the merits, and therefore did not toll the running of the Federal habeas limitations period (Petition, p. 27). Mr. Barton first noted that the holding in ***Pace*** did not accommodate the broad reading given it by the District Court, and no other Court had so

interpreted ***Pace*** (Petition, p. 27). Mr. Barton further countered that the District Court's one-of-a-kind ruling should, at the very least, be found debatable in that the ruling runs contrary to similar rulings on the matter by the Eighth Circuit itself (Petition, p. 28-29). ***Streu v. Dormire***, 57 F.3d 960, 963-965 (8th Cir. 2009) and ***Bishop v. Dormire***, 526 F.3d 382, 384 (8th Cir. 2008). Mr. Barton also observed that debatability of the matter was demonstrated in that one Eighth Circuit Justice would grant relief to Mr. Barton on the subject; while ignoring the vote of one Justice was consistent with Eighth Circuit past practice, 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 (Petition, p. 29-30). *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)*.

3. Contrary to Respondents' claim, Missouri law was settled only after Mr. Barton's properly filed abandonment of counsel petition was decided

Respondents claim that, when Mr. Barton brought his Missouri state court claim that he had been abandoned by state post-conviction counsel, he ignored "well-established" state court precedent to supposed effect that abandonment could not include the mental-illness-induced failures by state post-conviction counsel which Barton was advancing (Brief in Opposition, p. 29). To the contrary, at the time that Mr. Barton's request for finding of abandonment of counsel was filed, Missouri Courts had regularly allowed that "(t)he precise circumstances, in which a motion court may find abandonment, are not fixed." ***Crenshaw v. State***, 266 S.W.3d 257, 259 (Mo.banc 2008); ***Kreidler v. State***, 417 S.W.3d 870, 872 (Mo.App.S.D. 2013). In deciding Mr. Barton's abandonment of counsel petition on the merits, the Missouri Supreme Court acknowledged this open question of law, and then ultimately decided the matter, albeit adversely

to Mr. Barton's position. ***Barton v. State***, 486 S.W.3d 332, 337-338, (Mo.banc 2016). The Missouri Supreme Court never intimated that Mr. Barton's petition had somehow been improperly filed; to the contrary, by deciding the matter on the merits, the Court unequivocally confirmed the propriety of Barton's filing.

Respondents go on that the District Court only gave "deference" to the Missouri Supreme Court's decision in deciding as it did, and thus no debate can arise in that regard (Brief in Opposition, p. 26-27, 29-30). In truth, in finding that Mr. Barton's abandonment petition was not properly filed, the District Court ignored that the merits finding by the Missouri Supreme Court was contrary to that conclusion. Moreover, as Mr. Barton fully explained in his Petition, the District Court plowed totally new ground by expanding upon the holding in ***Pace v. DuGuglielmo*** in ways not contemplated in that holding, and never done by any other court (Petition, p. 27-28).

Respondents claim that, if Mr. Barton was granted a COA in his case, there would be created "a de facto extension mechanism" for any future motion filed "under the auspices of abandonment" (Brief in Opposition, p. 30). By so arguing, Respondents ignore that, though the limits of Missouri law on abandonment of counsel were "not fixed" prior to filing of Mr. Barton's petition, the decision made in Mr. Barton's case has finally resolved the matter, and so there is no possibility for Respondents' concerns about the future to come about.

4. There is a conflict between the District Court decision and Eighth Circuit precedent, which District Court acknowledged, and which shows debatability of the issue justifying a COA grant

Respondents contend that there is no conflict between the District Court's holding and Eighth Circuit precedent because, in the prior Eighth Circuit cases, the question of whether those petitions were properly filed was not disputed (Brief in Opposition, p. 14, 31). What Respondents fail to grasp is that, in those prior Eighth Circuit cases, no controversy arose about

the propriety of the state court filing because the Missouri Courts accepted the filings as proper and decided the matters on the merits, and thus there was no question which could have been raised about the propriety of the filings. ***Streu v. Dormire***, 57 F.3d 960, 963-965 (8th Cir. 2009) and ***Bishop v. Dormire***, 526 F.3d 382, 384 (8th Cir. 2008).

Respondents further contend that the District Court did not acknowledge a conflict with Eighth Circuit precedent, but rather questioned whether that precedent "remained good law in light of subsequent Missouri cases" (Brief in Opposition, p. 31, fn 4). Respondents draw a distinction without a difference in that the District Court clearly acknowledged his conflict/ debate with Eighth Circuit precedent, and cited particular holdings by the Missouri courts to purport that the contrary Eighth Circuit precedents were decided wrongly (Petition Appendix A, p. 13). The District Court explanation also demonstrated the error of the District Court's way. The District Court noted that, in 2013, the Missouri Supreme Court clarified that Motions to Reopen, of the sort which were allowed to toll habeas proceedings in the earlier Eighth Circuit precedent cases, should no longer be entertained as proper state post-conviction petitions (Petition Appendix A, p. 13). ***Eastburn v. State***, 400 S.W.3d 770, 774-775 (Mo.banc 2013). Employing the same logic he applied to Mr. Barton's abandonment of counsel action, the District Court postulated that, since motions to reopen were disallowed by the Missouri Supreme Court in 2013, that later decision should harken back to previous proceedings and justify an after-the-fact conclusion that the motions to reopen in those earlier cases, including the Eighth Circuit precedent cases, should now be considered improperly filed, and thus should not have been allowed to toll the Federal habeas timeclock (Petition Appendix A, p. 13). In this way as well, the District Court ignores the plain fact that, in the previous motion to reopen cases, the Missouri

Courts deemed the motions properly filed and disposed of them on the merits, and only held that no such motions should be advanced in the future. ***Eastburn v. State***, supra.

Respondents go on that this Court should not intervene merely to settle an intra-Eighth-circuit dispute Circuit (Brief in Opposition, p. 14-15). This argument misses the point made by Mr. Barton that the conflict is important, not in and of itself, but because it demonstrates the debatability of the matter.

6. Per the terms of ***Buck***, now is not the time for a merits determination

At to this question, Respondents again wish to engage a one-sided ultimate merits argument, this time as to the underlying grounds 13 and 14 of Mr. Barton's amended petition (Brief in Opposition, p. 33-35). In his suggestions and traverse to the District Court, Mr. Barton has shown his ability to successfully engage on these subjects (Doc. 36, p. 112-127; Doc. 56, p. 138-157). Not only do the fifteen pages allotted here not permit verbatim repetition of all of that. More importantly, this Court has made clear what Respondents refuse to recognize, that the request for certificate of appealability is not the place for a merits analysis-rather it is time to do what Mr. Barton has done, to show debatability of the issues among jurists of reason. ***Buck v. Davis***, supra.

CONCLUSION

WHEREFORE, in light of the foregoing, and in light of the premises set for in Mr. Barton's petition to this Court, 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

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CERTIFICATE OF SERVICE AND COMPLIANCE

It is hereby certified

- that required privacy act redactions have been made to the foregoing,
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- that, copies of the foregoing were e-mailed and postal mailed to the following on this 11th day of November, 2019

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