CAPITAL CASE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WALTER BARTON

Petitioner

v.

WILLIAM STANGE

Respondent

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

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

WALTER BARTON,	)	
	)	
Respondent,	)	
	)	
v.	)	Case No. 4:20-CV-08001-BCW
	)	
WARDEN WILLIAM STANGE,	)	
	)	
Respondent.	)	

ORDER GRANTING STAY OF EXECUTION

After the development of a substantial record, Petitioner Walter Barton seeks habeas corpus relief under 28 U.S.C. § 2254 (Doc. #1) and has also filed a Motion for Stay of Execution (Doc. #3). The Court, being duly advised of the premises, grants Petitioner's motion for stay of execution pursuant to 28 U.S.C. § 2251(a)(1).

BACKGROUND

In March 2006, after a tumultuous and lengthy trial process involving two venue changes, two mistrials, and a trial conviction affirmed by the Missouri Supreme Court and subsequently vacated by the trial court on post conviction review, this case went to trial for a fifth time and resulted in Petitioner's conviction by a jury for first-degree murder and a death sentence.

On January 15, 2008, the Missouri Supreme Court affirmed Petitioner's conviction and sentence on direct appeal by a slim 4-3 margin. State v. Barton, 240 S.W.3d 693, 711 (Mo. 2008). The United States Supreme Court denied Barton's petition for writ of certiorari in October 2008, thus completing the direct appeal process. Barton v. Missouri, 555 U.S. 842 (2008).

Barton subsequently filed another PCR motion under Missouri Rule of Criminal Procedure 29.15. The PCR court denied relief in February 2013, and the Missouri Supreme Court

unanimously affirmed this decision and issued its mandate on June 24, 2014. (Doc. #1-13) (citing Barton v. State, 432 S.W.3d 741, 764 (Mo. 2014)).

On June 9, 2015, Barton filed a petition for habeas corpus relief in this Court. Walter Barton v. Cindy Griffith, 4:14-CV-08001-GAF, Doc. #1. The same day, counsel for Barton filed an additional state court challenge in Cass County, Missouri, asserting that Barton's previous attorneys had abandoned him during a portion of the previous PCR proceeding. The United States District Court stayed consideration of Barton's § 2254 petition until the abandonment issue was resolved. The Circuit Court of Cass County denied Barton's abandonment claim, the Missouri Supreme Court affirmed this denial on May 24, 2016. The District Court thus lifted the stay of the § 2254 proceedings, and Barton filed an amended petition on May 24, 2016, adding three additional claims.

The district court denied § 2254 relief on each of the grounds raised. Walter Barton v. Cindy Griffith, 4:14-CV-08001-GAF, Doc. #59. The district court also declined to issue a certificate of appealability.

On December 21, 2018, the Court of Appeals for the Eighth Circuit declined to issue a certificate of appealability with respect to the order denying § 2254 relief and dismissed Barton's appeal. Walter Barton v. Cindy Griffith, 4:14-CV-08001-GAF, Doc. #70). The Eighth Circuit issued its mandate on March 29, 2019. Barton's subsequent petition for writ of certiorari to the U.S. Supreme Court was denied on November 18, 2019.

On November 19, 2019, the State filed a request with the Missouri Supreme Court that an execution date for Petitioner be set, which the Missouri Supreme Court ultimately granted on February 18, 2020, setting the execution date for May 19, 2020.

Subsequent to the State's request for an execution date, Petitioner filed a petition for writ of habeas corpus relief pursuant to Mo. Rev. Stat. § 532.430(3) and (4), Missouri Supreme Court Rule 91.010, and Article I, §§ 10 and 21 of the Missouri Constitution. (Doc. #1-5). The habeas petition before the Missouri Supreme Court asserted the following grounds for relief: (1) Petitioner's actual innocence, relying on the conclusions of a blood spatter expert and the prior convictions of a State witness as clear and convincing evidence undermining confidence in the correctness of the judgment and sentence; and (2) Petitioner's lack of mental competence for execution. (Doc. #1-5).

On April 27, 2020, the Missouri Supreme Court denied Petitioner's February 3, 2020 petition for habeas corpus relief. (Doc. #1-2). The Missouri Supreme Court also denied Petitioner's motion to stay execution.

One week after the Missouri Supreme Court's decision denying Petitioner's habeas request, on May 4, 2020, Petitioner filed the instant petition for habeas corpus relief in this Court. (Doc. #1). Also on May 4, 2020, Petitioner filed a motion for leave to proceed in forma pauperis and for appointment of counsel "pursuant to 28 U.S.C. § 2254 and 18 U.S.C. § 3599(a)(2)." In addition, Petitioner filed a motion for stay of execution on May 4, 2020. (Doc. #3).

On May 5, 2020, the Court granted Petitioner's motion for leave to proceed in forma pauperis, and for appointment of counsel. (Doc. #4). On the same day, the Court issued a show cause order directing the State to answer or otherwise respond to the habeas petition in this Court (Doc. #1) on or before May 12, 2020. The State filed its opposition suggestions for both the habeas petition and the motion for stay of execution on May 6, 2020. Petitioner filed the traverse and reply to the motion for stay on May 11, 2020. (Docs. #10, #11). Thus, Petitioners habeas petition and motion for stay of execution are fully briefed as of Monday, May 11, 2020.

The petition for habeas relief seeks this Court's review of the Missouri Supreme Courts denial decision pursuant to 28 U.S.C. § 2254(d)(1) and (2). As referenced above, the issues presented to and rejected by the Missouri Supreme Court are these: (1) Petitioner's asserted incompetency for execution; and (2) Petitioner's asserted actual innocence based on (a) the testimony of a blood spatter expert who says he would have contradicted the testimony of the State's blood spatter expert had counsel for Petitioner called him to testify at trial and (b) the discovery of additional prior convictions for the State's witness, jailhouse informant Katherine Allen, who testified at trial that Petitioner had threatened to kill her "like he did that old lady." (Doc. #1-2 at 4).

This Court must determine whether the rulings of the Missouri Supreme Court on these issues are contrary to or involve unreasonable application of United States Supreme Court precedent or are the result of an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1)-2).

ANALYSIS

The motion for stay of execution argues the Court "is empowered to issue a stay of the execution scheduled for May 19, 2020," based on 28 U.S.C. § 2251(a)(1). Petitioner argues this statute applies where a § 2254 petition is pending and has been brought in a timely fashion, and the scheduled execution does not provide adequate time for the Court to consider the merits of the petition for habeas relief. (Doc. #3 at 3). Petitioner also seeks stay for non-statutory reasons attributable to COVID-19.

Respondent counters Petitioner is not entitled to a stay of execution because the habeas petition contains two claims which both fail as a matter of law. Respondent argues in order to demonstrate the need for a stay, Petitioner must demonstrate all the requirements for injunctive

relief, including a probability of success on the merits. Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1980) (setting forth factors for injunctive relief as threat of irreparable harm, the balance of the harms, probability of success on the merits, and the public interest).

"Federal courts cannot enjoin state-court proceedings unless the intervention is authorized expressly by federal statute or falls under one of two other exceptions to the Anti-Injunction Act. McFarland v. Scott, 512 U.S. 849, 857 (1994). "The federal habeas corpus statute grants any federal judge 'before whom a habeas corpus proceeding is pending' power to stay a state-court action 'for any matter involved in the habeas corpus proceeding.'" Id. (quoting 28 U.S.C. § 2251).

> A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

28 U.S.C. § 2251(a)(1).

Section 2251 "[b]y no means grants capital defendants a right to an automatic stay of execution. Section 2251 does not mandate the entry of a stay, but dedicates the exercise of stay jurisdiction to the sound discretion of a federal court." McFarland, 512 U.S. at 858.

"[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006) (citing Nelson v. Campbell, 541 U.S. 637 (2004)). "At the same time, criminal defendants are entitled by federal law to challenge their conviction and sentence in habeas corpus proceedings." McFarland, 512 U.S. at 859.

Respondent relies on Hill to argue Petitioner "carries the burden of persuasion" and has not and cannot "satisfy all the requirements for a stay, including a showing of significant possibility

of success on the merits." Hill, 126 S. Ct. at 2104. In the context of a 42 U.S.C. § 1983 challenge to the State's execution procedure, the Supreme Court stated, "[l]ike other stay applicants, inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." Id. at 2104 (citing Barefoot v. Estelle, 463 U.S. 880, 895-96 (1983); Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)).

In this case, briefing on the petition for habeas corpus relief and motion for stay of execution was complete on Monday, May 11, 2020. The petition for habeas corpus relief, filed in this Court on May 4, 2020, within a week after the Missouri Supreme Court's ruling on April 27, 2020, requires this Court to determine whether the rulings of the Missouri Supreme Court on these issues are contrary to or involve unreasonable application of United States Supreme Court precedent or are the result of an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1)-2).

This evaluation underpins whether Petitioner has demonstrated the need for a stay in equity under § 2251(a)(1) because the habeas corpus petition is pending in this Court, and in order to determine whether Petitioner has demonstrated that a stay of execution is warranted, the Court must assess whether, among other factors, Petitioner is likely to succeed on the merits of the habeas petition.

For these reasons, the Court requires more time to consider the merits of the claims beyond the 15 days available in this case between the filing of the habeas petition on May 4, 2020, and the scheduled execution on May 19, 2020. Lonchar v. Thomas, 517 U.S. 314, 320 (1996) ("[i]f if the district court cannot dismiss the petition on its merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot. That is, if the

district court lacks authority to directly dispose of the petition on the merits, it would abuse its discretion by attempting to achieve the same result indirectly by denying the stay."); Dobbert v. Strickland, 670 F.2d 938 (11th Cir. 1982) ("Where the merits cannot be satisfactorily considered prior to execution of a scheduled death sentence . . . a stay should be granted.").

Section 2251(a)(1) states a federal court with a pending habeas petition may stay state proceedings. The parties did not identify, and the Court in its research did not locate, any Eighth Circuit interpretation of the specific limits of this section. The record suggests Petitioner acted quickly to file a potentially meritorious petition for writ before this Court after the Missouri Supreme Court issued its ruling, so no filing delay militates against a stay. Notably, the same constitutional claims before this Court were pending consideration before the Missouri Supreme Court from early February 2020 until April 27, 2020. At a minimum, equity requires this Court's meaningful consideration the petition for habeas relief, which the Court anticipates would require no more than 30 days from today's date to complete. Thus, the Court grants Petitioner's Motion to Stay Execution pursuant to its authority under § 2251(a)(1) and denies the motion to stay on the other grounds raised. Accordingly, it is hereby

ORDERED Petitioners Motion for Stay of Execution (Doc. #3) is GRANTED under § 2551(a)(1).

IT IS SO ORDERED.

DATE: May 15, 2020

/s/ Brian C. Wimes
JUDGE BRIAN C. WIMES
UNITED STATES DISTRICT COURT

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 20-1985

Walter Barton

Petitioner - Appellee

v.

Warden William Stange

Respondent - Appellant

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: May 15, 2020
Filed: May 17, 2020

Before LOKEN, GRUENDER, and GRASZ, Circuit Judges.

PER CURIAM.

After two mistrials, a trial and conviction that was reversed and remanded by the Missouri Supreme Court, and a second trial and conviction that was later vacated, Walter Barton was convicted after his fifth trial for murder in the first degree. *State v. Barton*, 240 S.W.3d 693, 696 (Mo. 2007). His conviction was affirmed by the Missouri Supreme Court, *id.* at 711, and became final in 2008, *see Barton v. Missouri*, 555 U.S. 842 (2008) (mem.).

Barton subsequently filed a motion for state post-conviction relief, and the Missouri Supreme Court affirmed the denial of his motion. *Barton v. State*, 432 S.W.3d 741, 764 (Mo. 2014). Barton filed another motion for relief based on the performance of his post-conviction counsel. *Barton v. State*, 486 S.W.3d 332, 335 (Mo. 2016). The Missouri Supreme Court again affirmed the denial of relief. *Id*. at 339. Barton then turned to federal court seeking *habeas* relief, the denial of which became final last year. *See Barton v. Stange*, 589 U.S. ---, 140 S. Ct. 525 (2019) (mem.).

In February 2020, Barton's execution was set for May 19, 2020. Barton again pursued state post-conviction relief, seeking a writ of *habeas corpus* from the Missouri Supreme Court based on a claim that he is not competent for execution and an actual innocence claim. *State ex rel. Barton v. Stange*, No. SC98343, slip op. at 1-2 (Mo. Apr. 27, 2020). The Missouri Supreme Court determined that Barton was competent based on the standards outlined by the United States Supreme Court. *See Madison v. Alabama*, 586 U.S. ---, 139 S. Ct. 718, 722 (2019). It also determined that Barton's evidence of his innocence did "not show actual innocence by a preponderance of the evidence as required for a gateway claim of actual innocence, nor [did] it rise to the level of clear and convincing evidence required for a freestanding claim of actual innocence." *Barton*, slip op. at 1-2.

Following the Missouri Supreme Court's decision, Barton filed another petition for *habeas* relief in the United States District Court for the Western District of Missouri under 28 U.S.C. § 2254 on May 4, 2020. He concurrently filed a motion for stay of execution. The district court received all of the relevant briefing for the *habeas* petition and the motion for stay of execution on May 11, 2020. On May 15, the district court entered an order granting the motion for stay of execution.

The State appeals, urging us to vacate the district court's stay of execution. "We generally review a district court's decision to stay execution for an abuse of discretion." *Nooner v. Norris*, 491 F.3d 804, 807 (8th Cir. 2007).

"[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Lee v. Hutchinson*, 854 F.3d 978, 980-81 (8th Cir. 2017) (per curiam). "To prevail, inmates must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Id.* at 981 (internal quotation marks omitted).

Here, the district court entered a stay pursuant to 28 U.S.C. § 2251(a)(1) on the basis that it "require[d] more time to consider the merits of the claims." The district court relied on the Supreme Court's ruling in *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996), where the Supreme Court explained that a district court should issue a stay if it cannot dismiss a *habeas* petition on the merits before the scheduled execution, as well as *Dobbert v. Strickland*, 670 F.2d 938, 940 (11th Cir. 1982) (per curiam), in which the Eleventh Circuit stayed an execution "to consider properly the merits of the issues raised."

We question the applicability of the authorities the district court relied on to enter a stay solely on the basis of time constraints that purportedly prevented even a preliminary consideration of the merits of the two issues Barton has raised to determine whether he has a significant likelihood of succeeding on either of them. *See Lonchar*, 517 U.S. at 316-17 (noting that the *habeas* petition was filed on the day of the scheduled execution); *Dobbert*, 670 F.2d at 939-40 (staying an execution where the *habeas* petition raised thirteen separate issues, one of which had "never been decided by any federal appellate court" before, and the panel had not received the "appeal papers" until roughly twenty-four hours before the scheduled execution).

This procedural point, however, need not be resolved now. Because the district court found itself without time to consider the merits at all, we have carefully reviewed them ourselves to determine if a stay is warranted. *See, e.g., Alabama v. Evans*, 461 U.S. 230, 231, 233-34 (1983) (per curiam) (concluding a petition for *habeas* was "without merit" and vacating a stay of execution that the district court entered because it concluded "'the time available does not permit this Court to make

a meaningful review or study'"). We find the merits "readily apparent" and therefore vacate the stay and remand the case with instructions to dismiss the petition. *See Hauser ex rel. Crawford v. Moore* 223 F.3d 1316, 1323 (11th Cir. 2000) (per curiam).

When, as here, an application for a writ of *habeas* corpus has been adjudicated on the merits in state court, we may grant a writ only where the adjudication:

> (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.

28 U.S.C. § 2254(d); *Colvin v. Taylor*, 324 F.3d 583, 586-87 (8th Cir. 2003).

"Under § 2254(d)(1)'s unreasonable application clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Cole v. Roper*, 783 F.3d 707, 710 (8th Cir. 2015) (internal quotation marks omitted) (quoting *Williams v. Taylor*, 529 U.S. 362, 411 (2000)). Instead, the application must also be unreasonable. *Id.* Stated another way, a state court's decision may be incorrect yet not unreasonable, and we grant relief only if it is both. *Id.*

Barton first argues that the Missouri Supreme Court's decision as to his incompetence claim "relies upon interpretations of the law which are contrary to United States Supreme Court precedent upon the matter and an unreasonable determination of the facts presented." The Eighth Amendment "prohibits the execution of a prisoner whose mental illness prevents him from rationally understanding why the State seeks to impose that punishment." *Madison*, 139 S. Ct. at 722 (internal quotation marks and brackets omitted) (citing *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007)). "The mental state requisite for competence

to suffer capital punishment neither presumes nor requires a person who would be considered 'normal,' or even 'rational,' in a layperson's understanding of those terms." *Panetti*, 551 U.S. at 959.

Noting these standards, the Missouri Supreme Court observed that Barton's own expert concluded in her report that Barton "demonstrated a rudimentary factual understanding of the punishment he is about to receive and the reasons for it." It also noted her conclusion that Barton "demonstrated a simplistic, but rational understanding of the punishment he is about to receive and the reasons for it." Finally, it noted her conclusion that Barton "did not demonstrate any delusional thinking or loss of contact with reality and no perceptual disturbances were noted."

Based on Barton's own expert's report, we cannot say that the Missouri Supreme Court unreasonably applied the standards the United States Supreme Court has established, nor can we say that the Missouri Supreme Court unreasonably determined the facts. The expert report demonstrates that Barton rationally understands why the State is imposing the death penalty. *See Madison*, 139 S. Ct. at 722. Barton's expert's conclusion that he was not competent under standards that are not controlling cannot change the clear dictates of the United States Supreme Court. Nor do the various district court and court of appeals decisions Barton cites show that the Missouri Supreme Court unreasonably applied clearly established federal law *as determined by the United States Supreme Court*. *See* § 2254(d)(1). Barton thus cannot demonstrate a likelihood of success on the merits on his competency claim.

Barton also asserts actual innocence as a gateway claim to raise "otherwise defaulted" claims of prosecutorial misconduct related to the testimony of Katherine Allen, a witness at Barton's fifth trial. He identifies four bases for his actual innocence claim: (1) the opinion of a blood spatter expert that would rebut the testimony of the State's blood spatter expert at Barton's fifth trial; (2) seventeen prior convictions Allen had at the time of the fifth trial that were not presented to the jury; (3) an agreement between the State and Allen to dismiss charges against her in

exchange for her testimony; and (4) Allen's 2016 federal conviction for identity theft and mail fraud.

"A habeas petitioner who raises a gateway claim of actual innocence must satisfy a two-part test in order to obtain review of otherwise procedurally barred claims." *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001). "First, the petitioner's allegations of constitutional error must be supported with new reliable evidence not available at trial." *Id.* "Evidence is only 'new' if it was 'not available at trial and could not have been discovered earlier through the exercise of due diligence.'" *Osborne v. Purkett*, 411 F.3d 911, 920 (8th Cir. 2005) (quoting *Amrine*, 238 F.3d at 1029). "Second, the petitioner must establish 'that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.'" *Amrine*, 238 F.3d at 1029 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Barton cannot satisfy this two-part test.

First, Barton's evidence regarding Allen's seventeen prior convictions and her agreement with the State is not "new." This evidence was "available at trial," *Osborne*, 411 F.3d at 920, because, as he notes, his conviction after his fourth trial had been set aside on the basis of this very evidence. Thus, this evidence cannot support his claim of actual innocence. *See Amrine*, 238 F.3d at 1029 (noting the district court "did not err by deciding to focus" on only the "new evidence" presented in support of a gateway actual innocence claim).

Second, Barton's evidence regarding his blood spatter expert's opinion is also not "new." As Barton notes, his counsel for the fifth trial met and spoke with this expert before trial. At that time, his counsel showed him "a number of things from Barton's file" and, after receiving the expert's preliminary input, "decided . . . as a matter of strategy . . . not [to] call a blood spatter expert" for fear that this expert's opinion would "be inconsistent with Barton's story regarding how the blood got onto his clothing." *Barton*, 432 S.W.3d at 755. His full opinion, which Barton has since obtained, thus could "have been discovered earlier through the exercise of due

diligence." *See Osborne*, 411 F.3d at 920. This evidence, then, is not "new" and cannot support a claim of actual innocence. *See Amrine*, 238 F.3d at 1029.

Third, Barton's evidence regarding Allen's 2016 conviction likely is "new," but it is the sole piece of evidence in this regard and cannot support the conclusion "that it is more likely than not that no reasonable juror would have convicted [Barton] in light of" it. *See id.* At the fifth trial, Barton's counsel crossexamined Allen and established that she "had been convicted thirteen times for forgery, fraud, bad checks, and the like." *Barton*, 240 S.W.3d at 706. Also, "in closing argument, defense counsel drove home the point that . . . Allen's criminal acts were acts of dishonesty," explaining how Allen was "'a woman who her entire life . . . has lied'" and was a "'scheming, conniving sort of person.'" *Id.* We find it "highly unlikely" that this "additional piece[] of impeachment information . . . aimed at a witness whose character was already tarred" would have been sufficient to change the result, *see United States v. Rosner*, 516 F.2d 269, 278 (2d Cir. 1975), so it is not "more likely than not that no reasonable juror would have convicted" Barton had it heard about this one additional conviction, *see Amrine*, 238 F.3d at 1029.

For the foregoing reasons, we vacate the stay of execution and remand with instructions to dismiss Barton's petition because we see no possibility of success on the merits on either of Barton's claims. *Cf. Middleton v. Roper*, 759 F.3d 867, 868 (8th Cir. 2014) (per curiam) (concluding the district court abused its discretion in granting a stay of execution because the petitioner had "not shown a substantial likelihood of success on the merits of his federal habeas petition"); *Green v. Thaler*, 699 F.3d 404, 408 (5th Cir. 2012) (vacating a stay of execution and remanding with instructions to dismiss the *habeas* petition).

APPENDIX C

SUPREME COURT OF MISSOURI

en banc

STATE EX REL. WALTER BARTON Relator, v. WILLIAM STANGE Respondent.	)	No. SC98343

ORIGINAL PROCEEDING IN HABEAS CORPUS

PER CURIAM

On February 18, 2020, this Court issued its order setting Walter Barton's execution date for May 19, 2020.[1] Barton seeks a writ of habeas corpus from this Court, arguing he is actually innocent. His evidence, however, does not show actual innocence but is simply additional evidence that might have been used to impeach a jailhouse informant and provide competing expert testimony to explain the presence of blood on his clothes. While this might have been helpful, it does not show actual innocence by a preponderance of the evidence as required for a gateway claim of actual innocence, nor does it rise to the level

[1] The factual background underlying Barton's first-degree murder conviction can be found in this Court's opinion affirming his death sentence. *State v. Barton*, 240 S.W.3d 693 (Mo. banc 2007).

of clear and convincing evidence required for a freestanding claim of actual innocence. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546-47 (Mo. banc 2003). Accordingly, his claims of actual innocence do not entitle him to relief.

Barton further claims he is not competent for execution because a traumatic brain injury gave him major neurocognitive disorder of sufficient severity that he meets the standard for incompetence set by the United States Supreme Court in *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007). He argues his execution would violate the Eighth and Fourteenth amendments of the United States Constitution, article I, §§ 10 and 21 of the Missouri Constitution and § 552.060.[2] "A petition for a writ of habeas corpus is a proper means to raise a claim of incompetency." *State ex rel. Cole v. Griffith*, 460 S.W.3d 349, 356 (Mo. banc 2015). This Court denies the petition because Barton has not demonstrated the "substantial threshold showing of insanity" required by *Panetti* and *Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (Powell, J., concurring) nor has he demonstrated he is incompetent under § 552.060.[3]

[2] All statutory references are to RSMo 2016, unless otherwise provided.
[3] On March 17, 2020, Barton filed a motion for stay of execution with this Court. That motion is contemporaneously overruled.

Analysis

A. Claim of Actual Innocence[4]

Mr. Barton claims he presented evidence he is actually innocent of the murder for which he was convicted and sentenced to death. He says this evidence is sufficient to show his innocence by a preponderance of the evidence, which would entitle him to have this Court consider his otherwise defaulted claim that the State failed to reveal certain exculpatory evidence. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). This Court disagrees.

There are two types of evidence of actual innocence on which Barton relies. The first is testimony from a blood spatter expert who he says would have testified that the blood found on Barton's shirt and pants after the murder was not blood spatter evidence as claimed by the State's expert. But Barton made this very claim at trial, arguing the evidence on which the State's expert relied did not support his conclusions. On appeal, this Court stated Barton's attack on the admissibility of the State's expert was frivolous. *Barton,* 240 S.W.3d at 705. Further, Barton's counsel considered hiring the very expert on whose testimony it now relies but decided that it would be more effective to just impeach the State's expert. *Barton v. State,* 432 S.W.3d 741, 755 (Mo. banc 2014).

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[4] Generally the first step in this Court's analysis of a petition for habeas corpus claiming of actual innocence – whether it be a gateway or freestanding claim – would be to consider whether the petitioner alleged new evidence to support the claim that was not available at trial, when combined with the other evidence, would meet the relevant standard for relief. As is evident from the following discussion, Barton does not meet that threshold for habeas relief based on actual innocence.

Now, in support of his claim for habeas relief, Barton argues similar testimony would have made the difference in the outcome of the case, for it shows he was actually innocent. To the contrary, while this testimony might have been useful to counter the testimony of the State's expert, it does not exculpate him or inculpate another. It simply provides competing expert testimony as to the source and nature of the blood on his clothes after the murder. Even if the jury believed this evidence, it would not require the jury to find he was actually innocent. To the contrary, at the time counsel believed the testimony might be inconsistent with Barton's explanation of how the blood got on his clothes. *Id.* at 756. Further, Barton already presented similar evidence in support of his post-conviction motion alleging ineffective assistance, and this Court found counsel was not ineffective in presenting this evidence. *Id.*

Barton also states his actual innocence is shown by his discovery of additional evidence impeaching the testimony of the State's jailhouse informant, Katherine Allen, who said Barton threatened to kill her "like he did that old lady." *Barton,* 240 S.W.3d at 700; *Barton,* 432 S.W.3d at 748.

Barton suggests that, at his fourth trial, his counsel had impeached this witness with six prior convictions, but his conviction later was set aside after the postconviction court found she had 29 prior convictions and certain additional criminal charges had been dismissed in return for her testimony.

Accordingly, the evidence of the full extent of Ms. Allen's prior convictions was known to Barton's counsel before his fifth and final trial. When she again lied and said she had only six prior convictions, defense counsel chose to impeach her with 12 of her

prior convictions for forgery, fraud, bad checks and similar crimes going to lack of truthfulness. He did not mention the other convictions or the charges that had been dismissed, nor was this issue raised in his post-conviction motion. The issue was raised but relief was denied in his federal habeas proceedings. Now Barton argues that, because this Court has not yet had an opportunity to consider this evidence, it should now consider it and hold this evidence in combination with new evidence that she was convicted in 2016 of identity theft and mail fraud, would make the difference and would show his actual innocence.

Taking Barton's claims about Ms. Allen's convictions as true, such evidence does not support a finding of actual innocence. While counsel might have discredited Ms. Allen even more at the trial, the impeachment he did undertake demonstrated for the jury that she had been convicted of multiple crimes involving untruthfulness. That she had been untruthful on yet more occasions is still merely impeachment evidence. Unlike in *Amrine,* in which the witnesses' testimony was recanted, Ms. Allen has not recanted her testimony, and the offered evidence does not require a finding she lied at Barton's trial. It remains an issue of credibility for the jury. Further, the opinion of this Court on direct appeal delineates the substantial additional evidence supporting the conviction, including Barton's presence in the victim's trailer and answering her telephone near the time of the murder, a check the victim made out to him, his washing blood off his hands prior to the victim's body being found, his inconsistent stories, his behavior at the time of the murder, and the undisputed presence of blood on his clothes, whether from spatter or otherwise. The

additional impeachment evidence does not show actual innocence by a preponderance of the evidence.

Because the evidence is insufficient to make a gateway claim of actual innocence by a preponderance of the evidence, it necessarily is also insufficient to support a freestanding claim of actual innocence, which requires clear and convincing evidence of actual innocence.

B. Claim of Incompetence

"The Eighth Amendment . . . prohibits the execution of a prisoner whose mental illness prevents him from rationally understanding why the State seeks to impose that punishment." *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019) (internal quotations omitted). The prisoner must prove he suffers from a psychotic disorder that makes him either unaware of the reasons for his punishment or such that he has no "rational understanding" of it. *Id.* at 723 (citing *Panetti*, 551 U.S. at 957-60). If the prisoner has a psychological dysfunction that "may have resulted in petitioner's fundamental failure to appreciate the connection between the petitioner's crime and his execution" then he may be incompetent to be executed. *Panetti,* 551 U.S. at 960 (internal quotations omitted.) In *Panetti*, the prisoner alleged he met this standard because he experienced "gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he ha[d] been sentenced." *Id.* Barton similarly must allege and demonstrate a "substantial threshold showing of insanity." *Id.* at 949; *Ford*, 477 U.S. at 426.

In support of his claim he is incompetent to be executed, Barton relies almost exclusively on the "Forensic Evaluation Report" authored by Dr. Patricia Zapf. Dr. Zapf

was hired by Barton's counsel after November 19, 2019, when the State filed its motion to set Barton's execution date. Dr. Zapf reviewed Barton's records and conducted a two-day evaluation of him. Dr. Zapf ultimately concluded: "As a result of his Major Neurocognitive Disorder, Mr. Barton has significant impairments in executive function, problem solving, attention, concentration, working memory, and abstract reasoning, which result in the inability to provide rational assistance to counsel and to engage in consistent, logical, and rational decision making." For these reasons, Dr. Zapf opined that Barton was incompetent under the standard set forth in *Dusky v. United States*, 362 U.S. 402 (1960), and Justice Marshall's plurality opinion in *Ford,* but noted he was competent under Justice Powell's controlling concurring opinion in *Ford.* Neither *Dusky* nor Justice Marshall's plurality opinion however, provide the relevant, controlling standard by which this Court evaluates Barton's incompetency claim.[5]

Dr. Zapf's report supports a finding that Barton is competent to be executed for several reasons. First, Dr. Zapf concluded Barton had a factual understanding of why the State is imposing capital punishment:

---

[5] The issue in *Dusky* was the petitioner's competency to stand trial, not his competency to be executed. 362 U.S. at 402. The relevant standard for competency to stand trial is "whether [defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against [defendant]." *Id.* While that standard is somewhat similar to the standard for competency to be executed, it is clear the standards are different and cannot be used interchangeably. The portion of Justice Marshall's plurality opinion in *Ford* regarding a prisoner's claim of incompetency to be executed garnered the votes of only three other justices. Because it was not a majority opinion, Justice Powell's concurring opinion on the same grounds is controlling because it "offered a more limited holding." *Panetti*, 551 U.S. at 949. In any event, competency is a legal determination that is made by courts, not experts. *State ex rel. Clayton v. Griffith*, 457 S.W.3d 735, 741 (Mo. banc 2015).

> ***Mr. Barton demonstrated a rudimentary factual understanding of the punishment he is about to receive and the reasons for it.*** He was able to describe the reason why he is in prison and elaborate on his place of residence within the prison. He was able to provide information about his conviction, a general description of the criminal act, and basic identifying information about the victim. Mr. Barton was unable to engage in abstract discussions regarding the justness of his conviction, maintaining that he was "railroaded" and reporting that "they're going to execute me if I can't prove my innocence[.]"

Emphasis added.

Second, Dr. Zapf concluded Barton had a "rational understanding"[6] of his punishment, noting, "Mr. Barton demonstrated a simplistic, but rational understanding of the punishment he is about to receive and the reasons for it."

Third, Dr. Zapf explicitly found Barton does not suffer from delusional thinking. Dr. Zapf stated "***he did not demonstrate any delusional thinking*** or loss of contact with reality and no perceptual disturbances were noted." (Emphasis added). In other words, Barton does not suffer from "gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced." *Panetti*, 551 U.S. at 960.

Additionally, Dr. Zapf did not state that Barton had other psychotic disorders that prevented him from forming both an awareness of the State's rationale for executing him and a rational understanding of that rationale, as required by *Panetti*. The DSM-5 provides that traumatic brain injury, like dementia and certain other diseases, can cause

[6] According to Dr. Zapf, "[r]ational understanding is differentiated from factual understanding in terms of the individual's ability to apply factually understood information to the specific instance of his own case."

neurocognitive disorders of a major or minor character. Dr. Zapf argues Barton is incompetent because his brain injury impaired his ability to provide rational assistance to his attorneys and to demonstrate rational decision-making in his own defense. But these conclusions are insufficient to support the determinations required by *Madison*, *Panetti*, and *Ford* unless she found his impairments resulted in an inability to have a rational understanding of the reasons for his punishment and the rationale for it. The mere fact that the prisoner does not believe he deserves the punishment is inadequate. In *Panetti*, the Supreme Court held:

> The mental state requisite for competence to suffer capital punishment ***neither presumes nor requires a person who would be considered 'normal, or even 'rational,'*** in a layperson's understanding of those terms. . . . The beginning of doubt about competence in a case like [Barton]'s is not a misanthropic personality or an amoral character. It is a psychotic disorder.

551 U.S. at 959-60 (emphasis added). While Dr. Zapf opines Barton has a neurocognitive disorder that causes him to lack the ability to provide rational assistance and to demonstrate rational decision-making due to his brain injury, she admits this does not meet the standard set out in *Ford* and she does not say Barton's cognitive dysfunction meets the standard set out in *Panetti.* His mental condition simply does not rise to the extreme level of a psychotic disorder. To the contrary, in response to Barton's petition for a writ of habeas corpus, the State provided Barton's "Complete Mental Health History" dated November 1, 2019. The history provides in pertinent part, "Offender does not appear to have any clinically significant symptoms of a mental illness at this time. Records indicate no requests for mental health services. [Barton] continues to make a good institutional adjustment."

Barton does not and cannot demonstrate a substantial threshold showing of insanity as required by *Panetti* and *Ford*.

In addition to his constitutional challenges, Barton also argues his brain injury leaves him incompetent to be executed under § 552.060.1,[7] which provides:

> No person condemned to death shall be executed if as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out.

Barton's statutory arguments mirror his constitutional ones, and they fail for similar reasons. When addressing § 552.060.1 challenges, this Court has looked to several factors in considering the prisoner's competency. For example, in *Cole*, this Court looked to whether the prisoner can articulate and understand legal issues with his case. 460 S.W.3d at 361. Further, the Court surveyed whether the prisoner understood the underlying facts of his case. *Id.* at 362. Dr. Zapf's report demonstrates Barton understands the nature and purpose of his pending execution. He remembers facts about the events giving rise to his conviction as well as information about the victim. In addition, Barton's claim that "they're going to execute me if I can't prove my innocence" proves his understanding of where he is in the legal process and the unique legal issues he currently faces. This Court finds Barton competent to be executed under § 552.060.1.

[7] Barton's arguments regarding § 552.060.1 are nothing more than conclusory statements claiming he lacks the capacity to understand anything enumerated in the statute. These statements alone do not carry Barton's burden of establishing entitlement to habeas corpus relief. *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. banc 2013). However, the Court will address this argument *ex gratia*.

Conclusion

Barton has not proved the substantial threshold showing of insanity required by *Panetti* and *Ford*. Therefore, the constitutional principles announced in *Madison*, *Panetti*, and *Ford* do not render him incompetent to be executed. Additionally, Barton has not proven that he is incompetent under § 552.060. Further, Barton has not offered evidence sufficient to show actual innocence as either a gateway or a freestanding claim. Barton's petition for a writ of habeas corpus is denied.

All concur.

APPENDIX D

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

WALTER BARTON,	)	
	)	
Movant,	)	
	)	
vs.	)	**Case No. 14-08001-CV-W-GAF**
	)	
	)	
	)	
TROY STEELE, et al.,	)	
	)	
Respondents.	)	

ORDER

Now before the Court is Movant Walter Barton's ("Movant" or "Barton") First Amended Petition for Writ of Habeas Corpus and Request for Hearing ("Amended Petition"), brought pursuant to 28 U.S.C. § 2254. (Doc. # 33). Respondents Cindy Griffith and Chris Koster (collectively, "Respondents" or the "State") oppose. (Doc. # 45). For the reasons stated herein, Movant's request is DENIED.

DISCUSSION

I. BACKGROUND

a. The Murder of Gladys Kuehler

On direct appeal, the Supreme Court of Missouri summarized the underlying criminal allegations as follows:

> The victim [Gladys Kuehler], who was 81 years old, was the manager of a mobile home park in Ozark, Missouri, and lived in a trailer she owned there. On the morning of October 9, 1991, Carol Horton, another resident of the park, went to the victim's trailer to assist her because she was infirm and unable to move about without the use of a cane. Horton left for a while to shop for the victim and to retrieve her mail and returned at about 11:00 a.m. When Horton saw the victim at

that time, the victim was sitting on a daybed she kept in her living room, and she looked like she was "doing okay."

Around noon that day, [Barton] came to Horton's trailer. [Barton] regularly frequented the park, but Horton had not seen him in a week, and appellant told her he had been living in his car. He was in a "happy-go-lucky" mood, talking and "dancing around" to radio music in Horton's trailer. He stayed at Horton's until around 2:00 p.m., when he said he was going to the victim's trailer to see if the victim would lend him $20.00, and he returned about 10–15 minutes later, still in a good mood.

Between 2:00 and 3:00 p.m., several people had contact with the victim at her trailer. Teddy Bartlett and his wife, and Sharon Strahan, all former residents of the trailer park, visited the victim around 2:00 p.m. and stayed until sometime around 2:45. While they were there, Dorothy Pickering, who co-owned the trailer park with her husband, Bill, and who was at the park with her husband cleaning a trailer, stopped by the victim's trailer to pick up some rent payments. A man named Roy also stopped by to return a fan and a magazine to the victim. In addition, at about 2:30, Debbie Selvidge, the victim's granddaughter, called the victim and spoke with her briefly. The visitors all left when the victim said she was not feeling well and was going to take a nap.

Meanwhile, [Barton] told Horton that he was going back to the victim's trailer, and left sometime around 3:00. As Bartlett and Strahan left, Strahan noticed appellant standing at the driver's side door of a pickup truck parked near the victim's trailer talking to someone inside the truck. Shortly thereafter, around 3:15 p.m., Bill Pickering called the victim's trailer because his wife said the victim wanted to talk to him about someone moving into the park. A male voice answered the telephone, and Pickering asked to speak with the victim. The man hesitated, and then said, "She's in the bathroom." Pickering then told the man who he was and asked to have the victim call him back.

Around 4:00 p.m., about an hour after he left Horton's trailer, [Barton] returned and asked to use her restroom, which she permitted. After a while, Horton noticed that appellant had been in there for a long time, and she had never heard the toilet flush, so she went to check on him and saw him at the sink. He said he had been working on a car and was washing his hands. All told, appellant spent about ten minutes or so in the bathroom. Horton also noticed, however, that appellant's mood had changed, and now, instead of being jovial as he was before, he was distant and seemed in a hurry. He asked her if she would take him to the "Fast Track" to get his car, but she said she could not, because she was going to the victim's trailer. At that point, appellant said, in a "very strong," definite voice, "No, don't . . . Ms. Gladys is lying down taking a nap." Horton went anyway, knocking on the victim's door around 4:15 p.m., but there was no answer, and Horton then left the park to get her car washed.

In the meantime, Selvidge called the victim at 4:00 p.m., as the two watched the same television program together everyday while talking on the telephone. When there was no answer, Selvidge went to the trailer to check on her grandmother. She knocked for some time, but there was no answer, and she noticed that there were no lights on, which was unusual, because the victim always left the porch light on when leaving the trailer. Selvidge then left the park to seek help from her mother.

At about 4:30, Horton returned home and went back to the victim's trailer to check on her, but again received no answer to her knocking. Between 6:00 and 6:30, Selvidge arrived back at the park and went to Horton's trailer, asking about the victim and telling Horton she had been trying to call the victim since 4:00. The two of them then returned to Selvidge's mother's house to try to call the victim again, and when they still were unsuccessful, they went back to the park and asked appellant, who had been at a neighbor's trailer, to help knock on the door again. The three took turns knocking on the door and calling out the victim's name, and appellant went over to the end of the trailer where the victim's bedroom was located and knocked on the side of the trailer. There still was no response so they decided to contact the police.

Horton and Selvidge then drove to the nearby town square, flagged down an Ozark police officer, and led him back to the park. After unsuccessfully attempting to enter the victim's trailer, the officer called for a locksmith, and then left to take care of another call. A short time later, the locksmith arrived and opened the front door, and Selvidge, Horton, and appellant entered the trailer.

Once inside, they called the victim's name, but received no answer. Selvidge started to walk down the hallway leading to the victim's bedroom when [Barton] said, "Ms. Debbie, don't go down the hall. Ms. Debbie, don't go down the hall." Selvidge noticed that the victim's clothes were in the bathroom by the stool and that the toilet lid was up, which was unusual. She then turned on the lights in the victim's bedroom and screamed as she found the victim, "practically nude," lying on the floor between her bed and closet. The victim had been stabbed numerous times, with her throat cut ear-to-ear and with her intestines eviscerating from some of her wounds. Selvidge started to bend down to touch the victim, but Horton, who had followed Selvidge down the hall to the bedroom, told her not to do so. Selvidge then went back into the hall, pushed past Horton and [Barton], who was following Horton, and went back to the living room. [Barton] said to Horton, "Let me see," and looked over Horton's shoulder into the bedroom at the victim, but he never got close to the body or the blood in the bedroom. [Barton] did not get upset upon seeing the victim, but remained calm, showing no emotion, and when he went back into the living room, he "comforted" Selvidge, telling her that he was "so sorry."

The police officer soon returned to the trailer, and after seeing that the victim had been stabbed, he cleared the scene and called for help. After paramedics arrived,

the officer interrogated those persons present. He asked [Barton] if he had seen the victim that day, and [Barton] told him that he had seen her between 2:00 and 2:30 that afternoon when he had asked her to lend him $20.00. He said that the victim told him she would lend him the money, but would have to write a check, which she would do later in the day. [Barton] claimed that this was the last time he had been there. However, [Barton] later spoke with a Highway Patrol investigator and told him that he was the one who answered the telephone call that Bill Pickering made at 3:15 that afternoon. Because that call occurred between when the victim was last seen alive and when she was found dead, the officers took [Barton] into custody.

At that point, the officer noticed what appeared to be blood on the elbow and shoulder of [Barton's] shirt, and [Barton] responded that he had gotten the blood on him when he slipped while pulling Selvidge away from the victim's body. Selvidge, however, reported that she had not gone in the room past the victim's feet, that she had no blood on her clothes, that nobody had fallen in the room, and that appellant and Horton had remained behind her while she was in the room. Police also noticed that neither Selvidge nor Horton had blood on them, that the victim's blood on the floor was "pretty well dried," as if it had been there for a while, and that there was no wet blood to slip on where the witnesses were standing in the room.

The investigation of the scene also revealed that there was blood on the sink of the victim's bathroom and on a table in the bathroom. The victim's checkbook was found. Although the victim regularly entered every check she wrote in her check register, there was no entry for check # 6027—that check was missing. Several knives also were seized from the scene, including one that was part of a set that was cleaner than the others and facing a different direction in the block, and another knife that was later found in a drainage ditch. Although none of these knives were positively identified as the murder weapon, the examiners did not exclude any of those knives as the murder weapon.

Three days after the murder, a young girl was cleaning up trash along a nearby highway with a group from her church when she found the missing check, # 6027, folded up and discarded in a ditch. The check was dated the same day of the murder and made payable to [Barton] for $50.00. Handwriting analysis confirmed that the victim had written everything on the check.

Tests conducted on [Barton's] clothing revealed that there was human blood on his shirt, blue jeans, and boots, and DNA tests conducted on the blood from [Barton's] shirt showed that it was the victim's blood. A blood spatter expert testified that some of the blood found on appellant's shirt, as well as two spots on [Barton's] jeans, were consistent 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.

> An autopsy conducted on the victim revealed that she was stabbed well in excess of 50 times, including being stabbed twice through her open right eye and once in the left eyelid, twice in the neck, eleven times in the left side of her chest, three times in the right chest, four times in the abdomen, twice to the back of the left hand (characterized as defensive wounds), twice to the back of the left arm, twenty-three times in the back, and three times in the left flank. There were at least two large slash wounds across her neck, one of which contacted the bone. There were also two X-shaped slash wounds to the abdomen, through one of which the victim's small intestine protruded. Internally, the victim's left lung collapsed, and one of her ribs fractured from the force of the attack. The cause of death was exsanguination due primarily to the wounds to her neck as well as the numerous other stab wounds. There was also at least one blunt force injury to the victim's head, and some bruising and injury to the victim's genital area that led examiners to the conclusion that the victim was sexually assaulted.

State v. Barton, 240 S.W.3d 693, 696-699 (Mo. 2007) (en banc).

b. Procedural History

This case's procedural history is lengthy and complex. The Court will refer to Barton's various appearances before the Missouri Supreme Court as follows:

State v. Barton, 936 S.W.2d 781 (Mo. 1996) (en banc) ("*Barton I*")

State v. Barton, 998 S.W.2d 19 (Mo. 1999) (en banc) ("*Barton II*")

Barton v. State, 76 S.W.3d 280 (Mo. 2002) (per curiam) ("*Barton III*")

State v. Barton, 240 S.W.3d 693 (Mo. 2007) (en banc) ("*Barton IV*")

Barton v. State, 432 S.W.3d 741 (Mo. 2014) ("*Barton V*")

Barton v. State, 486 S.W.3d 332, 339 (Mo. 2016) (en banc) (*Barton VI*)

Since his original arrest in 1991, the State of Missouri has initiated five separate trials against Barton. The State's first two attempts to convict him resulted in mistrial–the first due to the prosecution's failure to endorse any witnesses, and the second because the jury remained deadlocked on the issue of guilt. The State achieved a guilty verdict and sentence of death on its third attempt, only to have the verdict overturned on direct appeal due to the trial judge's improper restriction of defense counsel's closing argument.

The State's fourth attempt resulted in another guilty verdict and death sentence. The verdict survived the direct appeal process, eventually being affirmed by a 5-2 vote by the Missouri Supreme Court. *See Barton II*, 998 S.W.2d at 30. Barton then filed for post-conviction relief under Missouri Rule of Criminal Procedure 29.15. The motion court denied Barton's request for relief, but the Missouri Supreme Court reversed and remanded, citing the motion court judge's failure to make sufficiently specific findings of fact. *Barton III*, 76 S.W.3d at 280-281. Further, the Supreme Court rescinded the motion court judge's appointment to oversee the post-conviction proceedings. *Id.* After the hearing on remand, Benton County Circuit Judge John Sims set aside Barton's conviction and sentence, and ordered a new trial. (*See* Doc. # 36-1).

The State opted to prosecute Barton a fifth time. The trial began in March 2006, and took place in Cass County, Missouri. The jury returned a guilty verdict, and Circuit Judge Joseph Dandurand imposed the death sentence. In 2007, the Missouri Supreme Court affirmed Barton's death sentence by a 4-3 margin. *See Barton IV*, 240 S.W.3d at 711. Barton's direct appeal process was finally exhausted in October 2008, when the United States Supreme Court denied his petition for writ of certiorari. *See Barton v. Missouri*, 555 U.S. 842 (2008). Subsequently, Barton again moved for post-conviction relief under Rule 29.15. The motion court denied his request for relief in February 2013, and the Missouri Supreme Court unanimously affirmed the judgment and issued its mandate on June 24, 2014. *See Barton V*, 432 S.W.3d at 764.

On June 9, 2015, Barton filed a habeas request under 28 U.S.C. § 2254 with this Court. (*See* Docket Sheet). On the same day, Barton's attorneys filed an additional state court challenge in Cass County, Missouri, requesting the court find that Barton's previous attorneys abandoned

him during a portion of the state court post-conviction proceedings. (Doc. # 36-29). That filing was titled "Request for Finding of Abandonment of Counsel." (*Id.*). This Court stayed its proceedings while Barton's state court motion was pending. (*See* Doc. # 26). The Circuit Court for Cass County eventually denied Barton's abandonment claim, and the Missouri Supreme Court affirmed on May 24, 2016. *See Barton VI*, 486 S.W.3d at 339. Barton filed his Amended Petition later that same day. (*See* Docket Sheet). Subsequently, this Court lifted the stay, leading to its consideration of the present motion. Barton then filed an Amended Petition on May 24, 2016, adding three new habeas claims.

c. Summary of Asserted Grounds for Habeas Relief

Barton brings the following claims under 28 U.S.C. § 2254:[1]

Ground I: Violation of the Double Jeopardy Clause of the Fifth Amendment

Ground II: Withdrawn

Ground III: Withdrawn

Ground IV: Withdrawn

Ground V: Ineffective Assistance of Counsel–Failure to impeach Katherine Allen

Ground VI: Ineffective Assistance of Counsel–Failure to appeal Katherine Allen's testimony regarding prior convictions

Ground VII: Ineffective Assistance of Counsel–Failure to call witness to rebut State's blood spatter expert

Ground VIII: Ineffective Assistance of Counsel–Failure to appeal trial court's failure to declare mistrial after State did not corroborate its opening statement with supporting testimony

Ground IX: Ineffective Assistance of Counsel–Failure to appeal jury instructions

[1] Barton advanced twelve claims in his original petition, and included three additional claims in his amended petition. (Docs. ## 18, 33). However, Barton withdrew three claims in his Suggestions in Support of the Amended Petition. (Doc. # 36, pp. 52-53).

Ground X: Ineffective Assistance of Counsel–Failure to appeal inclusion of victim impact evidence during penalty phase

Ground XI: Ineffective Assistance of Counsel–Failure to develop and present mitigation defense

Ground XII: Ineffective Assistance of Counsel–Failure to assert that Barton was incompetent

a. Trial Counsel
b. Appellate Counsel

Ground XIII: Ineffective Assistance of Counsel–Failure to object to State's opening statement

Ground XIV: Ineffective Assistance of Counsel–Failure to object to jury instructions

Ground XV: Ineffective Assistance of Counsel–Failure to object to inclusion of victim impact statement during trial

II. LEGAL STANDARD

"A state prisoner may seek a writ of habeas corpus in federal court if his confinement violates the federal Constitution or federal law." *Weaver v. Bowersox*, 241 F.3d 1024, 1029 (8th Cir. 2001) (citing 28 U.S.C. § 2254(a)). "Federal courts are bound by the AEDPA[2] to exercise only limited and deferential review of underlying state court decisions in habeas corpus cases." *Ryan v. Clarke*, 387 F.3d 785, 790 (8th Cir. 2004) (internal quotations omitted). Under 28 U.S.C. § 2254, federal courts may only grant relief to state prisoners when the state's criminal process:

> (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 facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1-2). These two relevant subsections distinguish between errors of law and errors of fact, and each is employed with its own standard of review. The first subsection's

[2] The AEDPA is an initialism for the Anti-Terrorism and Effective Death Penalty Act of 1996.

inquiry focuses on whether the state court "arrive[d] at a conclusion opposite to that reached by the [United States Supreme Court] on a question of law," or whether "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrive[d] at a result opposite." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). The inquiry under the second subsection turns on whether the petitioner can demonstrate by clear and convincing evidence that the state court adjudication failed to make reasonable findings of fact. *See Middleton v. Roper*, 455 F.3d 838, 854 (8th Cir. 2006).

III. ANALYSIS

a. Timeliness of Claims added in the Amended Petition (Grounds XIII-XV)

The State first challenges the timeliness of three claims Barton raises for the first time in his amended petition. (Doc. # 45, pp. 18-23). Under the AEDPA, state prisoners have one year to seek federal habeas relief from when the date their judgment of conviction became final. *Streu v. Dormire*, 557 F.3d 960, 961 (8th Cir. 2009). Any amendments to a habeas petition must also be filed within the same one-year limitations period. *See United States v. Craycraft*, 167 F.3d 451, 456-57 (8th Cir. 1999). "This one-year statute of limitations is tolled, however, during the time in which a '*properly filed application* for State post-conviction or other collateral review with respect to the pertinent judgment . . . *is pending*.'" *Streu*, 557 F.3d at 961 (quoting 28 U.S.C. § 2244(d)(2)) (emphasis added). "To qualify as a 'properly filed' application for state post-conviction relief, so as to toll the statute of limitations under § 2244(d)(2), the application must be 'in compliance with the applicable laws and rules governing filings.'" *McMullan v. Roper*, 599 F.3d 849, 853 (8th Cir. 2010) (quoting *Artuz v. Bennett*, 531 U.S. 4, 8 (2000)). "A properly filed application is one that meets all of the state's procedural requirements." *Id.* (quoting *Beery v. Ault*, 312 F.3d 948, 950-51) (8th Cir. 2002)). Federal courts have an

independent duty to evaluate the timeliness of state court proceedings. *Lewis v. Norris*, 454 F.3d 778, 780 (8th Cir. 2006).

Here, the sole question is whether the motion Barton filed in the Circuit Court of Cass County on June 9, 2015 tolled the relevant statute of limitations.[3] If his filing tolled the statute, then the amended petition falls within § 2244's one-year limitation period; if not, then the amended petition is untimely. The State contends that the Missouri procedural rules do not provide for a "motion to reopen," and absent the state court finding that Barton's counsel abandoned him, Barton's filing is insufficient to toll the statute. However, Barton's motion was not titled a "motion to reopen"; it was styled as a "Request for finding of abandonment of counsel." (*See* Docket Sheet). The Missouri Supreme Court has previously discussed such a styling. *See Eastburn v. State*, 400 S.W.3d 770, 774-775 (Mo. 2013) (en banc) (describing elements of an abandonment of counsel claim). In *Eastburn*, the court encountered a "motion to reopen," in which a prisoner attempted to bring several untimely habeas claims after previously exhausting her post-conviction appeals. *Id*. at 773. The state filed a motion to dismiss, but entered into an "agreement to reopen" with Eastburn for the limited purpose of determining whether she was abandoned by her post-conviction counsel. *Id.* Despite ultimately finding against Eastburn, the Missouri Supreme Court agreed that habeas petitioners can file post-conviction abandonment claims out of time in certain limited circumstances. *Id.*; *see also Moore v. State*, 328 S.W.3d 700, 702-03 (Mo. 2010) (en banc).

> While there is no provision in [the Missouri Rules of Civil Procedure] to allow late filings, this Court has recognized a late filing may be accepted when a movant has

[3] The State also argues that Barton's Amended Petition does not relate back to the original petition, nor is it subject to equitable tolling. (Doc. # 45, pp. 21-23). Barton would presumably be entitled to argue both doctrines as alternative bases to amend his petition, but Barton waived both in his Traverse. (Doc. # 56, p. 10).

> been abandoned by postconviction counsel. Abandonment by post-conviction counsel occurs when: (1) when post-conviction counsel fails to file an amended motion and the record shows the movant was deprived of meaningful review of the claims; or (2) when post-conviction counsel files an untimely amended motion. Abandonment also may occur when the overt action of post-conviction counsel prevents the movant from filing a timely original motion.
>
> A motion to file an untimely post-conviction relief motion is not the same as filing a motion to re-open. When a movant has been abandoned by post-conviction counsel, the opportunity for the movant to file a timely post-conviction motion has passed. Accordingly, there is nothing to re-open. While parties may have referred to this motion as one to re-open the post-conviction proceedings based on abandonment, this nomenclature does not exist in our rules and should not be used henceforth.

Eastburn, 400 S.W.3d at 774 (internal quotations and citations omitted).

However, even though Missouri precedent allows for Barton's motion, the question of whether the motion was properly filed in state court and pending during the relevant period requires a separate inquiry. *See Artuz*, 531 U.S. at 8-9 (stating "the question whether an application has been properly filed is quite separate from whether the claims contained in the application are meritorious and free of procedural bar" (emphasis omitted)); *see also Walker v. Norris*, 436 F.3d 1026, 1030 (8th Cir. 2006) (considering whether a post-conviction relief petition is properly filed, despite the claims themselves being invalid). The United States Supreme Court, in *Pace v. DiGuglielmo*, offers the following rationale:

> In *Artuz v. Bennett* . . . we held that time limits on postconviction petitions are "condition[s] to filing," such that an untimely petition would not be deemed "properly filed." However, we reserved the question we face here: "whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed." Having now considered the question, we see no grounds for treating the two differently.
>
> As in Artuz, we are guided by the "common usage" and "commo[n] understanding]" of the phrase "properly filed." In common understanding, 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. The purpose of AEDPA's statute of limitations confirms this commonsense reading. On petitioner's theory, a state prisoner could toll the

> statute of limitations at will simply by filing untimely state postconviction petitions. This would turn § 2244(d)(2) into a de facto extension mechanism, quite contrary to the purpose of AEDPA, and open the door to abusive delay.

544 U.S. 408, 413 (2005) (internal citations omitted). Like *DiGuglielmo*, Barton's underlying motion that requested the Circuit Court of Cass County find he was abandoned by counsel relies on certain enumerated exceptions to timely-filing requirements. *Compare Barton VI*, 486 S.W.3d at 337-38 (discussing precedential exceptions for timely-filing that relate to abandonment in Missouri) *with DiGuglielmo*, 544 U.S. at 411 n.1 (listing statutory exceptions[4] for timely-filing that relate to collateral appeals in Pennsylvania). Also like *DiGuglielmo*, the state courts involved in Barton's latest post-conviction proceeding determined that Barton's claim did not meet any relevant exception:

> Mr. Brotherton filed a timely amended motion on behalf of Mr. Barton asserting 48 claims and six grounds for relief. Mr. Barton's allegation is that this was inadequate because Mr. Brotherton failed to include "vital" issues in his amended motion that were later deemed waived on appeal. This in turn, Mr. Barton argues, deprived him of the fair disposition of his Rule 29.15 proceeding. In other words, Mr. Barton is claiming that Mr. Brotherton's illness made him miss claims he otherwise would have brought. Mr. Barton's claim is one of ineffective assistance of post-conviction counsel, which is categorically unreviewable in Missouri state courts.
>
> . . .
>
> Whether or not Mr. Barton has a cognizable federal claim of ineffective assistance . . . he does not have a claim of abandonment under Missouri law and was not required to seek further relief in Missouri courts as a necessary step to pave the way for a federal habeas petition.
>
> Mr. Barton nonetheless did file this claim of abandonment. The motion court did not clearly err in overruling it without an evidentiary hearing. His claim does not fit within Missouri's definition of "abandonment" and is not cognizable in Missouri courts.

[4] The three exceptions to the Pennsylvania Postconviction Relief Act discussed in *Pace* are (1) if governmental interference prevented filing; (2) in a new constitutional rule is made retroactive; and (3) if new facts arise that could not have been discovered through due diligence. *Pace*, 544 U.S. at 413 n.1; 42 Pa. Cons. Stat. §§ 9545(b)(1)(i)-(iii) (1998).

Barton VI, 486 S.W.3d at 338-39 (internal citation omitted).

Barton challenges the State's argument by citing to *Streu*, in which the Eighth Circuit concluded that a motion to reopen that alleges abandonment by post-conviction counsel was a properly-filed motion sufficient to toll the AEDPA's statute of limitations. *Streu*, 557 F.3d at 965. However, the *Eastburn* court answered the question of whether Missouri procedure allows for a "motion to reopen" in the negative. *See Eastburn*, 400 S.W.3d at 775. Further, *Streu* was decided without the benefit of several subsequent Missouri Supreme and Appellate Court decisions, in which various panels rebuked petitioners attempting to shoehorn ineffective assistance of counsel claims into a post-conviction request for a finding of abandonment. *See, e.g., Bello v. State*, 464 S.W.3d 284, 292 (Mo. Ct. App. 2015) ("The scope of abandonment does not encompass perceived ineffectiveness of post-conviction counsel."); *Bain v. State*, 407 S.W.3d 144, 148 (Mo. Ct. App. 2013) ("While attempting to frame his claim in terms of abandonment in an attempt to fit within the exception . . . Appellant has alleged nothing more than ineffective assistance of post-conviction counsel"); *Sittner v. State*, 405 S.W.3d 635, 639 (Mo. Ct. App. 2013) ("[Movant]'s claim of abandonment does not fit any characterization of abandonment as defined by [Missouri's] Supreme Court"); *Jensen v. State*, 396 S.W.3d 369, 373 (Mo. Ct. App. 2013) ("Appellant's claims of abandonment are not cognizable under Missouri law); *Middleton v. State*, 350 S.W.3d 489, 492 (Mo. Ct. App. 2011) (stating the court lacked jurisdiction to hear the motion). Therefore, even though Barton's motion may be titled in a way contemplated by the *Eastburn* panel, the substance of his argument fails to meet any relevant exception that would otherwise allow untimely filing. *See Barton VI*, 486 S.W.3d at 338-39. Accordingly, the time during which the Circuit Court for Cass County and the Missouri Supreme Court were considering Barton's request is not excluded from the AEDPA's one-year limitations

period.[5] *DiGuglielmo*, 544 U.S. 413. The three claims Barton added for the first time in his amended petition, Grounds XIII-XV, are accordingly dismissed as untimely.

b. Procedural Default

Defendant argues that several of Barton's claims must be dismissed as procedurally defaulted. "Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). "Under the doctrine of procedural default, 'a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule.'" *Franklin v. Hawley*, 879 F.3d 307, 311 (8th Cir. 2018) (quoting *Martinez*, 566 U.S. at 9). The doctrine prevents state criminal defendants from depriving state courts the ability to hear claims in the first instance, and ensures defendants do not use federal courts as a method of circumventing state court authority. *See Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). In the Eighth Circuit, "a habeas petitioner must have raised both the factual and legal bases for each ineffectiveness of counsel claim in the state courts in order to preserve the claim for federal review." *King v. Kemna*, 266 F.3d 816, 821 (8th Cir. 2001). "'In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of

[5] The fact that the Missouri Supreme Court considered the merits of Barton's argument does not affect the Court's analysis. *Runyan v. Burt*, 521 F.3d 942, 945 (8th Cir. 2008) (citing *Carey v. Saffold*, 536 U.S. 214, 225-26 (2002)).

federal law . . . .'" *Franklin*, 879 F.3d at 311 (quoting *Coleman*, 501 U.S. at 750) (ellipsis in original).

"Cause for a procedural default exists where something external to the petitioner, something that cannot fairly be attributed to him, impeded his efforts to comply with the State's procedural rule." *Maples v. Thomas*, 565 U.S. 266, 280 (2012) (internal quotation and alterations omitted). For instance, a prisoner's post-conviction counsel's negligence does not qualify as cause, so as to excuse the prisoner's procedural default, "'because the attorney is the prisoner's agent, [and] under well-settled principles of agency law, the principal bears the risk of negligent conduct on the part of his agent.'" *Martinez*, 566 U.S. at 10 (quoting *Maples*, 565 U.S. at 280-81). "Thus, when a petitioner's postconviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause." *Maples*, 565 U.S. at 281. However, the Supreme Court has noted the distinction between situations like *Coleman*, where the postconviction attorney fails to advance an issue in a collateral appeal, and one where an attorney errs during an initial collateral proceeding. *See Martinez*, 566 U.S. at 10-11. In situations like *Coleman*, federal courts can be assured that at least some level of state court reviewed the merit of the prisoner's claims, whereas federals courts in situations like *Martinez* lack such assurances. *Id.*

> When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim. This Court on direct review of the state proceeding could not consider or adjudicate the claim. And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims.
>
> The same is not true when counsel errs in other kinds of postconviction proceedings. While counsel's errors in these proceedings preclude any further review of the prisoner's claim, the claim will have been addressed by one court, whether it be the trial court, the appellate court on direct review, or the trial court in an initial-review collateral proceeding.

. . .

> From this it follows that, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington* . . . . To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit

Id. at 10-11, 14 (internal citations omitted). Reduced to its basic elements, the *Martinez* equitable exception requires petitioners that wish to overcome their procedural default demonstrate the following: "(1) the claim of ineffective assistance of trial counsel was a 'substantial' claim; (2) the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding; and (3) the state collateral review proceeding was the 'initial' review proceeding with respect to the 'ineffective-assistance-of-trial-counsel claim.'" *Dansby v. Hobbs*, 766 F.3d 809, 834 (8th Cir. 2014) (quoting *Trevino v. Thaler*, 569 U.S. 413, 423 (2013)).[6] Analysis of whether a claim has merit under *Martinez* overlaps with ineffective assistance of counsel analysis under *Strickland*. *See, e.g.*, *Deck v. Steele*, 249 F. Supp. 3d 991, 1024 (E.D. Mo. 2017); *Sund v. Young*, No. 5:14–CV–05070–KES, 2015 WL 4249405, at *4 (D.S.D. July 23, 2015); *Wright v. Hobbs*, No. 5:13–cv–210 KGB–JTR, 2015 WL 2374184, at *5-6 (E.D. Ark. May 18, 2015). "'Substantial,' in other words, means

[6] Shortly after announcing the *Martinez* equitable exception, the Supreme Court gently expanded the class of cases to which the exception applies, from those originating from states that require ineffective assistance of counsel claims to be advanced in an initial state-level postconviction proceeding, to those originating in states where "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *See Dansby*, 766 F.3d at 829 (internal quotation omitted).

'that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *McLaughlin v. Steele*, 173 F. Supp. 3d 855, 870 (E.D. Mo. 2016).

1. Ineffective Assistance of Direct Appellate Counsel (Grounds VI, XIII, IX, X, & XII(b))

Barton alleges his counsel was ineffective for failing to advance several claims in his direct appeal, as well as ineffective for failing to appeal a claim denied by the Rule 29.15 motion court. Barton now brings these claims as Grounds VI, XIII, IX, X and XII(b).

Missouri law requires habeas petitioners to advance all ineffective assistance of counsel claims in their Rule 29.15 proceeding. Mo. Sup. Ct. R. 29.15; *see also Jolly v. Gammon*, 28 F.3d 51, 53 (8th Cir. 1994) (stating in Missouri, a claim must "be presented at each step of the judicial process to avoid default" (internal quotation omitted)). Here, Barton failed to do so. (Doc. # 45-88, pp. 30-42). Both parties seem to acknowledge that the Eighth Circuit has foreclosed the possibility that this Court might extend the *Martinez* equitable exception to ineffective assistance claims that arise from proceedings outside the trial process. (Doc. # 45, pp. 37-38; Doc. # 56, p. 13).

> Most circuits to address the point have declined to extend *Martinez* to claims alleging ineffective appellate counsel, and we agree. *Martinez* focused on a claim of ineffective assistance at trial, emphasizing that the Sixth Amendment right to trial counsel is a bedrock principle in our justice system and the foundation for our adversary system. The right to appellate counsel has a different origin in the Due Process Clause, and even the right of appeal itself is of relatively recent origin, so a claim for equitable relief in that context is less compelling. Most important, in announcing the equitable exception in *Martinez* for claims of ineffective assistance of counsel at trial, the Court was clear that the rule of *Coleman*—that ineffective assistance of counsel during state postconviction proceedings cannot serve as cause to excuse procedural default—governs in all but the limited circumstances recognized here. Those limited circumstances involved a claim that trial counsel was constitutionally ineffective. We therefore

> decline to extend *Martinez* to claims alleging ineffective assistance of counsel on direct appeal.

Dansby, 766 F.3d at 833 (internal quotations and citations omitted). Barton notes that the United States Court of Appeals for the Ninth Circuit reached the opposite conclusion on similar facts, extending *Martinez*'s equitable exception to include attorney errors committed on direct appeal. *See Nguyen v. Curry*, 736 F.3d 1287, 1293-94 (9th Cir. 2013). Despite the Ninth Circuit's decision, this Court is bound by Eighth Circuit precedent. *Hood v. United States*, 342 F.3d 861, 864 (8th Cir. 2003). Barton cannot employ the *Martinez* equitable exception to excuse the procedural default of his ineffective assistance of direct appellate counsel claims. Further, the Eighth Circuit has also ruled that *Martinez* does not apply to ineffective assistance of post-conviction appellate counsel claims. *See Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012) (stating "[t]hus, unlike *Martinez*, [the petitioner] has already has his day in court; deprivation of a second day does not constitute cause"). Therefore, Barton's grounds VI, VIII, IX, X and XII(b) are denied.

2. Ineffective Assistance of Trial Counsel (Grounds V, VII, XI, XII(a))

a. Ineffective Assistance of Counsel–Failure to impeach Katherine Allen (Ground V)

In his fifth claimed ground for relief, Barton argues that his defense counsel was ineffective for failing to impeach Katherine Allen on the basis of her past false statements, the benefit she received from the State in exchange for her testimony, and the full extent of her criminal history. (Doc. # 36, pp. 54-72). Barton did not advance this claim in prior state proceedings, thus procedural default analysis applies. *Franklin,* 879 F.3d at 311. The State contends that, regarding Allen, defense counsel was not ineffective and Barton was not prejudiced; thus, he fails to demonstrate cause for the purposes of *Martinez*. (Doc. # 45, pp. 47-56).

At the time of the fifth trial, Allen was a prisoner at the Madison Correctional Facility, located in Madison, Wisconsin. (Doc. # 36-15, p. 118). Allen had testified at the fourth trial, which initially resulted in a conviction but was overturned on a state post-conviction appeal.[7] (Doc. # 36-1). After introducing Allen to the jury, the prosecutor elicited testimony about six of her prior convictions, including felony forgery and charge fraud. (Doc. # 36-15, p. 118). She also stated that she had a fraudulent check fraud dismissed in Cass County, Missouri. (*Id.*). She then testified that she met Barton while she was previously imprisoned at the Lawrence County, Missouri jail. (*Id.* at 119). During her time at the Lawrence County jail, Allen served as the jail's "trustee." (*Id.* at 120). As trustee, Allen performed various chores, including cooking meals and delivering them to other prisoners. (*Id.*). She testified that, during the course of her duties, she engaged in several arguments with Barton. (*Id.* at 121-22). Allen described one of the arguments as follows:

> [Prosecutor]: What was the argument about?
>
> [Allen]: Well, that I didn't want to talk to him anymore or give him any kind of attention.
>
> . . .
>
> [Allen]: He would just get angry.
>
> [Prosecutor]: Once you told him that, did he say anything back to you?
>
> [Allen]: Yeah. He told me that - - asked me if I knew what he was in there for. I didn't say anything, and he said that he could get out of that little cell back there and kill me like he killed that old lady.
>
> [Prosecutor]: Did he ever talk to you about the age of the person that he talked about as being the old lady?

[7] Indeed, the fourth verdict was reversed was because Judge John Sims, Circuit Judge for Benton County, Missouri, had determined the prosecutors had failed to disclose Allen's entire criminal history to the defense, and because Allen had then committed perjury by drastically understating her criminal record while testifying under oath. (*Id.* at 15-22).

[Allen]: No, he did not.

[Prosecutor]: Did he tell you who the old lady was?

[Allen]: No, he did not.

[Prosecutor]: Did he use any terminology other than the fact of saying she was an old lady?

[Allen]: No.

[Prosecutor]: No, this that you are talking about, did it happen one time or more than one time?

[Allen]: Probably at least five times.

[Prosecutor]: Was it the same threats?

[Allen]: Same threats.

(Doc. # 36-15, pp. 118-122). After the State's concluded its direct examination, the following exchange occurred on cross-examination:

[Defense Counsel]: Ms. Allen, you just told this jury that you have six prior convictions; correct?

[Allen]: Yes, I did.

[Defense Counsel]: Did you forget about 7, 8, 9, 10, 11, 12, 13 convictions, or are you sticking with the 6?

[Allen]: I don't know how you are looking at those, though, because that was on my other case. It ran all together. So I'm not sure how you are looking at them.

[Defense Counsel]: I am looking at them as convictions. How many times have you been convicted? Give the jury, if you can, even a ballpark.

[Allen]: I would stick at six.

[Defense Counsel]: Okay. We are going to go over some of those six.

[Allen]: Okay.

(*Id.* at 123).

After the above-quoted dialogue, Barton's defense counsel proceeded to exhaustively recite and question Allen on twelve additional charges she faced between 1978 and 1998, an exchange that spans nine pages of the trial transcript. (*Id.* at 123-31). During his cross-examination, he made a record of her previous crimes that involved deceit, such as her convictions for forgery and check fraud. (*Id.*). Defense counsel also questioned Allen on her repeated uses of various aliases during that time period. (*Id.* at 126-29). Defense counsel's line of questions into Allen's prior deceptive behavior was subject to multiple objections, in which the prosecution took exception to defense counsel's various attempts at impeaching Allen's credibility. (*Id.* at 132, 134, 139).

Courts "generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel." *United States v. Orr*, 636 F.3d 944, 952 (8th Cir. 2011) (internal quotation omitted). "In that vein, the Eighth Circuit has found constitutionally deficient performance of trial counsel based on ineffective cross-examination where counsel allowed inadmissible devastating evidence before the jury or when counsel failed to cross-examine a witness who made grossly inconsistent prior statements." *Id.* (internal quotation and alteration omitted). Here, Barton does not contest that his defense counsel failed to confront Allen with her past deceptive acts or that he failed to mount any kind of impeachment. Instead, he largely quarrels with the degree to and manner of which defense counsel attacked Allen's credibility. He contends that defense counsel's tactics were "substandard" and only made it appear to the jury that Allen was being bullied on the stand. Barton simply states that defense counsel should have gone about impeaching Allen in a different manner. However, "how much to impeach a witness is generally a matter of trial strategy left to the discretion of counsel." *Dansby*, 766 F.3d at 835. "[T]here are a few, if any,

cross-examinations that could not be improved upon." *Henderson v. Norris*, 118 F.3d 1283, 1287 (8th Cir. 1997). "[I]f that were the standard of constitutional ineffectiveness, few would be the counsel whose performance would pass muster." *Id.* (internal quotation omitted). In this circumstance, Barton's defense counsel questioned Allen about her criminal history at length, and specifically as it related to her tendency to behave deceptively. (Doc. # 36-15, pp. 123-31). While others may have adopted a different strategy, "there are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689. So long as defense counsel made thorough investigation prior to examining Allen at trial, Barton's ineffective assistance claim fails as a matter of law. *See id.* at 690 (stating "strategic choices made after thorough investigation . . . are virtually unchallengeable"). Accordingly, Barton fails to demonstrate his Ground Five is a substantial claim, and it is thus denied.

b. Ineffective Assistance of Counsel–Failure to call witness to rebut State's blood spatter expert (Ground VII)

Barton next alleges that his defense counsel was ineffective for failing to call his own expert to contradict the State's blood spatter expert. (Doc. # 36, pp. 72-87). Barton raised a similar claim before the Missouri Supreme Court in his most recent state post-conviction hearing. *See Barton V*, 432 S.W.3d at 755-56. The Missouri Supreme Court summarized the proceedings as follows:

> At the trial, the State called a blood spatter expert to testify that several of the blood stains on Barton's shirt were consistent with medium to high velocity impact spatter. The expert testified that this type of spatter can come from the blood being propelled through the air after something impacts the blood, *i.e.*, that the spatter was consistent with stabbing or striking a victim. Instead of calling a spatter witness of their own, defense counsel thoroughly cross-examined the State's expert, attempting to undercut his conclusions and his credentials. Counsel also used the cross-examination of the State's expert to attempt to discredit the entire field of blood spatter analysis, calling it a "junk science."

Id. at 755. The Missouri Supreme Court then ruled that:

> Based on this record, Barton has not carried his burden of proving either that counsel's investigation of blood spatter experts was insufficient or that counsel's decision not to call a blood spatter expert was a matter of trial strategy. Defense counsel's testimony demonstrates that they conducted a thorough investigation and specifically decided that calling an expert would be detrimental to the defense.
>
> Therefore, the motion court did not clearly err in finding that Barton received effective assistance of counsel based on counsel's failure to call a blood spatter expert.

Id. at 756.

Barton argues the Missouri Supreme Court's prior ruling has no preclusive effect, as his claim before this Court, while related, is more narrowly drawn and relies on a separate factual basis. (Doc. # 56, p. 80). If that was true, Ground VII would be subject to procedural default analysis. *Franklin*, 879 F.3d at 311. However, review of Barton's previous filings demonstrates the marked similarity between the claims. In the relevant Amended Motion to Vacate, Set Aside, or Correct the Judgment or Sentence & Request for an Evidentiary hearing, filed May 17, 2013 in the Circuit Court of Cass County, Missouri, he styles the claim "Failed to Investigate/Rebut Blood Spatter evidence," and contests the manner in which his trial counsel chose to confront the State's expert. (Doc. # 45-77, p. 177). He argued that his trial counsel should have attacked the expert's qualifications and attempted to impeach him on the basis of his prior employment record with the Kansas City Police Department. (*Id.* at 178-79). Most notably, Barton contends that, had his counsel contacted a separate expert, there is a likelihood Barton would have mounted a more capable defense. (*Id.* at 180-81). Indeed, he reasserted on his last state post-conviction appeal that "[t]he motion court clearly erred denying counsel was ineffective for failing to call a blood spatter expert, like Stuart James . . ." (Doc. # 45-91, p. 12).

In support of Barton's latest blood spatter claim, he submits an affidavit prepared by a separate blood spatter expert. (Doc. # 36-3). The affiant, Lawrence Renner, testified at Barton's last state post-conviction trial:

> Also at the motion hearing, Barton called two blood spatter experts. The first[8] allegedly was the expert who Barton's trial counsel spoke to at Life in the Balance. That expert testified that he did not remember speaking with Barton's trial counsel and that he would need around 30 hours to render an opinion on the case. The second expert was Stuart James, whom Barton alleges his counsel should have called to testify. James testified that the number of spots was insufficient to establish a high velocity impact pattern. James also testified that those same spots were not transfer stains, but that they had to have been airborne when they came in contact with Barton's shirt. James confirmed the State's expert's testimony that the stains were consistent with high velocity impact spatter, but said that the number of spots was insufficient to establish a pattern.

Barton V, 432 S.W.3d at 756. In sum, the affidavit is largely a resubmission of his prior testimony. (Doc. # 36-3). For these reasons, the Court finds that Barton is advancing his previous argument, and the Court can only reverse the Missouri Supreme Court's decision if it resulted from an unreasonable application of constitutional law, or involved an unreasonable finding of fact. 28 U.S.C. § 2254(d)(1-2).

As the *Barton V* court observed, "'[g]enerally, the selection of a witness and the introduction of evidence are questions of trial strategy and are virtually unchallengeable.'" 432 S.W.3d at 755 (quoting *Johnson v. State*, 333 S.W.3d 459, 463 (Mo. 2011) (en banc)). "'[D]efense counsel is not obligated to shop for an expert witness who might provide more favorable testimony.'" *Id.* (alteration in original) (quoting *Johnson*, 333 S.W.3d at 464); *see also Marcrum v. Luebbers*, 509 F.3d 489, 511 (8th Cir. 2007) (stating "[w]here counsel has obtained the assistance of a qualified expert . . . counsel has no obligation to shop for a better expert"). In this circumstance, Barton cannot point to an argument that the Missouri Supreme Court failed to

[8] Affiant, Lawrence Renner.

consider, nor does he demonstrate clear and convincing evidence the court made an unreasonable factual finding or came to an unreasonable conclusion of law. *See* 28 U.S.C. § 2254(e)(2). He simply says his counsel should have gone about controverting the blood spatter evidence in a different manner. However, even if "[h]indsight now suggests that a different strategy might have been more effective . . . this does not mean trial counsel was ineffective." *Nave v. Delo*, 62 F.3d 1024, 1036 (8th Cir. 1995).

For these reasons, Barton fails to demonstrate his counsel was ineffective. Additionally, to the extent Barton is attempting to argue that he did not advance this claim in state post-conviction proceedings, the test under *Martinez*'s equitable exception overlaps with general *Strickland* principles, *see McLaughlin*, 173 F. Supp.3d at 870, and Barton cannot show this claim is a substantial one, to which reasonable jurists could debate or agree that his petition should have been resolved in a different manner. Barton's Ground Seven is denied.

c. Ineffective Assistance of Counsel–Failure to develop and present mitigation defense (Ground XI)

In Barton's eleventh ground for habeas relief, he argues that his trial counsel was ineffective for failing to develop and present a mitigation defense for the trial's penalty phase. (Doc. # 36, pp. 87-102). Barton contends that his counsel ignored an array of viable trial strategies, and instead opted for one that casted his client in a disparaging light.

In this claim, Barton again raises an argument that resembles claims previously raised during his state post-conviction proceedings. As the State succinctly summarizes, Barton raised the following arguments that relate to Ground Eleven in his state post-conviction motion:

> 1. Counsel failed to contact Dr. Merikangas after prior postconviction counsel urged them to do so and did not call Dr. Merikangas to present evidence regarding Barton's diminished capacity.

2. Counsel failed to hire an adequate mitigation specialist, but instead delegated that task to Kim Freter, co-counsel, who failed to conduct an adequate investigation.

3. Counsel failed to investigate and/or call several of Barton's family and friends who would have testified regarding Barton's difficult childhood and his attitude after the 1974 brain injury.

4. Counsel failed to adequately develop and present the testimony of Lucy Engelbrecht and Donna Potts, and for not investigating or calling Steve Engelbrecht, Lucy's son, to discuss the positive impact Barton had on his life.

5. Counsel failed to advance an adequate closing argument on Barton's behalf, effectively leaving Barton without counsel.

(Doc. # 45, pp. 42-43; Doc. # 45-77, pp. 170-87). The state motion court denied the five claims. (Doc. # 45-86, pp. 72-76). Barton also raised three more claims that relate to Ground XI in his state post-conviction motion appeal to the Missouri Supreme Court:

1. Counsel was ineffective for failing to call Dr. Merikangas to establish that, due to a brain injury, Barton was predisposed to violent impulsive acts.

2. Counsel was ineffective for not calling Juanita Branan, Marie Johnson, Joyce Rogers, Robert Barton, Mary Reese, and Ralph Barton, Jr., to testify that Barton had an abusive past and became predisposed to violent acts following a head injury.

3. Counsel was ineffective because his penalty phase argument was rambling and incoherent to the point that it became prejudicial, arguing that counsel did not argue mitigating evidence but, instead, argued that the death penalty was morally repugnant.

(Doc. # 45, p. 43; Doc. # 45-88, pp. 133-35, 139-54). The Missouri Supreme Court determined those three claims failed as well. *Barton V*, 432 S.W.3d at 757-59. However similar these claims are to Barton's current Ground XI, the State concedes that the claims are sufficiently different so as to constitute a new claim, and argues that the Court must apply procedural default analysis. (Doc. # 45, p. 44).

As stated above, procedural default can only be overcome through a showing of cause for the default, and resulting actual prejudice. *Franklin*, 879 F.3d at 311. Under *Martinez*, ineffective assistance of counsel serves as "cause," so long as the claim is substantial, in that reasonable jurists could debate or agree the claim deserves to proceed further. *See Martinez*, 566 U.S. at 14.

The Missouri Supreme Court discussed trial counsel's choice of mitigation phase strategy at length in *Barton V*:

> At the motion hearing, defense counsel testified that their main strategy in the penalty phase was to focus on residual doubt concerning whether Barton was actually guilty of the crime. Counsel testified that it was their desire to avoid presenting any witnesses whose testimony would have made it more likely that Barton committed the crime. Counsel felt that the prosecution's case was fairly thin and decided that Barton's best chance of avoiding death would be to use any of the jury's remaining doubt of Barton's guilt to their advantage. Counsel also testified that Barton did not want to present any witnesses to beg for his life. Counsel also wanted to avoid presenting witnesses who had testified at prior trials and had not been persuasive. The motion court found that this was a reasonable trial strategy.
>
> . . .
>
> During the penalty phase, trial counsel presented testimony from three witnesses: two women Barton had met through a prison ministry and Barton's current wife, whom Barton met when she began sending him letters as part of a pen pal organization. Each of these three women testified that Barton was an important part of her life and that each would miss Barton very dearly if he were to be executed. His wife testified that Barton had been a positive influence on her son and that he too would find Barton's execution difficult to bear. On cross-examination of these witnesses, the prosecution's questioning attempted to cast doubt on how much these witnesses would miss Barton by asking if they were ever afraid of him or if they knew what he had done.
>
> Defense counsel's closing argument made use of both the testimony of the witnesses and the prosecution's cross-examination. Defense counsel's argument suggested that the death penalty was morally repugnant and ignored the feelings of the three witnesses who testified on Barton's behalf. Counsel argued that the jury should consider the testimony of the three witnesses in determining whether death was appropriate. Specifically, counsel stated:

> I want to talk to you about what mitigating circumstances are. Mitigating circumstances are things that aren't listed. They are simple human things.... [Barton's wife] loves her husband. [Barton's stepson] loves his stepfather. Those are mitigating circumstances.... You can find that [Witness] loves [Barton] like a son.... [T]o suggest that she is not right somehow because she believes this man has a value, that she is somehow inferior, that her feelings of loss are somehow inferior because she loves this man, that is a repugnant stance to take.
>
> Defense counsel coupled this individualized evidence with a plea for mercy. Mercy is a valid sentencing consideration. Counsel argued that the jury should show mercy because Barton had people who cared for him, because the death penalty was immoral, and because the jury should be "better" than the "Walter Bartons of the world."

432 S.W.3d at 757-59.

Barton objects to the strategy of his trial counsel for several reasons, and his arguments can be grouped into two categories: first, Barton argues that trial counsel did not advance the chosen line of defense in an effective manner; and second, that counsel should have chosen a different defense strategy.

Barton attempts to characterize his trial counsel's effort of advancing the dual "plea of mercy" and "residual doubt" defense as so insufficient that it amounted to the presentation of no defense. (Doc. # 36, 91-97). However, both are valid lines of defense, especially when defense counsel pursues them with an understanding of the relative weaknesses of other mitigation strategies. *See Darden v. Wainwright*, 477 U.S. 168, 186 (1986) ("In this case, there are several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy from petitioner himself."); *Williams v. Roper*, 695 F.3d 825, 833-34 (8th Cir. 2012) (analyzing whether mitigation strategy based on lingering residual doubts of guilt among jurors was effective assistance of counsel). Even in *Antwine v. Delo*, where an appeal to the juror's sense of mercy in the penalty phase was rejected as constitutionally ineffective, the Eighth Circuit's stated

rationale for the decision related to counsel's failure to perform an adequate pre-trial investigation, and not counsel's choice of defense strategy alone. 54 F.3d 1357, 1367-68 (8th Cir. 1995); *see also Rompilla v. Beard*, 545 U.S. 374, 386-390 (2005) (analyzing whether an otherwise-valid reasonable doubt strategy was hamstrung by a failure to investigate). Here, Barton admits that repeated litigation assured that any witnesses were well-known. (Doc. # 36, pp. 89-90). Further, varying strategies had been tested and confirmed as unsuccessful, trial counsel possessed this knowledge, and the team wanted to avoid strategies that had failed in the past. (Doc. # 45-75, p. 487, 530). As the Missouri Supreme Court stated, "Barton has not demonstrated that his counsel's strategy was unreasonable, only that a reasonable alternative strategy existed." *Barton V*, 432 S.W.3d at 758. The existence of reasonable and effective alternative strategies does not preclude a Court determining that the chosen defense strategy was not ineffective. *Strickland*, 466 U.S. at 689. As choice of trial strategies made after thorough investigation of the facts and law are "virtually unchallengeable," Barton's trial counsel was not ineffective for their chosen mitigation defense. *See id.* Thus, Barton fails to demonstrate this portion of his ineffective assistance claim is a "substantial" one, for the purpose of *Martinez*. 566 U.S. at 14.

The other categories of Barton's complaints relates to the skill with which Barton's trial counsel undertook his mitigation defense. Barton focuses on the quality of the opening statement presented by David Bruns and the closing statement delivered by Brad Kessler. (Doc. # 36, pp. 92-93). In his initial suggestions in support of his motion, Barton contends that various statements made by both destroyed the credibility of their overall strategy, such as when counsel stated ". . . we never went, and said, 'well, it wasn't Walter. . .'" (Doc. # 36-16, p. 52), or when counsel stated that Barton ". . . is guilty beyond a reasonable doubt. Okay? (*Id.* at p. 55). (Doc. #

36, pp. 92-93). However, in his Traverse, Barton concedes the State's point that he invoked both statements out of context. (Doc. # 56, pp. 102-103). Closer survey of Barton's other objections reveals the same. That subsequent counsel would phrase various aspects of his defense in a different manner does not demonstrate the previous counsel was ineffective. *Strickland*, 466 U.S. at 689 (stating "[e]ven the best criminal defense attorneys would not defend a particular client in the same way"). Barton's trial counsel was not ineffective for failing to investigate or develop a mitigation strategy, nor were they ineffective in the manner which they pursued their mitigation strategy.

Accordingly, Barton fails to demonstrate the requisite elements to merit shelter from procedural default under the *Martinez* equitable exception. To the extent Barton instead argues that general 28 U.S.C. § 2254 analysis applies, the Missouri Supreme Court made reasonable determinations of fact and reasonably applied constitutional law in their decision. Barton's Ground XI is denied.

d. Ineffective Assistance of Counsel–Failure to assert at trial that Barton was incompetent (Ground XII(b))

Barton next argues that his counsel was ineffective for failing to assert that he was incompetent to stand trial. (Doc. # 36, pp. 102-111). Barton argues that his counsel knew or should have known he suffered from brain damage, and should have taken steps to suspend the proceedings so that he could seek treatment. (*Id.*). Barton's federal habeas counsel contends that he has, for the first time in Barton's experience, retained an expert that specializes in the type of brain damage Barton suffers from, and that expert believes Barton faces deficits in his ability to think, absorb information, sequence and predict events, moderate his mood, and consistently and reliably reach conclusions. (*Id.* at 107; Doc. # 36-4).

"A defendant is incompetent to stand trial if he is unable to understand the charges he faces and the consequences involved or he is unable to communicate with counsel 'with a reasonable degree of rational understanding.'" *Forsyth v. Ault*, 537 F.3d 887, 891 (8th Cir. 2008) (quoting *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996)). "A defendant is presumed competent and bears the burden of proving otherwise." *Id*. Barton now contends that the available evidence should have led any reasonably effective attorney to raise the issue of his competency to the trial court.

Barton's trial attorneys in 2006 were not working from a blank slate, and instead had over a decade's worth of defense experience from which to draw from in crafting their strategy. Counsel had access to various records, such as the pre-trial medical and psychiatric assessment prepared by Dr. H.P. Robb, prior to Barton's first trial. (Doc. # 45-93). Dr. Robb opined, in part, the following:

> The defendant does not suffer from a mental illness or defect as defined in Section 552.010 RSMO.
>
> The defendant has the ability to communicate with his attorney in his own defense and to conduct himself appropriately in a courtroom setting.
>
> It is [his] opinion on the basis of the present examination and background information that the defendant most probably did not suffer from a mental disease or defect during the time of the alleged criminal conduct and that he was able to conform his conduct to the requirements of law.

(*Id.*).

Additionally, trial counsel had access to the results of a neuropsychological evaluation performed by Dr. Dennis G. Cowan in 1993. (Doc. # 45-94). The express purpose of the evaluation was to assess Barton's level of function, and to rule out the presence of any cortical brain damage or dysfunction, which is the brain injury Barton now claims. In the examination, Barton told Dr. Cowan the following:

> I told my lawyer I did not want this evaluation. I don't trust you [Dr. Cowan]. I don't trust any doctor and especially no psychiatrist. I only agreed to go along with this because you came all the way to see me.

(Doc. # 45-94, p.1). Dr. Cowan went on to note that Barton understood Dr. Cowan's statements, and had a past history as a good student in school, and reached all developmental milestones at normal rates. (*Id.*). Dr. Cowan acknowledged Barton's past head injuries, and noted that while Barton may suffer mild to moderate impairment, his opinion was limited to not being able to rule out the presence of cortical brain dysfunction. (*Id.*). Dr. Cowan later testified as to the contents of his evaluation at Barton's 1994 trial. (Doc. # 36-28, pp. 224-243). He largely reiterated the substantive portions of the report, responded "no" when asked if Barton was "crazy or anything," and admitted that Barton was functioning in a range comparable with 15-20 percent of the population, at least for the purposes of one intelligence measure. (*Id.* at 229, 237).

Counsel also had access to the opinion testimony of Dr. James Merikangas, an expert that testified at several of Barton's previous proceedings. He last testified before Barton's state post-conviction motion court, where Barton claimed his trial counsel was ineffective for failing to have Dr. Merikangas testify as an expert. *Barton V*, 432 S.W.3d at 757-58. Dr. Merikangas opined that Barton suffered from impulse control issues stemming from a brain injury. *Id.* at 757. However, "[t]he motion court . . . found that much of Dr. Merikangas' testimony was difficult to believe, not particularly persuasive, or 'seemed to defy common sense and logic.'" *Id.* at 758.

Although not raised as a ground for habeas relief in his state post-conviction motion, the motion court heard testimony regarding his most recent counsel's opinion of Barton's mental state:

> [Ted Bruce, Assistant Prosecuting Attorney]: Did you consider – well, let me ask you a more basic question. As you spoke to Mr. Barton, did you believe or have

> any reason to believe that he suffered from some type of mental deficiency that made it either difficult or impossible for him to effectively communicate with you in preparing for trial?
>
> [Brad Kessler, defense counsel]: He was very effective in communicating. You didn't like what he had to say a lot of the time but he got his point across.
>
> [Bruce]: I am just wondering whether or not you thought or you saw anything or observed anything that made you believe that, maybe, you needed to again consult with a mental health expert about Mr. Barton?
>
> [Kessler]: No. And again, I am going to say, I mean, our investigator on the case had been on death row with him for thirteen years. I mean, this is a guy who was a known factor to us, and so, no, I didn't think he was unable to understand or assist in his defense whatsoever.
>
> . . .
>
> [Bruce]: And based upon your experience in litigating these cases and based upon what you had observed, yourself, in dealing with Mr. Barton, did you feel that you saw anything or had an opinion about anything that caused you to believe that it was important to override his personal belief that this is how he wanted to proceed?
>
> [Kessler]: No.
>
> [Bruce]: You didn't decide based upon what you observed that you thought he had a mental disease or defense and that you should assert it regardless?
>
> [Kessler]: Look, I don't think the guy was normal by any stretch of the imagination.
>
> . . .
>
> [Kessler]: I didn't think he was normal, you know, in any stretch of the imagination, but he was certainly competent to assist in his defense and to tell us what he wanted and not wanted.

(Doc. # 45-75, pp. 526-29). Further review of the record reveals that Barton repeatedly discouraged his attorneys from advancing any sort of competency defense across the many years and trials that separate the commission of the crime and his present motion before this Court. For instance, his original defense counsel, Daniel Gralike, testified at Barton's 1995 post-

conviction hearing, and stated that Barton had specifically ordered the team to not pursue a defense focused on his mental capacity. (Doc. # 45-11, p. 97-98).

As a general principle, "[c]ounsel [is] not obliged to disregard both [previous reports] and his client's wishes and further pursue a determination that his client was not competent to proceed." *King*, 266 F.3d at 824; *see also LaRette v. Delo*, 44 F.3d 681, 685-86 (8th Cir. 1995) (stating that counsel was not ineffective for following client's wish to not pursue competency defense). As Barton admits, much of the evidence he cites in this claim overlaps with his Ground XI claim that his counsel mounted a constitutionally ineffective penalty phase strategy. (Doc. # 36, p. 106). However probative his cited evidence may be for the purposes of evaluating mitigation strategies, the test of whether a defendant is competent to stand trial is a separate and more specific inquiry. "[P]resence of a mental illness does not equate with incompetency to stand trial." *United States v. Cook*, 356 F.3d 913, 918 (8th Cir. 2004). Instead, to be considered legally incompetent to stand trial, a defendant must be "unable to understand the charges he faces and the consequences involved or . . . unable to communicate with counsel with a reasonable degree of rational understanding." *Forsyth*, 537 F.3d at 891 (internal quotation omitted). The record demonstrates a defendant who reasonably communicated with his attorneys, repeatedly instructed them against pursuing a competency defense, and understood the nature and consequences of the charges he faced. Barton's attempt to reverse course at this late juncture does not overcome the record below. Barton's claim is denied.

3. Violation of the Fifth Amendment Double Jeopardy Clause (Ground I)

Barton next claims that the State of Missouri violated his Fifth Amendment guarantee to be free from being subject to double jeopardy during the course of his prosecution. "The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated

prosecutions for the same offense." *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982). "This clause provides a criminal defendant with three protections." *United States v. Amaya*, 750 F.3d 721, 724 (8th Cir. 2014) (internal quotation omitted). "'The first two guard against successive prosecution, either after an acquittal or after a conviction.'" *Id.* (quoting *Dodge v. Robinson*, 625 F.3d 1014, 1017 (8th Cir. 2010)). "The third protects against 'multiple punishments for the same offense.'" *Id.* (quoting *Bally v. Kemna*, 65 F.3d 104, 106 (8th Cir. 1995). "The Double Jeopardy Clause, however, does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding." *Oregon*, 456 U.S. at 672. "If the law were otherwise, the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again." *Id.* (internal quotation omitted). However, the Clause may bar successive prosecution after mistrial when the State acted in a way deliberately aimed at goading defendant's counsel into moving for mistrial. *United States v. Radosh*, 490 F.3d 682, 685 (8th Cir. 2007) (quoting *Oregon*, 456 U.S. at 676).

Here, Barton claims that, prior to the first trial in April 1993, the prosecutor, Bob Ahsens, intentionally failed to give notice to defense counsel of the witnesses he planned to call for testimony. The relevant portions of the transcript are quoted below:

> MR. GRALIKE [Defense Counsel]: I have no problem with that. Although, we never received any endorsement for Larry Arnold for the state.
>
> MR. AHSENS [Prosecuting Attorney]: I believe he was endorsed. I certainly have reports of his anticipated testimony.
>
> MR. GRALIKE: I don't believe he's endorsed under the court file.
>
> MR. AHSENS: Well, if not, then out of an overabundance of caution I would move to endorse him now.

MR. GRALIKE: I would object to that, Judge. In fact, I'm not sure if anybody is endorsed, Bob.

***

THE COURT: You've had some time to look through the court file. I think from the look on people's face you've been unable to find anything where the witnesses have been endorsed or disclosed. Is that a fair assumption?

MR. AHSENS: Well, your honor, as far as the endorsement is concerned that I - Mr. McCormick may be able to speak more to that than [I]. On the disclosure, to be frank, while it does not show on the docket sheet, when I - I personally prepared this and mailed it to the public defender's office.

THE COURT: Do you know what date on or about?

MR. AHSENS: Yes, sir, I can tell you.

THE COURT: Did you send a copy to the clerk or?

MR. AHSENS: Yes, sir. At least it was my – please understand I directed my secretary to do so. I signed it and

THE COURT: You signed a certification, all right.

MR. AHSENS: I signed a certification in my file. This was part and parcel. It went out at the same time although I can't guarantee you it went under the same cover. There's a number of other motions.

THE COURT: And I guess the other side of the coin is, who it's addressed to, Mr. Gralike or Mrs. - ?

MR. AHSENS: Daniel Gralike, Capital Attorney, Office of the State Public Defender, 3402 Buttonwood, Columbia, Missouri 65201-3724.

THE COURT: I guess, Mr. Gralike, you as an officer of the court are telling us you didn't get that?

MR. GRALIKE: I'm not saying that. I'm not aware of that.

THE COURT: You're not saying that? Not that he didn't, but you didn't receive it. Is that what you're saying?

MR. GRALIKE: That's my understanding, Judge. I have not seen that.

MR. AHSENS: Now, Judge, let me say too, - Dan, let me show you this so you're aware of it. It was with the materials and receipt. It had all those with the police

reports. And that's the receipt you signed or someone at your office signed for it. You checked the items off I believe or someone for you did when we sent that material as well.

THE COURT: Did we discuss this before when we were here on the record as to witnesses? It's been a long time ago.

MR. AHSENS: Not that I recall, sir. Sir, let me make what record I can on this. According to my file I have a copy which included the signature and the date stamp and a letter. I'll show you what is - it says "Answer to Disclosure" which includes under paragraph one a lengthy list of witnesses and it's signed by myself with a certification service date of August 12, 1992.

THE COURT: This does not show anything sent to the file. I thought you –

MR. AHSENS: Well, it won't show that, sir, because normally the original would go to the file and the original would contain the certificate of service.

THE COURT: Well, is there a cover letter perhaps in your file that would show "Dear Clerk, please find enclosed for filing"?

MR. AHSENS: I don't have such a cover letter, sir, but I wouldn't necessarily file it.

THE COURT: But it seems as though Mr. Gralike didn't get it and neither did the Clerk.

MR. AHSENS: On the second issue let me show you something further. Accompanying that was a full packet of reports which included this receipt that the defense review and sign. Notice that it says "Thanks, Bob. Signed, D. Gralike." Certified mail receipt which I believe is for the packet that included both this receipt and the answer for disclosure. I'll look for a letter. I hadn't gotten that far in my file.

. . .

MR. AHSENS: ... Frankly, I thought I'd given meticulous disclosure. I am flabbergasted by the lack of any showing of file [sic] that that disclosure was filed. I believed and had no reason not to believe that it had been filed properly and disclosed to the defense. As I've told Mr. Gralike in the past, I have never played hide the ball with disclosure. I always try to give them everything I have and I thought we had done that. Lack of endorsement, I believed there was an endorsement. I believe I've seen one but I can't put my hands on it now.

. . .

[Following an off-the-record discussion, the following proceedings took place:]

THE COURT: All right, we're back on the record. We have Mr. Harris, the circuit clerk here with us who is going through his filings and he still has found nothing to indicate that the circuit clerk has received what was prepared by the attorney general's office. The defendant not having it puts us I think in a posture in which this case cannot go forward. Now Mr. Gralike, you earlier suggested unless this could be resolved that you were going to ask for a mistrial. Is that correct, sir?

MR. GRALIKE: That is correct, Judge.

THE COURT: Anybody want to speak to that? I don't know what else to say other than what the court has already alluded to. I see no way - I don't think that would work. You're shaking your head no, Mr. Ahsens.

MR. AHSENS: I have no further comment, Judge. Let me say this for the record ... It was my intention and certainly I thought I had scrupulously provided disclosure. I think Mr. Gralike will agree that we have talked frequently and have tried to do so. That particular document was not filed I cannot account for how that didn't happen since my file contains it and my co-counsel's file contains it. I am, as I said before, flabbergasted that it's not on file with the court. I cast no aspersions and I certainly don't blame the clerk for that, but something went amiss somewhere. This gentleman is very, I'm sure, very good at what he does. And I would have to say that there has been some error somewhere other than his office. If he doesn't have it, he doesn't have it. But we made every effort to provide full disclosure and I certainly thought I had. In my conversations with Mr. Gralike I believed that he had received this document. I'm not saying that – and please don't misunderstand – I'm not saying anything about your misrepresenting your failure to receive it, but had I had any inkling that this had not been received I would have corrected that error.

. . .

MR. GRALIKE: Judge, I'm going to request that Mr. Barton be discharged.

THE COURT: On what basis?

MR. GRALIKE: Well, does the State intend to refile? I don't know if they can or not.

MR. AHSENS: Well, since you're declaring a mistrial that doesn't require me to refile.

THE COURT: Just postpones this proceeding.

MR. GRALIKE: The jury's been sworn, hasn't it?

THE COURT: The jury has been sworn. I don't think that creates jeopardy.

(Doc. # 45-10, pp. 94, 96-99, 103–07).

Though Barton's case has reached the Missouri Supreme Court three times, albeit in various forms, only once has a panel of judges expressly discussed whether Ahsens' tactics should have barred the State's successive prosecution. *See Barton IV*, 240 S.W.3d at 711. The Missouri Supreme Court stated the following in its majority opinion:

> Without regard to the merits of the claim, the claim is barred by collateral estoppel. Appellant acknowledges that this precise issue was raised in his 1996 appeal featuring the same parties, and this Court, remanding for a new trial based on a different trial court error, necessarily concluded that the Double Jeopardy Clause did not preclude a new trial. Even were this Court to reconsider the merits, the claim still fails because 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. The point is denied.

(*Id.*).

As a preliminary matter, it is important to note that *Oregon v. Kennedy*'s double jeopardy protection analysis focuses on the intent of the prosecutor. 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). The Eighth Circuit has previously discussed the superior position the trial court judge maintains when ascertaining whether a prosecutor's conduct gives rise to *Kennedy*'s protections. *See Jacob v. Clarke*, 52 F.3d 178, 182 (8th Cir. 1995) (noting that the state trial court's finding must be accorded deference); *see also United States v. Standefer*, 948 F.2d 426, 432-33 (8th Cir. 1991) (stating district court judge was in best position to make a *Kennedy* finding). Over the last 25 years, various trial court and motion court judges have analyzed claims involving Mr. Ahsen's failure to endorse witnesses at the first trial. (Doc. # 45-11, pp. 80-83, 93-94, 101-04; Doc. # 45-14, pp. 68-76; Doc. # 45-40, pp. 17-22, 64-65; Doc. #

45-44, pp. 51; Doc. # 45-51, pp. 37-54; Doc. # 45-83, pp. 54-55). Further, the record supplied by the parties extensively documents the fact-finding conducted by the Missouri state courts regarding Movant's double jeopardy claim. (*Id.*) Simply stated, no court that has heard Movant's double jeopardy claim has voiced anything but skepticism. This is not to say that the Missouri state courts have failed in any manner to seriously consider the implications that would follow a successful showing that Mr. Ahsens committed prosecutorial misconduct by intentionally withholding the witness endorsement list—simply that, in each instance, "Movant did not offer any evidence to establish an evil or improper motive on the part of the prosecutor." (Doc. # 45-83, p. 41).

Movant argues against the Missouri Supreme Court's direct factual finding, that all evidence shows that Ahsens's failure was inadvertent and not the result of any malevolent intent, by pointing to various ambiguities in the transcript, as well as circumstances surrounding the prosecution. For instance, Movant contends that the trial rule Ahsens failed to follow was so basic that any failure must be self-evidently intentional, that an issue involving the certificate of service proves that Ahsens forged a key document, and that a broader survey of Ahsens's conduct demonstrates a prosecutor that acted in bad faith.[9] However these inferences do not constitute clear and convincing evidence that the Missouri Supreme Court unreasonably ascertained the relevant facts. *See Garrison v. Burt*, 637 F.3d 849, 853 (8th Cir. 2011) (stating the standard with which a federal district court reviews a habeas petition under 28 U.S.C. §

[9] Several of these arguments arise for the first time in Movant's Traverse (Doc. # 56), and not in his initial Suggestions in Support of the Amended Petition (Doc. # 33). Generally, arguments raised for the first time in a reply brief are improper and will not be considered by the Court. *Bank of Am., N.A. v. UMB Financial Servs.*, 618 F.3d 906, 911 n.3 (8th Cir. 2010); *Turnage v. Fabian*, 606 F.3d 933, 942 n.9 (8th Cir. 2010). However, the Court considers these arguments for the purpose of evaluating whether the Missouri Supreme Court's determination was reasonable.

2254). After thorough review of the record, this Court agrees with the Missouri Supreme Court's conclusion that Ahsens' error was inadvertent. Like other cases involving allegations of prosecutorial misconduct, this Court is doubtful that Ahsens designed a discovery violation in advance of a trial that, for his relevant purposes, seemed to be going well. *See Amaya*, 750 F.3d at 726 (discussing whether the prosecutor engineered a discovery violation in advance of trial); *see also United States v. Washington*, 198 F.3d 721, 724-25 (8th Cir. 1999) (same). Movant's Fifth Amendment double jeopardy claim is denied.

IV. EVIDENTIARY HEARING

Habeas petitioners often request courts to hold evidentiary hearings to assist in the adjudication of their claims. "'[I]n deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.'" *Crawford v. Norris*, 363 F. App'x 428, 430 (8th Cir. 2010) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007)). The AEDPA provides the relevant standard:

> 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 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 fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2); *see also Cox v. Burger*, 398 F.3d 1025, 1030 (8th Cir. 2005). Even if § 2254 does not plainly preclude a district court from granting an evidentiary hearing, the court may still deny the hearing "if such a hearing would not assist in the resolution of [the] claim." *Johnston v. Luebbers*, 288 F.3d 1048, 1059 (8th Cir. 2002). In this circumstance, all of Barton's claims involve ascertaining matters of fact clearly documented by the record. Accordingly, and evidentiary hearing would not assist the Court in resolving his claims, and his request for an evidentiary hearing is denied.

IV. CERTIFICATE OF APPEALABILITY

A movant can appeal a decision to the Eighth Circuit only if a court issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability should be issued only if a movant can make a substantial showing of a denial of a constitutional right. *Id.* § 2253(c)(2). To meet this standard, a movant must show reasonable jurists could debate whether the issues should have been resolved in a different manner or the issues deserve further proceedings. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). For the reasons stated throughout this Order, Barton fails to make the requisite showing for issuance of a certificate of appealability.

CONCLUSION

Barton fails to demonstrate that the Missouri Supreme Court made an unreasonable determination of fact, or made a decision involving an unreasonable application of federal constitutional law. Further, he cannot overcome the procedural default of many of his claims, nor does he demonstrate cause to establish they are entitled to the *Martinez* equitable exception. Barton also fails to show that an evidentiary hearing would assist the Court in the resolution of his claims. Barton's Petition for Writ of Habeas Corpus is denied without a certificate of appealability.

IT IS SO ORDERED.

s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

DATED: April 9, 2018

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2241

Walter Barton

Petitioner - Appellant

v.

Cindy Griffith

Respondent - Appellee

Chris Koster; Troy Steele

Respondents

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:14-cv-08001-GAF)

JUDGMENT

Before LOKEN, GRUENDER and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

December 21, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX F

PATRICIA A. ZAPF PHD
Forensic & Clinical Psychology
5668 FishHawk Crossing Blvd, #306 | Lithia, FL 33547 | Ph: 212-866-0608 | patricia.zapf@gmail.com

FORENSIC EVALUATION REPORT

NAME: Walter BARTON
DOB: 01-24-1956 (63 years)
CASE NO(s): State v. Walter Barton #87859-MSPDS
DATE OF EVALUATION: Jan 11-12, 2020

DATE OF REPORT: January 29, 2020

REFERRAL INFORMATION

On December 17, 2019 I was retained by Mr. Frederick A. Duchardt, Jr., the defense attorney for Mr. Walter Barton (Case # 87859-MSPDS), with a request to evaluate Mr. Barton with respect to his adjudicative competence (competence for execution). Mr. Barton is a 63-year-old White male who was convicted and sentenced to death for the first degree murder of Gladys Keuhler, which took place on October 9, 1991.

NOTIFICATION

Prior to beginning the interview Mr. Barton was informed of the nature and purpose of the evaluation, the limited confidentiality of the information to be obtained, and the possibility that a written report or testimony might be offered for the purposes of assisting the court in making a determination regarding his competency for execution. Mr. Barton indicated that he understood the information provided in the notification and agreed to participate in the evaluation.

CASE SUMMARY

Five trials and a host of post-conviction proceedings have occurred in connection with the underlying case against Mr. Barton. Direct appeal of the judgment of conviction and sentence of death against Mr. Barton at Barton's fifth trial is reported at ***State v. Barton***, 240 S.W.3d 696 (Mo.banc 2007). In addition, there are five other reported opinions by the Missouri Supreme Court which are, in chronological order, ***State v. Barton***, 936 S.W.2d 781 (Mo.banc 1996), ***State v. Barton***, 998 S.W.2d 19 (Mo.banc 1999). ***Barton v. State***, 76 S.W.3d 280 (Mo.banc 2002), ***Barton v. State***, 432 S.W.3d 741 (Mo.banc 2014), and ***Barton v. State***, 486 S.W.3d 332 (Mo.banc 2016). Mr. Barton also sought Federal Habeas Corpus relief in the United States District Court for the Western District of Missouri. That petition was denied, and certificates of appealability were denied.

DATA SOURCES

Data sources that were considered for the purposes of this evaluation include the following:

- Military Records for Walter Emel Barton (1974-1977)
- Neuropsychological Evaluation Report of Michael M. Gelbort, PhD (02.10.12)
- Neuropsychological Evaluation Report of Dennis G. Cowan, EdD (01.25.93)
- Missouri State Penitentiary Surgery Department report (10.11.78)
- Neurodiagnostic EEG Lab report (02.24.93)
- Missouri Department of Corrections medical service request (02.28.90)
- Psychiatric Evaluation Report by Bruce Harry, MD (07.13.83)
- Potosi Correctional Center Psychological Evaluation Report by Betty Weber (08.30.94)
- Jefferson Regional Medical Center records (04.22.74 – 05.29.74)
- WAIS-R Record Form (05.28.92)
- Lester E. Cox Medical Center MRI Report (03.04.93)
- Southwest Missouri Medical and Psychiatric Assessment by H.P. Robb, MD (09.24.92)
- Deposition of James R. Merikangas (09.18.00)
- Deposition of James R. Merikangas (09.06.95)
- Psychological Evaluation Report by Gerald H. Heisler, PhD (08.18.93)
- Missouri Division of Corrections Psychiatric report by B. A. Ajans, MD (10.13.76)
- Missouri Division of Corrections Psychological report by S. Robertson, PhD (10.13.76)
- ABLE Cover page with scores by B. A. Ajans (10.13.76)
- Missouri Division of Corrections Psychometric test data (10.13.76)
- Cox Medical Center records (03.26.98 – 03.31.98)
- St. Vincent Infirmary medical records (Little Rock, AK) (04.22.74 – 04.27.74)
- Neurologic Examination Report by James R. Merikangas, MD (08.09.95)
- Report of High School Equivalence (11.28.77)
- Testimony of Dennis G. Cowan, EdD (1994)
- Testimony of Dennis G. Cowan (1995)
- Washington County Memorial Hospital records (08.28.12)
- Ferrell-Duncan Clinic radiology records (03.26.98)
- Professional Audiology Services Audiology Evaluation Report (02.22.89)
- Trial testimony of James R. Merikangas, MD (1998)
- Handwritten notes of Dr. Whipple (no date)
- Pine Bluff School Records (7^{th} grade – 10^{th} grade)
- Testimony of James R. Merikangas, MD (2012)
- Psychiatric Evaluation Report of John H. Wisner, MD (06.12.15)
- Records from State of Missouri Department of Corrections (1994-2017)
- Interview with Mr. Barton on Jan 11-12, 2029 (4.25 hours)
- Psychological testing with Mr. Barton on Jan 11 – 12, 2020
    - Test of Memory Malingering (TOMM)
    - Miller-Forensic Assessment of Symptoms Test (M-FAST)
    - Montreal Cognitive Assessment (MoCA)

RELEVANT BACKGROUND INFORMATION

Mr. Barton appears to be a generally reliable historian with a reasonable ability to recall major life events, providing consistent historical details, dates, or timeframes for events. The following is an account of his background and history as reported by Mr. Barton in interview and generally corroborated by medical and treatment records.

Family History: Walter Barton was born on January 24, 1956 in Mansfield, Louisiana but reported that he always believed he was born in Pine Bluff, Arkansas, where he grew up, since he could not recall being in Louisiana. He reported being the second son of five children born to his parents and indicated his mother, father, older brother, and a younger sister are all deceased and that his younger brother and younger sister are currently alive and living in Missouri and Texas respectively.

Relationship History: Mr. Barton reported being married four times. Each of these marriages took place while he was incarcerated and he has not lived with any of these women. He was able to provide general timelines regarding when and for how long he was married to each woman, with his first marriage occurring in 1983 and lasting until 1987; second marriage from approximately June through December, 1989; third marriage from 1993 though 2002; and the fourth marriage occurring in 2010, with his wife filing for divorce sometime in 2012 but then dropping the petition and so he reports still being legally married at the time of this evaluation.

Educational History: Mr. Barton reported attending school in Pine Bluff, Arkansas and indicated that he was an average student who got along well with his peers and his teachers. Records from Pine Bluff Public Schools indicates that Mr. Barton received primarily Cs and Ds from 7th grade through 11th grade. Mr. Barton reported left school on August 2, 1974 at the end of the 11th grade and enlisted in the military shortly thereafter.

Military History: Military records indicate that Mr. Barton enlisted in the Army on October 16, 1974 and was stationed at Ft. Leonard Wood as a military policeman/detective. He was discharged under other than honorable conditions on May 27, 1977.

Employment History: Mr. Barton reported working a series of odd jobs, mainly in construction or working at grocery stores, while he was in high school and prior to enlisting in the Army. He also indicated working a series of jobs while incarcerated.

Drug/Alcohol History: Mr. Barton did not report a significant history of drug or alcohol use.

Psychiatric History: Mr. Barton did not report a significant history of psychiatric treatment or hospitalization. He denied ever being hospitalized for psychiatric concerns and denied a family history of mental illness, although he noted that his father had 'shell shock' WWII but could not elaborate on what 'shell shock' was or how it affected his father.

Suicide attempts: Mr. Barton denied ever attempting suicide, replying "no, not that I know of" in response to my inquiry regarding whether he has ever made a suicide attempt.

Medical History: Mr. Barton has a well-documented history of several significant head injuries and has undergone several evaluations by various medical and mental health professionals.

Mr. Barton reported that he was a boxer from the age of 15 (approximately 1971) through high school and that he continued to box while in the Army and with the prison boxing program while incarcerated with the Missouri Department of Corrections (until approximately 1991). He reported sustaining several head injuries and being 'knocked out too many times to count.'

In April 1974 (age 18) while in the 11th grade, Mr. Barton suffered a serious head injury after being thrown to a concrete floor in a fight with another student at school. St. Vincent medical records indicate that he lost consciousness and was incoherent after regaining consciousness. Mr. Barton was initially treated at Jefferson Hospital in Pine Bluff, Missouri but was shortly

thereafter transferred to St. Vincent Infirmary in Little Rock where he was admitted for four days. Medical records from St. Vincent Infirmary indicate that he presented as lethargic and amnestic, was vomiting and was bleeding from his right ear. X-rays were taken and he was diagnosed with cerebral concussion and basilar skull fracture.

In October 1976, psychometric data from the Missouri Department of Corrections Classification and Assignment indicates that Mr. Barton obtained an IQ score of 98 (average intellectual functioning).

In January 1978, while incarcerated within the Missouri Correctional system, Mr. Barton sustained a significant head injury for which he was hospitalized for three days. Medical records from the Missouri State Penitentiary Hospital indicate that Mr. Barton presented with vomiting upon admission and was diagnosed with head trauma and skull fracture.

In November 1978, records from the Missouri Division of Corrections, indicate that Mr. Barton was involved in an assault where he was hit on the back of the head and sustained a two-inch gash. He was x-rayed and treated.

A psychiatric evaluation conducted by Dr. Harry for the Missouri Division of Probation and Parole in 1983 described Mr. Barton as “slightly immature” and “slightly peculiar,” with “cognitive functioning [that] tended to be simplistic” and concluded that Mr. Barton showed no evidence of mental illness but did not conducted testing or specific evaluation of his cognitive or neuropsychological functioning.

A psychological evaluation conducted by Dr. Heisler for the Missouri Division of Probation and Parole in 1983 indicated that Mr. Barton lacked insight, stuttered and manifested a speech impediment, demonstrated no introspection or insight, gave no spontaneous verbalizations, appeared concrete and was not able to engage in abstract thinking, was “not able to relate easily as an adult or adjust to emotional situations,” and described Mr. Barton as “indefinite, lacking confidence, and indecisive.”

Records from the Missouri Department of Corrections indicate that Mr. Barton’s hearing was tested in June of 1984 and again in February and June of 1989, with all reports concluding that Mr. Barton is deaf in his right ear. It appears to be widely accepted that this hearing loss was the result of the head injury/skull fracture incurred in 1974.

A Missouri Department of Corrections Medical Service Request from February 1990 indicates that Mr. Barton suffered an additional head trauma and was treated without being taken to the hospital.

Intelligence testing conducted by the Missouri Department of Corrections in May 1992 indicates that Mr. Barton obtained an IQ of 84.

A pretrial psychiatric assessment by Dr. Robb conducted in May 1992 concluded that Mr. Barton showed “no evidence of mental illness.” No testing was conducted and no formal assessment of cognitive abilities or neuropsychological functioning was evident.

In January 1993 a neuropsychological evaluation by Dr. Cowan indicated that Mr. Barton demonstrated impairment on 75% of the tests that were conducted, was classified as “brain-damaged” on the Halstead Impairment Index and demonstrated moderate neuropsychological impairment. Results indicated impairments in attention, concentration, complex sensory-

perceptual function, abstract thinking, judgment, sequencing, problem solving, memory, learning/integration of new material, and slow processing speed. Dr. Cowan concluded that these deficits were the result of diffuse brain damage with additional lateralizing signs within the right posterior hemisphere and resulted in functional impairments that included slow mental processing, poor impulse control, low frustration tolerance, poor attention and concentration, distractibility, and concrete reasoning abilities such that he shows considerable difficulty in being able to reason out complex situations beyond the information that is presented.

A psychological evaluation conducted at Potosi Correctional Center in July 1994 by Betty Weber indicated that Mr. Barton had superficial insight, “very poor impulse control” and “immature judgment”.

A neurological evaluation conducted by Dr. Merikangas in August 1995 concluded that Mr. Barton had severe brain damage, primarily, in the left hemisphere but also involving both hemispheres of the brain. Testimony by Dr. Merikangas indicates that Mr. Barton suffers from two types of brain damage – congenital abnormalities (birth defects, including hypoplasia of the cerebellum, thinning of the corpus callosum, encephalomalacia in olfactory lobe, and enlarged occipital ventricles) as well as acquired brain damage (olfactory lobe, frontal lobe) from cerebral concussion and basilar skull fracture in 1974 and subsequent head injuries. Dr. Merikangas noted specific impairment in Mr. Barton’s foresight and planning abilities, decision making ability, ability to consider future consequences, and impulse control.

SPECT imaging conducted in March 1998 at the Duncan-Ferrell Clinic showed reduced blood flow (usually caused by brain damage) in Mr. Barton’s left frontal cortex and an MRI conducted in 2012 at Washington County Memorial Hospital showed Mr. Barton to have atrophy of the brain.

A neuropsychological evaluation conducted by Dr. Gelbort in February 2012 concluded that Mr. Barton demonstrated evidence of brain damage, primarily in the frontal lobes, left more than right and reported an IQ of 86. Test results indicated that Mr. Barton showed deficits in verbally mediated comprehension and problem solving, as well other formal tasks of executive functions and problem solving/reasoning skills. Dr. Gelbort concluded that the pattern of results was consistent with having suffered an acquired brain injury in the past but having continued cognitive impairment and indicated that Mr. Barton showed specific deficits in verbal reasoning, problem solving, and intuitive thinking skills.

Additional Collateral Information. Mr. Barton’s attorney, Mr. Fred Duchardt, was appointed by the United States District Court for the Western District of Missouri in 2014 to assist Mr. Barton with pursuit of Federal Habeas Corpus claims and has worked with Mr. Barton for last five years.

Mr. Duchardt indicated that Mr. Barton is kind and respectful in his interactions with him but that he has consistent difficulty in communicating with Mr. Barton, particularly if Mr. Barton is excited. Mr. Duchardt noted that, when Mr. Barton becomes excited, he will often stutter and stammer, as if his mind is moving too fast for his mouth. He also reported that Mr. Barton has been consistently unable to absorb and repeat back what was told to him, even if ideas were repeated multiple times.

Mr. Duchardt reported that Mr. Barton’s condition has steadily worsened during the time he has represented him. He noted that Mr. Barton’s ability to advocate for himself in prison are significantly impaired and reported that he has had to intervene with prison staff on Mr. Barton’s

behalf several times to ensure that care is received. Mr. Duchardt also noted that Mr. Barton repeats the same word-for-word questions and rote phrases in all their conversations and expressed concern regarding Mr. Barton's inability to engage in anything more than superficial conversation or to form original thoughts.

Regarding the ability to engage in conversation with Mr. Barton about his impending execution, Mr. Duchardt noted that he is unable to have meaningful communication with Mr. Barton on this topic as Mr. Barton struggles to find thoughts and words, cannot seem to get to the point, and his mind seems to skip onto other things. When he is able to provide a response to a question, and is then asked to repeat what he said, Mr. Barton is unable to recreate what he just said.

Finally, Mr. Duchardt indicated that, although the issue of Mr. Barton's adjudicative competence was not raised during his trials, each of Mr. Barton's former defense attorneys acknowledged to Mr. Duchardt having had difficulty working with Mr. Barton in presenting a defense to his case.

Previous Evaluation History. Psychological and psychiatric evaluations completed with Mr. Barton in the mid-1970s and early-1980s all referred to disorders of complex thinking and difficulty controlling impulses, but without consideration of Mr. Barton's history of severe head trauma or its impact on his mental competence.

In October 1976 a psychological evaluation conducted by Dr. Robertson for the Missouri Department of Corrections noted that "Mr. Barton may be experiencing a psychotic reaction that should be carefully evaluated" and reported MMPI results indicated that Mr. Barton was "likely to make snap judgments and to change his mind frequently and often" and described him as having "a subtle thinking disturbance" which he opined might be due to "latent schizophrenia." Dr. Robertson did not relate Mr. Barton's poor judgment and impulsivity to a possible brain injury.

In 1992, a pre-trial psychiatric evaluation conducted by Dr. Robb addressed the issue of Mr. Barton's competence-related abilities, however, Dr. Robb did not complete any formal assessment of Mr. Barton's cognitive abilities and focused his evaluation on whether Mr. Barton had a mental illness. Concluding that his "present mental examination reveals no evidence of mental illness" Dr. Robb opined that Mr. Barton had the "ability to communicate with his attorney" and "conduct himself appropriately in a courtroom setting." Dr. Robb included a total of five sentences in his report to describe Mr. Barton's competence-related abilities; he addressed factual understanding but did not address Mr. Barton's rational understanding (appreciation) or his decision-making abilities. (As a side note, it was common at the time to focus on factual understanding in competency evaluations and not on higher order cognitive abilities such as decision making as the importance of a defendant's decision-making abilities for competence had not yet been highlighted by the court as it was in *Godinez;* this practice is no longer considered to meet professional standards for competency evaluation, which require assessment of decision making and the ability to provide rational assistance to counsel, in addition to factual and rational understanding.)

In 1983, a psychological evaluation conducted by Dr. Gerald Heisler for the Missouri Division of Probation and Parole noted that Mr. Barton "appeared concrete and was not able to engage in abstract thinking." And that he "did not show indications that he can solve problems well." Dr. Heisler also noted that Mr. Barton "was able to follow instructions but has difficulty being able to problem solve or explore alternatives that he faces. He appears to need direction and guidance in order to function best." Dr. Heisler noted that Mr. Barton lacked insight, stuttered and manifested a speech impediment, demonstrated no introspection or insight, gave no

spontaneous verbalizations, appeared concrete and was not able to engage in abstract thinking but did not explore the relationship of these observations to Mr. Barton's head injury and did not address the impact of Mr. Barton's poor abstraction or ability to think through alternatives on his mental competence.

In 1995, Mr. Barton was examined by Dr. James Merikangas, who concluded that "his neurological exam is consistent with severe brain damage, primarily in the left hemisphere but involving both hemispheres." In 2000, Dr. Merikangas testified to his findings in a deposition and also testified that at trial he was not asked to explain the effects of Mr. Barton's brain injuries. He elaborated that Mr. Barton is "someone who is deficient in the ability to control himself, that he's not a normal person and that his capacity to form intent was reduced, that his capacity to understand complex or difficult situations is less than normal, and that he has this mental defect."

In 1993, a neuropsychological evaluation conducted by Dr. Dennis Cowan, who concluded that Mr. Barton demonstrated 'significant neuropsychological impairment in the areas of attention/concentration, judgment, abstract reasoning, problem solving, sensory-perceptual functioning, motor functioning, memory functioning, integration of novel learning, and speed of mentation." Dr. Cowan elaborated, "The neuropsychological dysfunction, which he is presently experiencing, will have many direct correlations upon his functional abilities. For example, this dysfunction will have a direct bearing upon how fast he is able to think or the speed of his mentation as well as the depth of his thought analyses. I would suspect that he tends to respond more on a 'gut-reactional level' rather than fully considering all of the ramifications and consequences of his actions. Similarly, with a lowered frustration tolerance level, such would result in him responding from a reactionary mode versus one of intellectual reasoning. Furthermore, this patient tends to be somewhat stimulus-bound in that his reasoning abilities are concrete and he tends to manifest considerable difficulties in being able to reason out complex situations beyond what the stimulus presents." In1994, Dr. Cowan testified that Mr. Barton's neuropsychological profile showed impairment on seventy-five percent of the tests performed and that, due to his "cognitive impairments, [impaired] abstract reasoning, and problems with emotional control," Mr. Barton lacked the capacity to deliberate.

In 2015, a psychiatric evaluation was conducted by Dr. John Wisner for the purpose of determining Mr. Barton's competence to proceed. Dr. Wisner noted that "His speech was repetitive, not logically ordered and often unconnected. He was distractible, wandered into unconnected or secondary issues, and at times lost track of the question. His speech was coherent, with mild to moderate dysarthria, and rapid. He did not hesitate or appear to think out his responses throughout the examination." In addition, Dr. Wisner noted that Mr. Barton "mostly did not recognize or acknowledge when he did not respond accurately, could not reach a conclusion, or lost track of the course of a discussion." Dr. Wisner diagnosed Mr. Barton with Traumatic Brain Injury due to basilar skull fracture and concussive injury in 1974, with imaging and functional brain imaging consistent with inferior frontal lobe injury and diffuse cortical damage; probable repeated cerebral injury due to impact injuries subsequent to initial trauma; and Major Neurocognitive Disorder due to encephalomalacia and probable additional cerebral injury. In addition, Dr. Wisner concluded that Mr. Barton's "mental status clearly demonstrates that he has extensive deficits of thinking ability, ability to sequence and predict the course of decisions/events, moderate his mood and emotional responses (affect), and consistently and reliably reach conclusions." Dr. Wisner opined:

1) Walter Barton suffers from the mental defect of Major Neurocognitive Disorder which impairs his capacity to absorb information presented to him, make complex and/or abstract determinations and decisions, and communicate these in coherent fashion.

2) This mental defect prevents him from understanding the legal proceedings against him and the punishment he is facing.

3) This mental defect likewise renders him unable to assist in his legal defense by making logical, consistent, and coherent choices based on the advice of counsel, and communicating these choices in a consistent and logical, coherent fashion.

It is important to note that Dr. Robb's (1992) evaluation, which no longer meets professional standards for a competency evaluation, and Dr. Wisner's (2015) evaluations are the only evaluations that have addressed the issue of Mr. Barton's competence to proceed.

CLINICAL ASSESSMENT

Mr. Barton is a 63-year old White male with a shaved head (white stubble) who was neatly groomed and wore a handlebar mustache. He wore the same (type of) clothing on each day I met with him, consisting of institution-issued grey pants with a cream button up shirt and white undershirt, grey and orange slip on flip flops and white socks. Mr. Barton was in a wheelchair but could stand on his own and walk the length of the interview room (8 feet or so) without assistance. He used his feet to propel the wheelchair forward while seated.

Mr. Barton was generally cooperative with the evaluation, although he would lose focus at times, looking around the room or staring off at nothing. Mr. Barton demonstrated some difficulty with remote memory, although his immediate and recent memory appeared relatively intact, as he was able to recall that he ate nothing for breakfast and was able to recall three of three items immediately and two of three items after five minutes. He was oriented to person (knew who he was), place (knew where he was), and time (knew the year and the month/season). His concentration and attention were notably poor, with him becoming easily distracted by noises and voices in the hallway and requiring questions to be repeated multiple times. There were several instances across both days of interviews where Mr. Barton would perseverate on an idea or a topic, coming back to it at various points when it was inappropriate to the context of the current discussion.

Mr. Barton did not have an adequately developed fund of information, likely a result of his limited education, and demonstrated impaired abstract reasoning ability as indicated by his inability to describe the meaning of common metaphors or analogies; he demonstrated concreteness in all his responses. He demonstrated poor judgment and limited insight into his concrete thinking or his cognitive limitations.

Mr. Barton presented with reduced speech productivity (gave very short answers to questions without the ability to elaborate when pressed). He spoke in a soft tone with a slow flow of speech. He demonstrated reduced thought productivity; that is, he did not produce many of his own thoughts as indicated by reduced speech and an inability to generate more than one or two responses to questions that pressed him for multiple responses. The structure of his thoughts appeared generally logical and mostly relevant, although at times he would become tangential, rambling, and incoherent. Throughout the interview Mr. Barton used common phrases but out of context, as if he was simply repeating phrases that he has heard without fully understanding what they mean.

Mr. Barton presented with a wide range of affect, becoming tearful easily and unable to speak at times when overcome with emotion, but made appropriate eye contact throughout the interview. He did not demonstrate any paranoid or delusional thinking during the interview.

Mr. Barton reported that he had been feeling “ok” over the last little while and reported that he likes and gets along well with the staff at Potosi Correctional Center. He denied any symptoms of major mental illness but did show signs of neurocognitive disorder, including perseveration of ideas, cognitive slowing, and impairment in reasoning and decision making.

Psychological Testing: I administered the *Miller Forensic Assessment of Symptoms* (M-FAST) and the *Test of Memory Malingering* (TOMM) in an attempt to determine Mr. Barton’s response style. These instruments were developed to aid in the assessment of whether an individual is attempting to exaggerate or feign mental illness (M-FAST) or cognitive impairment (TOMM).

In any forensic evaluation the issue of malingering must be considered. To evaluate for the possibility that Mr. Barton was not accurately reporting (e.g., over-reporting, exaggerating) his current level of symptomatology the *Miller Forensic Assessment of Symptoms* (M-FAST) was administered. The M-FAST is a brief, screening interview designed to provide information regarding the likelihood that an individual is malingering mental illness. Individuals who score higher than the suggested cutoff on the M-FAST should be further evaluated with a structured instrument to determine the probability and extent of malingering. Mr. Barton’s score on the M-FAST did not meet the cutoff, thus providing no indication that he should be further evaluated with respect to the validity of his symptom presentation. In addition, no exaggeration was evident in Mr. Barton’s reports of his psychiatric symptoms; my observations indicate that Mr. Barton tended to minimize any psychiatric difficulties he might be experiencing.

To evaluate for the possibility that Mr. Barton was not accurately reporting his degree of memory impairment or cognitive functioning the *Test of Memory Malingering* (TOMM) was administered. The TOMM consists of two learning trials, each of which includes the individual presentation of 50 visual stimuli for 3 seconds each and then requires that the examinee select which of two visual stimuli had been previously presented. Malingering is suggested when the examinee scores at a level lower than expected on the basis of chance. Mr. Barton made 1 error out of 50 on the first trial and scored perfectly on the second trial, scoring well above the suggested cutoff for malingering and, without prompting, recognizing the one error he made on the first trial.

These results indicate that Mr. Barton appears to have been responding in a straightforward manner without attempts to malinger or exaggerate the extent of his deficits. It appears that any noted memory deficits are likely the result of his cognitive limitations.

The *Montreal Cognitive Assessment* (MoCA) is a brief test that measures executive functions and multiple cognitive domains—including attention, concentration, executive function, visuospatial skills, calculation, language and memory—to detect mild cognitive impairment and Alzheimer’s disease.

Mr. Barton’s overall score on the MoCA was consistent with moderate cognitive impairment and fell within the range suggesting Alzheimer’s disease. Mr. Barton demonstrated impairments in visuospatial skills and executive function (planning, foresight, decision-making), and an inability to alternate or shift between concepts due to a predominantly concrete thought process; impaired attention and concentration; impaired language and verbal fluency; impaired abstraction (capacity to spontaneously conjure an abstract concept); and impaired delayed

recall with no improvement with cues, which indicates impaired encoding memory (as opposed to retrieval memory), as consistent with Alzheimer's disease.

Current Diagnoses: Mr. Barton meets criteria for the following diagnoses:

- Major Neurocognitive Disorder, due to traumatic brain injury (likely Chronic Traumatic Encephalopathy)
- Rule Out Major Neurocognitive Disorder, due to Alzheimer's disease

Note: Because Chronic Traumatic Encephalopathy (CTE) can only be determined upon death, the cause of Mr. Barton's major neurocognitive disorder must be noted as traumatic brain injury as consistent with his well-documented history of congenital and acquired brain injury. The rule out diagnosis indicates that this would be the most likely alternate causal explanation for the major neurocognitive deficits that Mr. Barton is demonstrating.

FORENSIC ASSESSMENT

The *Checklist for Evaluations of Competency for Execution*[1] (Zapf, Boccaccini, & Brodsky, 2001) was used to structure the evaluation of competency for execution. This instrument is not formally scored, but rather is used as an *aide memoire* to guide the evaluation of competence for execution. Current evaluation guidelines call for a broad assessment of relevant abilities[2].

Mr. Barton was evaluated with respect to his ability to (a) factually understand the punishment he is to receive and the reasons for it; (b) rationally understand the punishment he is to receive and the reasons for it; and (c) provide rational assistance to counsel and make rational decisions regarding any further legal actions in his case.

Factual Understanding: Mr. Barton demonstrated a rudimentary factual understanding of the punishment he is about to receive and the reasons for it. He was able to describe the reason why is in prison and elaborate on his place of residence within the prison. He was able to provide information about his conviction, a general description of the criminal act, and basic identifying information about the victim. Mr. Barton was unable to engage in abstract discussions regarding the perceived justness of his conviction, maintaining that he was 'railroaded' and reporting that 'they're going to execute me if I can't prove my innocence,' demonstrating some illogical thought process.

Mr. Barton's responses regarding factual understanding inquiries indicate that he is able to reiterate information that has been presented to him through educational attempts but does not have a depth of understanding that includes ability to reason about logical alternatives, further elaborate, or abstract beyond simple factual information.

Rational Understanding: Rational understanding is differentiated from factual understanding in terms of the individual's ability to apply factually understood information to the specific instance of his own case. Rational understanding (appreciation) includes the individual's ability to recognize how others might perceive him and how he might be impacted by various decisions

[1] Zapf, P. A., Boccaccini, M. T., & Brodsky, S. L. (2003). Assessment of competency for execution: Professional guidelines and an evaluation checklist. *Behavioral Sciences and the Law, 21,* 103-120.
[2] Zapf, P. A. (2009). Elucidating the contours of competency for execution: The implications of *Ford* and *Panetti* for the assessment of CFE. *Journal of Psychiatry and Law, 37*, 269-307.

and outcomes.

Mr. Barton demonstrated a simplistic, but rational understanding of the punishment he is about to receive and the reasons for it. He did not demonstrate any delusional thinking or loss of contact with reality and no perceptual disturbances were noted.

Mr. Barton's responses regarding rational understanding inquiries demonstrated an appreciation (rational understanding) of the personal importance of the punishment and the personal meaning of death; and the personal, mental, and physical changes that are associated with death. His responses did not demonstrate any unusual or inappropriate beliefs about death or feelings of invulnerability; did not demonstrate any inappropriate affect regarding death; and provided no indication of irrational thought process.

Rational Assistance & Decision Making: An individual's overall ability to assist his attorney and make self-interested decisions regarding his case is comprised of various abilities, such as the ability to communicate with counsel, to relate to and trust his attorney, and to assist in planning legal strategy and actions. Perhaps most important, as underscored in the majority opinion in *Godinez*, is the ability of the individual to engage in rational decision-making about his case.

It is with respect to the ability to provide rational assistance and decision making that Mr. Barton demonstrated the most significant and concerning impairments. He demonstrated a relatively intact ability to communicate basic facts to his attorney, but his communication skills are limited by his cognitive deficits and his inability to concentrate or attend for a lengthy period of time. In addition, his lack of insight into his cognitive deficits and the impact that these have on his functioning impairs his ability to provide relevant details that might impact (indeed, very likely could have significantly impacted) his ability to provide rational assistance to counsel and engage in rational decision making about his case.

Mr. Barton's responses to inquiries regarding rational assistance and decision making indicated significant impairment in his ability to engage in rational decision making about his case and provide meaningful assistance to counsel. Mr. Barton demonstrated impaired concept formation, poverty of thought, and impaired ability to engage in spontaneous discussion about a concept. Even if questions were short, concrete, easy to understand and Mr. Barton was given adequate time to respond, his responses demonstrated significant difficulty in responding to inquiries requiring anything more than a simplistic, vague, or unelaborated response. Mr. Barton was unable to distinguish between more and less relevant information, to assign appropriate weight to information according to relevance, or to ascertain why a particular piece of information would be important or relevant to his case. In addition to his cognitive limitations, his inability to attend or concentrate for extended periods of time presents a challenge in this regard.

Formulation. The formulation of an opinion regarding competence in this case is complex. The issue of competence for execution is raised in only a handful of cases (and is far less prevalent than the issue of trial competence, although both types of competencies fall under the umbrella of adjudicative competence); this rarity has resulted in a lack of opportunity to develop and evolve the relevant standards and statutes to guide the evaluation and determination of competence for execution (as compared to the well-developed standards and statutes in every state that now guide the evaluation and determination of competence to stand trial).

The United States Supreme Court established in *Ford v. Wainwright* (1986) that execution of the insane was unconstitutional but did not provide a legal standard for competence for execution. Although Justice Marshall's plurality opinion alluded to a two-prong standard for competence for execution (taking into account the ability to provide rational assistance to counsel in addition to factual and rational understanding), Justice Powell's concurring opinion articulated a constitutionally minimal standard that only considered an inmate's awareness of the punishment and the reasons for it.

More than 20 years after *Ford*, The United States Supreme Court in *Panetti v. Quarterman* (2007) broadened the interpretation of Justice Powell's standard to include consideration of an inmate's rational as well as factual understanding. The Supreme Court, however, did not address the issue of the standard for competence and left unresolved the issue of whether a one-prong (factual and rational understanding) or two-prong (prong one plus the ability to provide rational assistance to counsel) standard should be applied in competence for execution.

In his plurality opinion in *Ford*, Justice Marshall advocated for a standard that included consideration of the ability to assist counsel and highlighted the importance of a "heightened standard of reliability" for fact-finding procedures in capital cases since "death is different" and "execution is the most irremediable and unfathomable of penalties" (p. 411). Marshall went on to note that, "the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding" (pp. 411-412). This reasoning appears consistent with having a legal standard for competence for execution that is at least as stringent as the standard for competence for any other type of adjudicative competence.

The United States Supreme Court, in *Godinez v. Moran* (1993), decided that the standards for competence to stand trial, competence to plead guilty, and competence to waive the right to assistance of counsel are the same: the constitutionally minimal standard for competence set out by the United States Supreme Court in *United States v. Dusky* (1960), which was comprised of two prongs encompassing both "a rational as well as factual understanding" and sufficient ability to "consult with counsel with a reasonable degree of rational understanding." In addition, the decision in *Godinez* underscored the importance of rational decision making as a component of competence.

It appears paradoxical, and in conflict with the principle of proportionality, that the *Dusky* standard should represent the minimal standard to be applied for the various adjudicative competencies throughout the criminal process but that the standard for competence for execution—where an incorrect determination carries the highest stakes given the severity of the consequences—would not be privy to this same constitutional minimum.

Resolutions of four professional organizations—the American Bar Association, the American Psychological Association, the American Psychiatric Association, and the National Alliance on Mental Illness—have called for stronger expressions of proportionality. Each of these four organizations has adopted resolutions and recommendations against executing prisoners who, because of mental disorder or disability, are unable to demonstrate appropriate factual understanding, rational understanding, or assistance of counsel (including the ability to make rational decisions within the relevant context).

Thus, while the legal standard for competence for execution appears to be evolving, the appropriate standard for competence for execution, according to the American Bar Association and three prominent national mental health organizations, appears to be the two-prong standard

in which both the ability to understand (factual as well as rational) and assist counsel (including the ability to make rational decisions) are required.

Missouri Revised Statute 552.060 concerning mental disease or defect upon sentence to death indicates: “No person condemned to death shall be executed if as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out.”

Missouri Revised Statute 552.010 defines mental disease or defect to “include congenital and traumatic mental conditions as well as disease;” thus Mr. Barton’s congenital and acquired traumatic brain injuries and resulting degenerative process meet the condition of a mental disease or defect as a threshold for incompetence.

Inclusion of the clause ‘or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out’ in Missouri’s statute suggest that the ability to provide rational assistance to counsel and the ability to make rational, self-interested decisions are likely encompassed by this standard. Thus, I offer the following conclusions and opinions:

(a) Mr. Barton meets criteria for Major Neurocognitive Disorder.

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

(b) Mr. Barton demonstrates a rudimentary factual and rational understanding of his punishment and the reasons for it.

(c) Mr. Barton demonstrates significant impairment in his ability to provide rational assistance to counsel and to engage in consistent, logical, and rational decision making.

Mr. Barton demonstrates significant impairment in his ability to provide rational assistance and to make rational, self-interested decisions regarding his case. There is ample evidence throughout more than two decades of Missouri state court proceedings—consisting of five jury trials and numerous appellate and state-post-conviction proceedings giving rise to more than a dozen court opinions—to suggest that Mr. Barton was likely impaired in his ability to provide rational assistance to counsel and make rational, self-interested decisions from the time of his first trial to the present. It is concerning that, although the issue of his trial competence was not raised through five trials, each of his former attorneys has acknowledged having had difficulty working with Mr. Barton in presenting a defense.

It is with the benefit of hindsight, along with current advances in our understanding of the impact of brain injuries and the degenerative impact of multiple repetitive blows to the head, that we are now able to conceptualize more accurately what was being implicitly recognized by the various mental health professionals who evaluated Mr. Barton but that was not explicitly understood at the time.

Over the last nearly three decades Mr. Barton has been evaluated by several mental health professionals, each of whom agreed that cognitive deficits are evident in Mr. Barton and described the impact of these deficits on his behavior and functioning. What these evaluators were not able to take into consideration two decades ago—because the science had not yet evolved to where it is now—is the functional impact of the cognitive deficits that result from congenital or acquired of brain injury. At present, after decades of research on the functional impact of brain injury, we recognize that changes in personality, inability to make self-interested decisions in emotional situations, impulsivity, and aggressive behavior are all symptoms that can result from a significant brain injury or a series of repetitive sub-concussive blows to the head. "It is now accepted that brain damage affecting emotional perception, processing, and expression—particularly damage to the frontal cortices—is correlated with diminished rationality, particularly in the realm of highly-personal decision making" (Maroney, 2006, p. 1420)[3].

Certain diseases such as Alzheimer's disease and Chronic Traumatic Encephalopathy (CTE), cannot be diagnosed until after death, upon examination of the brain. There are, however, tools that can be used to evaluate both the structure (SPECT, MRI) and function (neurocognitive testing) of the brain while the individual is alive. In Mr. Barton's case, both the structural imaging results (SPECT, MRI performed between 1993 and 2012) and the functional testing results (neurocognitive testing conducted between 1993 and 2012) are consistent with those from individuals with a degenerative brain disease such as dementia or chronic traumatic encephalopathy.

It is likely the case that Mr. Barton's functional deficits were impairing his ability to provide rational assistance and rational decision making in his own defense throughout the last several decades.

Opinions

(1) It is my opinion that, to a reasonable degree of psychological certainty, in consideration of the standard set forth by the court in *Dusky*, Mr. Barton is incompetent to proceed.

As a result of his Major Neurocognitive Disorder, Mr. Barton has significant impairments in executive function, problem solving, attention, concentration, working memory, and abstract reasoning, which result in the inability to provide rational assistance to counsel and to engage in consistent, logical, and rational decision making.

(2) It is my opinion that, to a reasonable degree to psychological certainty, in consideration of the standard set forth in Justice Powell's concurrence in *Ford*, Mr. Barton is competent to proceed.

As a result of his Major Neurocognitive Disorder, Mr. Barton has significant impairments in executive function, problem solving, attention, concentration, working memory, and abstract reasoning. He is, however, able to demonstrate a rudimentary and non-delusional understanding of the punishment he is about to receive and the reasons for it.

As delineated above, competence for execution is the only aspect of adjudicative competence where the constitutionally minimal standard for competence to proceed remains unclear. The

[3] Maroney, T. A. (2006). Emotional competence, "rational understanding" and the criminal defendant. *American Criminal Law Review, 43*, 1375-1435.

Court's reasoning in *Godinez* highlighted the importance of decision making abilities in providing rational assistance to counsel and specified that *Dusky* provided the constitutionally minimal standard for competence to proceed.

In light of the continuing evolution of the standard for competence for execution (e.g., from *Ford* through *Panetti*), the resolutions of four prominent national organizations (the American Bar Association, the American Psychological Association, the American Psychiatric Association, and the National Alliance on Mental Illness), and current professional guidance regarding the evaluation of competence for execution, it appears appropriate to address Mr. Barton's competence regarding competence-related abilities beyond simple factual and rational understanding.

(3) It is my opinion that, to a reasonable degree to psychological certainty, in consideration of the standard alluded to in Justice Marshall's plurality opinion in *Ford* and adopted by the American Bar Association, the American Psychological Association, the American Psychiatric Association, and the National Alliance on Mental Illness, Mr. Barton is incompetent to proceed.

As a result of his Major Neurocognitive Disorder, Mr. Barton has significant impairments in executive function, problem solving, attention, concentration, working memory, and abstract reasoning, which result in the inability to provide rational assistance to counsel and to engage in consistent, logical, and rational decision making.

Any forensic evaluation is only as good as the information on which it is based. Missing information may adversely affect the reliability of any findings or opinions. If new or potentially relevant information comes to light, please contact me so that I can make a determination regarding whether this new information would lead to a substantive change in my findings or opinions on this matter.

As a forensic psychologist, I recognize that the determination of a defendant's competency to stand trial is ultimately a matter for the court to decide. Therefore, the opinions rendered above are of an advisory nature only. I will be happy to provide the court with any further information, records, or testimony that it may require.

Respectfully submitted,

Patricia A. Zapf, PhD
Licensed Clinical Forensic Psychologist

Addendum:
Earlier today, as I was completing this report, I received an email from Mr. Duchardt with the information that on January 17, 2020 Mr. Barton had spontaneously decided to drop all of his appeals and sent a letter to the Missouri Supreme Court requesting a speedy execution date. Apparently Mr. Barton's jailhouse "wife" had threatened to "divorce" him, and this prompted him to decide to "just end it all." Mr. Duchardt reported that, in subsequent conversations over the last week or so, Mr. Barton has since changed his mind and has withdrawn this request. This is a good example of the impact of Mr. Barton's impulsivity, emotional lability, and impaired reasoning on his ability to make logical, rational, and consistent decisions.

APPENDIX G

Supreme Court of Missouri

en banc

SC87859

State of Missouri, Respondent,
vs.
Walter Barton, Appellant.

☐ Sustained

☐ Overruled

☐ Denied

☐ Taken with Case

☐ Sustained Until

☒ Other

Order issued: Order and warrant of execution issued on February 18, 2020, ordered vacated. Amended order and warrant of execution ordered to issue on this date.

By: _____
Chief Justice

February 18, 2020
Date

207 West High Street, Jefferson City, MO 65101

Office of Missouri Supreme Court Clerk

Fax

To:	Ms. Cindy Griffith, Warden	**From:**	Cynthia L. Turley
Fax:	573-438-6006	**Pages:**	5, including this cover page
Phone:	573-438-6000	**Date:**	February 18, 2020
Re:	State of Missouri, Respondent, vs Walter Barton, Appellant. SC87859	**CC:**	

☐ **Urgent** x **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

• **Comments:**

Dear Ms. Griffith:

I am faxing with this cover sheet a copy of the amended order of execution, amended warrant of execution and cover letter issued on this date in the above-entitled cause.

I have also mailed these documents to you on this date.

Cynthia L. Turley

Deputy Clerk, Court en banc

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

BETSY AUBUCHON
CLERK

TELEPHONE
(573) 751-4144

February 18, 2020

Ms. Elizabeth Unger Carlyle via e-filing system
#516
6320 Brookside Plaza
Kansas City, MO 64113

Mr. Frederick A. Duchardt, Jr. via e-filing system
P.O. Box 216
Trimble, MO 64492

In Re: State of Missouri, Respondent, vs. Walter Barton, Appellant.
Missouri Supreme Court No. SC87859

Dear Counsel:

The Court issued an order today vacating the order of execution and warrant of execution setting an execution date of May 20, 2020. This is to advise that the Court this day entered an amended order in the above-entitled cause, a certified copy of which is herewith attached. A certified copy of the amended warrant is also attached for your information. The execution is set for May 19, 2020. By copy of this letter, a certified copy of the amended order and amended warrant are provided to all shown below.

Very truly yours,

BETSY AUBUCHON

cc:
Mr. Michael Spillane/Office of Missouri Attorney General via e-filing system and hand delivery
Mr. Andrew Crane/Office of Missouri Attorney General via e-filing and hand delivery
Ms. Anne L. Precythe/Missouri Department of Corrections via hand delivery
Mr. Christopher Limbaugh/Office of the Governor via hand delivery
Mr. Walter Barton c/o Missouri Department of Corrections via hand delivery
Ms. Cindy Griffith via regular mail and facsimile

Supreme Court of Missouri

en banc

February 18, 2020

STATE OF MISSOURI, Respondent,	)	
vs.	)	No. SC87859
WALTER BARTON, Appellant.	)	

AMENDED WARRANT OF EXECUTION

Now on this day, Appellant, Walter Barton, being in custody pursuant to a sentence of death heretofore rendered against him by the Circuit Court of Cass County, and affirmed by this Court, it is therefore considered, ordered and adjudged by this Court that Walter Barton be and remain in the custody of the Department of Corrections and, thereafter, within the twenty-four hour period beginning at 6:00 p.m. on May 19, 2020, under the supervision and direction of the director of said department, shall suffer death. Said director is directed to make return of this warrant to this Court showing the time, mode and manner in which this warrant was executed.

STATE OF MISSOURI-Sct.
I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the order of said Supreme Court, entered of record at the January Session thereof, 2020, and on the 18th day of February, 2020, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 18th day of February, 2020.

SEAL OF THE SUPREME COURT OF MISSOURI

Betsy AuBuchon, Clerk

Cynthia L. Fuller Deputy Clerk

SUPREME COURT OF MISSOURI
en banc

February 18, 2020

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
v.	)	No. SC87859
	)	
WALTER BARTON,	)	
	)	
Appellant.	)	

AMENDED PER CURIAM

BE IT REMEMBERED, that on July 7, 2006, the Circuit Court of Cass County entered its judgment finding Walter Barton guilty of murder in the first degree and fixing punishment at death; and

Thereafter, on July 21, 2006, Walter Barton's notice of appeal from said conviction was filed in this Court; and

Thereafter, on December 18, 2007, this Court affirmed Walter Barton's conviction; and

Thereafter, on January 15, 2008, this Court overruled Walter Barton's motion for rehearing; and

Thereafter, on May 10, 2013, Walter Barton's notice of appeal from the judgment overruling his post-conviction relief motion was filed in this Court; and

Thereafter, on May 13, 2014, this Court affirmed the overruling of Walter Barton's post-conviction motion; and

Thereafter, on June 24, 2014, this Court overruled Walter Barton's motion for rehearing; and

Thereafter, Walter Barton sought relief in various federal courts; and

Thereafter, on November 18, 2019, the Supreme Court of the United States denied Walter Barton's petition for a writ of certiorari; and

Thereafter, on November 19, 2019, the state filed a motion to set execution date and, on January 31, 2020, Walter Barton filed a response thereto;

NOW, THEREFORE, it is ordered that Walter Barton's sentence be executed during the 24-hour period beginning at 6:00 p.m. on May 19, 2020.

A warrant of execution is directed to issue accordingly.

STATE OF MISSOURI-Sct.
I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the order of said Supreme Court, entered of record at the January Session thereof, 2020, and on the 18th day of February, 2020, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 18th day of February 2020.

Betsy AuBuchon, **Clerk**

Cynthia L. Tuckey **Deputy Clerk**

* * * Communication Result Report (Feb. 18. 2020 3:07PM) * * *

1) SUPREME COURT OF MISSOURI
2)

Date/Time: Feb. 18. 2020 3:06PM

File No.	Mode	Destination	Pg(s)	Result	Page Not Sent
0817	Memory TX	85734386006	P. 5	OK	

Reason for error
E. 1) Hang up or line fail
E. 2) Busy
E. 3) No answer
E. 4) No facsimile connection
E. 5) Exceeded max. E-mail size
E. 6) Destination does not support IP-Fax

207 West High Street, Jefferson City, MO 65101

Office of Missouri Supreme Court Clerk

Fax

To:	Ms. Cindy Griffith, Warden	From:	Cynthia L. Turley
Fax:	573-438-6008	Pages:	5, including this cover page
Phone:	573-438-6000	Date:	February 18, 2020
Re:	State of Missouri, Respondent, vs Walter Barton, Appellant. SC87659	CC:	

☐ Urgent x For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

• Comments:

Dear Ms. Griffith:

I am faxing with this cover sheet a copy of the amended order of execution, amended warrant of execution and cover letter issued on this date in the above-entitled cause.

I have also mailed these documents to you on this date.

Cynthia L. Turley

Deputy Clerk, Court en banc

APPENDIX H

AFFIDAVIT OF LAWRENCE RENNER

I, Lawrence Renner, having been duly sworn, do hereby depose and state the following:

THAT, I am a forensic analyst who specializes in crime scene investigation and reconstruction, as well as identification and interpretation of crime scene blood stains and spatter; I have been so employed for forty-two years, working in the public sector for the City of Santa Fe, New Mexico, crime scene unit and for the New Mexico State Police, Department of Public Safety Crime Laboratory, and in the private sector as a consultant and expert witness; I have been certified as a senior crime scene analyst and as a bloodstain pattern examiner by the International Association for Identification; I hold bachelor's and master's degrees in biology; I have received training in my fields of expertise at more than one hundred professional training sessions, I have been an instructor in my fields of expertise at more than one hundred professional training sessions, and I have published eleven articles in my fields of expertise; I have testified as an expert on subjects of crime scene reconstruction and blood spatter analysis in Federal, State and Military Courts throughout the United States;

THAT, all opinions which I shall express in this affidavit are based upon my expertise, as described, and are expressed to a reasonable degree of scientific certainty;

THAT, in 2015, I was asked by attorney Frederick A. Duchardt, Jr. to conduct an analysis of the evidence collected in connection with the 1991 homicide of Gladys Kuehler; in connection with this work, I have reviewed a videotape and 33 photographs of the crime scene, as well as 134 autopsy photographs; I have also personally examined the clothing of Mr. Barton seized at the time of his arrest, particularly a shirt, a pair of blue jeans, undershorts, and a bandana; and, I have personally examined a bedspread seized from the residence of Gladys Kuehler during the investigation of the homicide; I have also reviewed the autopsy report by James W. Spindler, M.D., laboratory reports by Thomas Buel,

Kathleen Green, Brian Hoey, Carol Horton, Donald Lock, Bob Luck, Cary Maloney, William Newhouse, Jenny Smith, and Sandra Stone, and transcripts of the sworn testimony by witnesses Megan Clement, Kim Freter, Lyle Hodges, Brian Hoey, Duane Isringhausen, Stuart James, Cary Maloney, Jack Merritt, William Newhouse, Keith Norton, M.D., Debbie Selvidge, and me, Lawrence Renner;

THAT, from my review of the written records, I have determined that DNA testing was done only on one item, that is a cutting from the shoulder area of Mr. Barton's shirt (see testimony of Brian Hoey, 4th Trial, p. 681); that DNA testing determined that the sample from the shoulder area of the shirt was consistent with the DNA of Gladys Kuehler (see testimony of Brian Hoey, 4th Trial, p. 683-684, testimony of Anita Matthews, 4th Trial, p. 698-701, testimony of Megan Clement, 5th Trial, p. 849-850);

THAT, from my review of the written records, I understand that Mr. Barton explained to police that any blood from Ms. Kuehler which might be found on his clothing would be there, not because he was Ms. Kuehler's assailant, but only as a result of inadvertent deposit resultant from Barton being in the room where the body was found by him, Debbie Selvidge and Carol Horton;

THAT, upon examining the jeans, bandana and boots of Walter Barton, I found NO stains which could possibly be blood; I particularly looked for stains on the jeans as described by William Newhouse in his testimony (5th Trial, p. 884-885, 904-905), and found none; I note that Mr. Newhouse created no photographs of the stains he claimed to have found; I also note that, according to the testimony of Cary Maloney, any blood which might have been on the jeans was removed and tested long before the jeans were examined by Mr. Newhouse or by me (5th Trial, p. 783, 785-787);

THAT, upon examining the undershorts of Walter Barton, I found a stain which I believe is urine;

THAT, upon examining the shirt of Walter Barton, I found an area had been cut out from the shoulder portion of the shirt; this finding was consistent with the

report that this area had been used to conduct DNA testing (see again the testimony of Brian Hoey, 4th Trial, p. 681); there were no stains remaining in this area;

THAT, upon further examination of the shirt, I found several transfer stains, that is stains made by contact between the shirt and a source of some substance; none of these stains are impact stain patterns, that is a stain created when force applied to the source of the substance would have caused the substance to spatter, that is travel through the air, onto the shirt; I found all of these stains on the front of the shirt, one at the left hem, which I would describe as a smudging stain, one over the left abdominal area, which is roughly circular, another just below the previous stain, which is in a v-shaped transfer pattern, and two soak stains in the cuff area, near a place which had been cut out; while all of these stains could be blood, they could also be other substances; there is no way to determine the age of any of these stains, and therefore there is no way to determine whether these stains were made at the same time, or at different times; the only way to determine whether these stains are the blood of Gladys Kuehler would be to conduct DNA testing of these stains;

THAT, I have reviewed the testimony of William Newhouse, and I am aware that Mr. Newhouse has expressed the opinion that the v-shaped stain on Mr. Barton's shirt, which I have described in the previous paragraph, is spatter due to "high-medium to high energy impact" (5th Trial, p. 886, 891-892; see also 4th Trial, p. 720-725); I strongly disagree with this assessment by Mr. Newhouse, and do not believe that any experienced blood spatter expert could reach such a conclusion based upon examination of this stain;

THAT, I have reviewed the testimony of attorney Kim Freter, and therefore I understand that Ms. Freter claims to have spoken with me at a Life in the Balance Seminar in 2005, further claims that, at that time she showed me certain photographs, and also claims that, at that time, she obtained from me opinions that the photographs shown depicted "three distinctive types of bloodstains" on Mr. Barton's clothing, including some sort of "high velocity spatter", and a blood drop on Mr. Barton's boot, and that was all somehow inconsistent with Mr. Barton's accounts to police about how he might have inadvertently gotten the blood of Gladys Kuehler on him at the time of the discovery of Kuehler's dead body by

him, Debbie Selvidge and Carol Horton (see testimony of Kim Freter, p. 408, 411-412);

THAT, I have no recollection of ever speaking with Ms. Freter about the facts of this case; I do acknowledge, as I have in my previous testimony, that it is possible that I did speak with Ms. Freter at the 2005 Life in the Balance seminar, since I conducted presentations at that seminar regarding blood spatter analysis, and since I did speak with many of the attendees about blood spatter analysis (see my previous testimony, p. 389, 392); however, since it is my strong practice to not render opinions about cases based upon review of photographs alone, I can be virtually certain that I did not render the opinions to Ms. Freter which she contends that I rendered;

THAT, because I have now examined the clothing of Mr. Barton, and because I have found no "high velocity spatter" stains on the clothing, I can be certain that Ms. Freter could not have shown me a picture depicting such "high velocity spatter", since that does not exist on the clothing; for those same reasons, I can also be certain that I could not have rendered the sort of opinion about "high velocity spatter" which Ms. Freter claims I rendered;

THAT, in the pictures of Mr. Barton's boots provided to me, there is no rounded drop of blood depicted as described by Ms. Freter in her testimony (see Freter testimony, p. 409-410); Mr. Duchardt has told me that he has searched the files in his possession and in the possession of the state, and has been unable to find such a picture; the lack of such a depiction of a drop may owe to the fact that, according to the testimony of Cary Maloney, he used up in testing done in 1992 all of the blood found on Mr. Barton's boots (5th Trial, p. 784-785); all of this calls into question whether Ms. Freter could have shown me a picture depicting a drop of blood on the boot as she has claimed;

THAT, even if Ms. Freter would have shown me a picture of a rounded blood drop on the top of Mr. Barton's boots, such evidence would not have been inconsistent with Mr. Barton's claim of inadvertent staining of his clothing, and therefore, I would not have told Ms. Freter it was inconsistent; Ms. Freter's insistence that "it (the drop) would have been elongated had it come while he

(Barton) was moving, which was what he (Barton) had said" (Freter testimony, p. 410) illustrates her vague understanding of the science; I can conceive of any number of circumstances in which such a rounded drop could have been inadvertently deposited on Mr. Barton's boot at the time of the discovery of the body by him, Debbie Selvidge and Carol Horton;

THAT, in light of the large number and severity of the wounds inflicted upon the body of Gladys Kuehler, there would have undoubtedly been a large amount of blood spattered around the scene and upon Ms. Kuehler's assailant; the photographs and video taken of the crime scene did not depict such blood spatter, but that is because those were incompetently done, in that the photographs failed to completely depict the crime scene; particularly, the walls and ceiling of the bedroom were not pictured in a way to show the blood spatter which undoubtedly occurred;

THAT, the clothing taken from Walter Barton could not have been the clothing worn by Ms. Kuehler's assailant because, even if it is assumed that all of the stains on the clothing were the blood of Ms. Kuehler, an assumption which I believe is dubious, those stains, in numbers and locations, are far, far fewer than what would be expected to be deposited by the spatter which would have occurred in inflicting the wounds on the body of Ms. Kuehler;

THAT, when I was engaged to witness in 2012 in connection with Mr. Barton's case, I was never provided with the evidence of the case, as described above, and I was never asked to render any of the expert opinions described above.

Dated this 7th day of December, 2015.

LAWRENCE RENNER

State of New Mexico)
County of Santa Fe)

Subscribed and sworn to before me this 7th day of December, 2015.

NOTARY PUBLIC

My commission expires 09/23/2019

OFFICIAL SEAL
Patricia Garcia
NOTARY PUBLIC - STATE OF NEW MEXICO
My Commission Expires: 09/23/2019

APPENDIX I

AFFIDAVIT OF ASHLEIGH BAUERNFEIND

I Ashleigh Bauernfeind, having been duly sworn, do hereby state the following:

THAT, I was one of the twelve jurors that deliberated and reached a guilty verdict in Walter Barton's 2006 murder trial in Cass County Case No. 05CA-CR00877;

THAT, I was one of the same twelve jurors that deliberated and subsequently recommended that Mr. Barton receive the death penalty;

THAT, the jury was not unanimously in support of guilt at the beginning of the guilt-phase deliberations, and we went through the evidence in great detail; we also attempted to ask several questions of the court regarding the evidence;

THAT, in my opinion, the State's blood spatter evidence was a compelling piece of evidence supporting Mr. Barton's guilt, and I did not feel that the defense attorneys did much to counter the State's expert on this matter;

THAT, I have recently reviewed the affidavit and findings of Lawrence Renner, the blood spatter expert retained by the defense for Mr. Barton's federal habeas case;

THAT, I find Mr. Renner's testimony to be compelling as it directly contradicts the State's theory that the blood stains on Mr. Barton's clothing were impact spatter, and supports the defense theory that they were transfer stains;

THAT, had I heard this evidence at Mr. Barton's trial, it would have affected my consideration of Mr. Barton's guilt as it related to the State's strongest evidence against him.

THAT, while I cannot speak to how other jurors would have voted in light of this evidence, I know we would have carefully considered this evidence, along with all of the evidence presented at trial, before reaching a verdict.

Dated this 14 day of April, 2020.

ASHLEIGH BAUERNFEIND

STATE OF MISSOURI

COUNTY OF BOONE

I do hereby certify that the preceding was subscribed and sworn to before me this 14 day of April, 2020, and that the principal, Ashleigh Bauerfeind, appeared remotely pursuant to all of the requirements of Executive Order 20-08.

Cindy J. Malone

NOTARY PUBLIC

My Commission expires June 05, 2020

CINDY J. MALONE
Notary Public, Notary Seal
State of Missouri
Boone County
Commission # 12350810
My Commission Expires June 05, 2020

APPENDIX J

AFFIDAVIT OF PAUL BARTLETT

I Paul Bartlett, having been duly sworn, do hereby state the following:

THAT, I was one of the twelve jurors, and the foreman of the jury, that deliberated and reached a guilty verdict in Walter Barton's 2006 murder trial in Cass County Case No. 05CA-CR00877;

THAT, I was one of the same twelve jurors that deliberated and subsequently recommended that Mr. Barton receive the death penalty;

THAT, the jury was not unanimously in support of guilt at the beginning of the guilt-phase deliberations, and we went through the evidence in great detail; we also attempted to ask several questions of the court regarding the evidence;

THAT, in my opinion, the State's blood spatter evidence was a compelling piece of evidence supporting Mr. Barton's guilt, and I did not feel that the defense attorneys did much to counter the State's expert on this matter;

THAT, I have recently reviewed the affidavit and findings of Lawrence Renner, the blood spatter expert retained by the defense for Mr. Barton's federal habeas case;

THAT, I find Mr. Renner's testimony to be compelling as it directly contradicts the State's theory that the blood stains on Mr. Barton's clothing were impact spatter, and supports the defense theory that they were transfer stains;

THAT, had I heard this evidence at Mr. Barton's trial, it would have affected my consideration of Mr. Barton's guilt as it related to the State's strongest evidence against him.

THAT, while I cannot speak to how other jurors would have voted in light of this evidence, I know we would have carefully considered this evidence, along with all of the evidence presented at trial, before reaching a verdict.

Dated this 1st day of May, 2020.

THAT, I would have been uncomfortable recommending the death penalty had I head this evidence.

PAUL BARTLETT

STATE OF MISSOURI

COUNTY OF CASS

I do hereby certify that the preceding was subscribed and sworn to before me this 1 day of May, 2020.

NOTARY PUBLIC

My Commission expires June 5, 2020

CINDY J. MALONE
Notary Public, Notary Seal
State of Missouri
Boone County
Commission # 12350810
My Commission Expires June 05, 2020

APPENDIX K

AFFIDAVIT OF EDWIN ANDERSON

I Edwin Anderson, having been duly sworn, do hereby state the following:

THAT, I was one of the twelve jurors that deliberated and reached a guilty verdict in Walter Barton's 2006 murder trial in Cass County Case No. 05CA-CR00877;

THAT, I was one of the same twelve jurors that deliberated and subsequently recommended that Mr. Barton receive the death penalty;

THAT, the jury was not unanimously in support of guilt at the beginning of the guilt-phase deliberations, and we went through the evidence in great detail; we also attempted to ask several questions of the court regarding the evidence;

THAT, in my opinion, the State's blood spatter evidence was a compelling piece of evidence supporting Mr. Barton's guilt, and I did not feel that the defense attorneys did much to counter the State's expert on this matter;

THAT, I have recently reviewed the affidavit and findings of Lawrence Renner, the blood spatter expert retained by the defense for Mr. Barton's federal habeas case;

THAT, I find Mr. Renner's testimony to be compelling as it directly contradicts the State's theory that the blood stains on Mr. Barton's clothing were impact spatter, and supports the defense theory that they were transfer stains;

THAT, had I heard this evidence at Mr. Barton's trial, it would have affected my consideration of Mr. Barton's guilt as it related to the State's strongest evidence against him.

THAT, while I cannot speak to how other jurors would have voted in light of this evidence, I know we would have carefully considered this evidence, along with all of the evidence presented at trial, before reaching a verdict.

Dated this FIRST day of May, 2020.

Edwin Anderson

EDWIN ANDERSON

STATE OF MISSOURI

COUNTY OF CASS

I do hereby certify that the preceding was subscribed and sworn to before me this 1 day of May, 2020.

NOTARY PUBLIC

My Commission expires June 05, 2020

CINDY J. MALONE
Notary Public, Notary Seal
State of Missouri
Boone County
Commission # 12350810
My Commission Expires June 05, 2020

APPENDIX L

Affidavit of Cindy Malone Re: JUROR MARK TUTOR

I, Cindy Malone, having been duly sworn, do hereby state the following:

THAT, I am currently employed by the Missouri State Public Defender as a Mitigation Specialist, and I have been assisting attorneys Fred Duchardt and Amy Bartholow on the Capital Case of Walter Barton;

THAT, in March of 2020, attorney Amy Bartholow and myself began reaching out to jurors from Mr. Barton's 2006 jury trial to follow up with new evidence regarding Mr. Barton's innocence;

THAT, as of March 14, we had only been able to meet in person with two jurors, one of whom ultimately signed an affidavit regarding the new evidence;

THAT, as of March 20, this juror outreach was significantly slowed to the COVID-19 pandemic and restrictions put on traveling;

THAT, on May 1, 2020, while stay at home orders were still in effect, Amy Bartholow and myself, drove from Columbia, MO, to Belton and Harrisonville, MO, to meet with two additional jurors, who each signed affidavits about the new evidence;

THAT, on today's date, which is a Sunday, May 17, 2020, I was contacted by another juror from Mr. Barton's trial, Mark Tutor, who currently lives in the State of Texas. Mr. Tutor's address is 8251 W. FM 515, Yantis, TX 75497-3884;

THAT, I had previously sent Mr. Tutor the affidavit of blood spatter expert, Lawrence Renner, to review, as well as the other juror affidavits we had obtained;

THAT, Mr. Tutor told me over the phone that had he heard this evidence at Mr. Barton's trial, it would have affected the way he considered the evidence during the jury deliberations regarding some of the State's strongest evidence against Mr. Barton, especially since the defense had presented no counter blood expert;

THAT, Mr. Tutor stated that he was willing to sign an affidavit to this effect;

THAT, given that Mr. Tutor lives in the State of Texas, and Mr. Barton's execution is set May 19, 2020, Ms. Bartholow and Mr. Duchardt asked me to prepare an affidavit regarding Mr. Tutor's information while they determine how to efficiently obtain his affidavit;

Dated this 17 day of May, 2020.

Cindy Malone

STATE OF MISSOURI

COUNTY OF BOONE

I do hereby certify that the preceding was subscribed and sworn to before me this 17th day of May, 2020.

Marilin Wallis
NOTARY PUBLIC

My Commission expires 2-21-23

MARILIN WALLIS
Notary Public - Notary Seal
Boone County - State of Missouri
Commission Number 15464720
My Commission Expires Feb 21, 2023

APPENDIX M

Affidavit of Cindy Malone

I, Cindy Malone, having been duly sworn, do hereby state the following:

THAT, I am currently employed by the Missouri State Public Defender as a Mitigation Specialist;

THAT, I have been assisting attorneys Fred Duchardt and Amy Bartholow on the Capital Case of Walter Barton.

THAT, in March of 2020, attorney Amy Bartholow and myself started to reach out to jurors from Mr. Barton's 2006 jury trial to follow up with new evidence regarding Mr. Barton's actual innocence.

THAT, as of March 14, we had only been able to meet in person with two jurors.

THAT, after the March 14 meeting with the first two jurors, due to the COVID-19 pandemic, Ms. Bartholow and myself, as employees at the Missouri State Public Defender, were mandated to work from home starting March 20. Due to this sudden upheaval in working capabilities, this significantly hampered my ability to reach out to the remaining jurors. My home cell phone does not have the best reception and I routinely had to stand at a certain spot in my yard in order to call out.

THAT, for the entire month of April, I was still working from home.

THAT, on April 29, 2020, I was able to finally be able to call out and speak with a few other jurors. During these cold calls, I had to ask jurors if they would be willing to meet in a parking lot close to their home, as there were no open businesses due to the continuing shut down orders due to COVID-19. Two of these jurors were agreeable.

THAT, on May 1, 2020, Amy Bartholow and myself, drove 2½ hours from Columbia, MO, to Belton and Harrisonville, MO, donning masks and gloves during our drive down.

THAT, on May 1, 2020, Amy Bartholow and myself met with these two jurors, separately, in two different parking lots: one at a library in Belton, and the other at a McDonald's in Harrisonville. We were required to stand 6 feet away from these jurors. On this day it was exceedingly windy, and both Ms. Bartholow and I had to yell to be heard. These are not the working conditions that are favorable to discussing sensitive subject matter with jurors, and I have never had to work under these conditions during my 14 years at the Public Defender.

Dated this 7 day of May, 2020.

Cindy Malone

Cindy Malone

MARILIN WALLIS
Notary Public - Notary Seal
Boone County - State of Missouri
Commission Number 15464720
My Commission Expires Feb 21, 2023

Subscribed and sworn before me on this date of May 7, 2020.

Marilin Wallis
NOTARY PUBLIC

APPENDIX N

Affidavit of Amy M. Bartholow

I, Amy M. Bartholow, having been duly sworn, do hereby state the following:

THAT, I am a capital post-conviction attorney with the Missouri State Public Defender;

THAT, myself and mitigation specialist Cindy Malone have been providing investigation assistance to attorney Fred Duchardt in Walter Barton's warrant litigation, as we are familiar with the history of his case.

THAT, in March of 2020, Ms. Malone and myself began reaching out to jurors from Mr. Barton's most recent trial to follow up with new evidence regarding his actual innocence.

THAT, as of March 14, we had met with two jurors and we were planning on contacting and meeting with as many of the remaining seven living jurors that we could.

THAT, after meeting with the first two jurors, the COVID-19 pandemic hit with full force, and Ms. Malone and I, as employees of the Missouri State Public Defender, were mandated to begin working from home as of March 20. Coordination efforts between Ms. Malone and myself, as well as with Mr. Duchardt, were severely hampered by this sudden and unforeseen disruption.

THAT, for the remainder of March, the entire month of April, and now into May, we have been working from make-shift home offices, with limited access to our System's internal server. Our VPN access is spotty and, because the entire Public Defender System was attempting to remotely access a single network, we were mandated to limit our access to two hours per day. Even this limited access was routinely disrupted and sometimes inaccessible. This made communication and sharing of documents extremely difficult.

THAT, on April 29, 2020, Ms. Malone was able to reach two additional jurors who agreed to meet with us. Although travel was not recommended, Ms. Malone and I felt that we had no choice but to put ourselves at risk to travel to talk to these jurors in person, given the time constraints of an outstanding warrant. However, due to social distancing requirements, there were no open facilities to meet for private conversation with jurors. They agreed to meet in parking lots where we could maintain a six foot distance.

THAT, on May 1, 2020, Ms. Malone and I drove 2½ hours from Columbia, MO, to Belton and Harrisonville, MO, wearing masks and gloves so as not to inadvertently contaminate one another.

THAT, on May 1, 2020, Ms. Malone and I met with one juror, Mr. Anderson, at a library parking lot in Belton, Missouri, and the other, Mr. Bartlett, at a McDonald's in Harrisonville. It was an extremely windy day, and we were required to shout over the wind to be heard by these jurors. We also handed them documents wearing face masks and latex gloves, in an effort not to inadvertently contaminate them.

THAT, since we were working in outdoor conditions with no electricity to power a computer laptop or printer, we could not revise the affidavits except in writing. I had brought a template of the first juror's affidavit, to determine whether these jurors agreed with the substance contained therein. However, had I been able to meet with these jurors under different circumstances, I would have tailored their affidavits based on our conversations. Also, I am certain that our conversations would have been lengthier and more detailed.

THAT, Mr. Bartlett, the jury foreperson, after a discussion with me about the penalty phase, agreed that an additional sentence should be added to his affidavit, reflecting his response that he would have been uncomfortable voting for a death sentence had he known the additional information from Mr. Renner. The handwritten portion of Mr. Bartlett's affidavit was written by me, then reviewed and initialed by Mr. Bartlett.

Dated this 7th day of May, 2020.

Amy M. Bartholow

Amy M. Bartholow

CINDY J. MALONE
Notary Public, Notary Seal
State of Missouri
Boone County
Commission # 12350810
My Commission Expires June 05, 2020

Subscribed and Sworn before me on this date of May 7, 2020

Cindy J. Malone

Notary Public

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appendix was served upon the following by e-mailing a copy of same to each this 18th day of May, 2020.

Michael Spillane
Assistant Attorney General
P.O. Box 899
Jefferson City, Mo. 65102
mike.spillane@ago.mo.gov

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