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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

Question One

Does new evidence of actual innocence, discussed in *Schlup v. Delo*, 513 U.S. 298, 327 (1995), require that it was not available at trial, as interpreted by the Eighth Circuit, or that it was not presented to the jury, as interpreted by the Second, Seventh, Fourth, Sixth and Ninth Circuits?

Question Two

Has the Missouri Supreme Court, and now the Eighth Circuit Panel, unreasonably interpreted standards pronounced by this Court for determination of execution competence, employed the wrong standard, and thereby found an incompetent man to be competent.

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INTRODUCTION

Walter Barton, after the fifth jury trial of a Missouri prosecution for murder, was sentenced to death, but that result was affirmed by the Missouri Supreme Court only by the slimmest of margins, 4-3 (Doc. [1] 1, p. 10-11). ***State v. Barton***, 240 S.W.3d 693, 711, 718-719 (Mo.banc 2007). State and Federal appeal and post-conviction proceedings were engaged, and those ended, on November 18, 2019 with denial by this Court of certificates of appealability upon the 28 U.S.C. 2254 determination. ***Barton v. Stange***, 140 S.Ct. 525 (2019).

The next day, on November 19, 2019, the State asked the Missouri Supreme Court to immediately set an execution date (Doc. 1, Appendix N). Instead, that Court belayed that request and granted Mr. Barton's time to investigate and bring forth any proper claims for habeas corpus under that Court's Rule 91.01 (Doc. 1, Appendix O). On February 3, 2020, Mr. Barton brought such a Petition, raising issues of execution incompetence and actual innocence (Doc. 1, Appendix D). On February 18, 2020, the Missouri Supreme Court set an execution date of May 19, 2020 (Doc. 1, Appendix P). However, that Court required until April 27, 2020 to consider, and determine on the merits, but ultimately rule against, Mr. Barton's Rule 91.01 habeas claims (Doc. 1, Appendix A[2]).

The litigation which is the subject before the Court was brought one week after State remedies were so exhausted, on May 4, 2020; at that time, Mr. Barton brought an original 28 U.S.C. 2254 Petition raising the execution incompetence and actual innocence issues which were considered by the Missouri Supreme Court (Doc. 1). In that Petition, Mr. Barton particularly

[1] "Doc." is used to refer to docket entries made before the District Court.
[2] This item has been directly supplied to this Court as Petition Appendix C.

averred and demonstrated that this is an original Petition for 2254 relief since the issues raised became ripe with the April 27, 2020 decision upon the matter by the Missouri Supreme, Court (Doc. 1, p. 6-7). The District Court issued an Order to Show Cause (Doc. 6), and Response to that Order was filed on May 6, 2020 (Doc. 7), and Mr. Barton filed his Traverse on May 11, 2020 (Doc. 10).

At the same time as the filing of the Petition, Mr. Barton also sought a stay of the execution date pursuant to 28 U.S.C. 2251(a)(1) (Doc. 3). Appellant brought forth objections (Doc. 7), and Mr. Barton made reply (Doc. 11).

On May 15, 2020, the District Court issued an Order for Stay pursuant to 28 U.S.C. 2251(a)(1) and ***Lonchar v. Thomas***, 517 U.S. 314 (1996) finding that a stay was required because there simply was not enough time left, prior to the May 19, 2020 execution date to give proper consideration to the issues raised and make a judgment on the merits (Doc. 14, p. 1, 6-7) [3]. The District Court observed, in passing, that this cannot be surprising since the Missouri Supreme Court, in considering the matters, had taken more than two-and-a-half months (Doc. 14, p. 7). The District Court also engaged in the balancing of equities requested by Appellant, finding that the balance supported the Order for Stay (Doc. 14, p. 7).

Respondent appealed, and on May 17, 2020, a Panel of the Eighth Circuit exercised their authority to independently judge the grounds for relief, found it to be "readily apparent" that grounds raised by Mr. Barton lacked merit, vacated the stay, and ordered dismissal of the petition (Appendix B).

In light of the short time given by the Panel to the case, exactly one day, the Panel has inadvertently committed the very sorts of egregious errors of fact and law which the District

[3] This item has been directly supplied to this Court as Petition Appendix A.

Court was trying to avoid by granting the Stay. Those errors by the Panel undermine the determination which has been made. This Petition for Certiorari is being brought to address those errors through questions raised for this Court's consideration.

CITATION OF THE OFFICIAL REPORTS OF OPINIONS IN THIS CASE

The decision by a three judge panel of the Court of Appeals for the Eighth Circuit, setting aside the District Court's Stay Order is reported on the Eighth Circuit electronic case filing system, and a copy is provided at Appendix B. The Stay Order, issued pursuant to 28 U.S.C. 2254(a)(1) by the United States District Court for the Western District of Missouri, is reported on that Court's electronic case filing system at Docket entry 14, and a copy is provided at Appendix A, and is referred to in this Petition as District Court "Doc. 14". The April 27, 2020 Missouri Supreme Court decision upon the issues raised in the Petition is reported at ***State ex rel Barton v. Stange***, ---S.W.3d---, 2020 WL 1987819 (Mo.banc 2020). A copy is provided at Appendix C, and is referred to in this Petition as District Court "Doc. 1, Appendix A".

As to the previous proceedings before the Missouri Supreme Court, the 4-3 decision by that Court to narrowly uphold Mr. Barton's fifth trial conviction and death sentence is reported at ***State v. Barton***, 240 S.W.3d 693 (Mo.banc 2007). There were five other opinions by the Missouri Supreme Court with respect to Mr. Barton's case, which are, in chronological order, ***State v. Barton***, 936 S.W.2d 781 (Mo.banc 1996), ***State v. Barton***, 998 S.W.2d 19 (Mo.banc 1999), ***Barton v. State***, 76 S.W.3d 280 (Mo.banc 2002) ***Barton v. State***, 432 S.W.3d 741 (Mo.banc 2014), and ***Barton v. State***, 486 S.W.3d 332 (Mo.banc 2016).

As to the previous 28 U.S.C. 2254 proceedings, the decision by the District Court is reported on the District Court's electronic filing system at Case # 14-8001, Doc. 59. A copy of that item was appended to the Petition filed in this case at Doc. 1, Appendix L) The Eighth

Circuit's refusal to grant certificates of appealability is reported on that Court's electronic filing system, and a copy is also appended to the District Court Petition as Doc. 1, Appendix W. This Court's denial of certificates of appealability is reported at ***Barton v. Stange***, 140 S.Ct. 525 (2019).

STATEMENT OF JURISDICTION

On May 17, 2020, in an action brought pursuant to 28 U.S.C. 2254, a Panel of the United States Court of Appeals for the Eighth Circuit set aside a Stay Order entered by the District Court and ordered the Petition in the case dismissed (Appendix B). This Petition is being filed the next day, on May 18, 2020.. This Court has jurisdiction to consider the decision from the Eighth Circuit pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Constitutional Provisions

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

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

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

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

Statutes

28 U.S.C.A. § 2251(a)(1) is as follows:

> **(a) In general.--**
> **(1) Pending matters.**--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.A. § 2253 is as follows:

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

28 U.S.C.A. § 2254 is as follows:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
(A) the applicant has exhausted the remedies available in the courts of the State; or
(B)(i) there is an absence of available State corrective process; or
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
(A) the claim relies on--
(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.
(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.
(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.
(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

1. History of the case prior to this cause of action

After four failed trials, at a fifth jury trial, the State of Missouri obtained against Walter Barton a conviction and sentence of death for the October 9, 1991 murder of Gladys Kuehler in

Christian County, Missouri. ***State v. Barton***, 240 S.W.3d 693, 696, 700 (Mo.banc 2007).

Upon direct appeal, the Supreme Court of Missouri affirmed the judgment and sentence against Mr. Barton, but only by the narrowest of margins; that is, four Judges voted to affirm, finding sufficient the evidence against Mr. Barton, consisting of expert testimony about blood stains found on Barton's clothing, informer testimony about a purported admission of guilt by Barton, and certain circumstantial evidence; and, three Judges dissented that the case against Mr. Barton was insufficient to justify the judgment and sentence. ***State v. Barton***, 240 S.W.3d 693, 711, 718-719 (Mo.banc 2007).

2. The matter of execution incompetence

After State and Federal appeal and post-conviction process were concluded, and several months prior to the setting of an execution date for Mr. Barton, Dr. Patricia Zapf, Ph.D. conducted an evaluation of Mr. Barton, consisting of review and summarization of voluminous records and conduct of a two-day, in person testing and evaluation session with Mr. Barton (Doc. 1, Appendix B, p. 2-10) [4]. Dr. Zapf's process included consideration of records pertaining to neuro-imaging and neuro-psychological testing of Mr. Barton which reported significant brain damage, as well as the 2015 conclusions by a Psychiatrist that, at that time, as a result of Traumatic Brain Injury and Major Neurocognitive Disorder, Mr. Barton was incompetent to proceed and incompetent for execution (Doc. 1, Appendix B, p. 6-7, 14). Dr. Zapf also took into account records concerning the opinions about Mr. Barton's competence expressed by those involved with incarcerating Mr. Barton, understanding that those institutional records contained no reference to or acknowledgment about the contrary imaging, neuropsychological and psychiatric opinions by other professionals (Doc. 1, Appendix B, p. 2).

[4] This item has been directly supplied to this Court as Petition Appendix F.

Relying upon her expertise, accounting for the information obtained from her review of the records, her testing, and her in-person sessions with Mr. Barton, and considering the matters to a reasonable degree of psychological certainty, Dr. Zapf diagnosed Mr. Barton as suffering from Major Neurocognitive Disorder due to traumatic brain injury (Doc. 1, Appendix B, p. 10). Dr. Zapf went on to explain the functional impacts for Mr. Barton caused by this condition.

> 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 (Doc. 1, Appendix B, p. 13).

Dr. Zapf went on to conclude, to a reasonable degree of psychological certainty, that Mr. Barton indeed suffers from Major Neurocognitive Disorder, and as a result he is unable to understand the proceedings against him, is unable to assist with his defense, and is not competent for execution; this is because 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" (Doc. 1, Appendix B, p. 14-15).

Dr. Zapf allowed that Mr. Barton's condition does not consist of effects like delusions, permits him to have "a rudimentary" understanding of the punishment he is about to receive and the reasons for it" (Doc. 1, Appendix B, p. 14-15). But Dr. Zapf firmly stated that, while this might meet a lesser standard set forth in a concurring Supreme Court opinion, under the standards universally accepted by the mental health community, and in light of the actually prevailing legal principles which are consistent with those mental health community standards, despite Mr. Barton's rudimentary abilities, and because of Mr. Barton's deficiencies, Mr. Barton is not competent to proceed to execution (Doc. 1, Appendix B, p. 15).

In a habeas corpus petition brought to the Missouri Supreme Court on Mr. Barton's behalf on February 3, 2020, it was urged that Mr. Barton should be found not competent for execution in light of the findings and conclusions by Dr. Zapf, those being that Mr. Barton's mental condition so impairs him that he cannot reach a rational understanding of the reason for execution, and that Mr. Barton 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 (Doc. 1, Appendix A, p. 6-7; Doc. 1, Appendix C, p. 12-15).

On February 18, 2020, the Missouri Supreme Court set for Mr. Barton an execution date of May 19 2020 (Doc. 1, Appendix P)[5]. Then, on April 27, 2020, the Missouri Supreme Court determined that Mr. Barton had not proven that he is incompetent to be executed (Doc. 1, Appendix A, p. 11). In so ruling, the Missouri Supreme Court deemed as the "controlling" standard for competency for execution the concurring opinion by Justice Powell in ***Ford v. Wainwright***, 477 U.S. 399, 422 (1986) (Doc. Appendix A, p. 7, fn. 5). Based upon that interpretation of the law, the Missouri Supreme Court found that its determination was supported by Dr. Zapf's allowance that Mr. Barton's condition met that lower standard (Doc. 1, Appendix A, p. 7-8). The Missouri Supreme Court also relied upon the opinions of Mr. Barton's incarcerators that Barton "does not appear to have any clinically significant symptoms of a mental illness at this time" and "continues to make a good institutional adjustment" (Doc. 1, Appendix A, p. 9). Finally, the Missouri Supreme Court took out of context a statement of Mr. Barton to Dr. Zapf that "they're going to execute me if I can't prove my innocence" (Doc. 1, Appendix A, p. 10). The Missouri Supreme Court found this latter comment significant even

[5] This item has been directly supplied to this Court as Petition Appendix G.

though it was deemed by Dr. Zapf, in context, as "demonstrating some illogical thought process" (Doc. 1, Appendix B, p. 10). The Missouri Supreme Court expressed no doubt whatsoever about the conclusions by Dr. Zapf and the other psychiatrists, psychologists and other imaging specialists that Mr. Barton suffers from Major Neurocognitive Disorder caused by Traumatic Brain Injury. The Missouri Supreme Court also expressed no doubt whatsoever about the full range of impacts of this condition upon Mr. Barton's functioning as described by Dr. Zapf.

In his Petition to the District Court, Mr. Barton explained that, in ruling the matter as they did, the Missouri Supreme Court relied upon legal conclusions which are contrary to or involve unreasonable applications of precedent from this Court. This Court has been clear that "the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane." ***Ford v. Wainwright***, 477 U.S. 399, 409-410 (1986); ***Panetti v. Quarterman***, 551 U.S. 930, 934 (2007). Since this Court in ***Ford*** was not called upon to clarify the term "insane", Justice Powell, in his concurrence, ventured his personal thought that there should be a lesser standard at play for execution competence, and on that basis posited that "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." ***Ford v. Wainwright***, 422. Since the Court, in ***Ford***, was not deciding this question, Judge Powell's notions were mere dicta. However, in ***Panetti***, this Court rejected outright the contention which was then being made in that case, and has now been made by the Missouri Supreme Court, that Justice Powell's lower standard is itself the proper, controlling standard; rather, it was made perfectly clear that one would be incompetent for execution for broader reasons, especially if his mental conditions "so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution." ***Panetti v. Quarterman***, 958-959. Since then, the lower Federal Courts have

clarified that the ***Panetti*** standards for lack of competence for execution include the mental-illness-induced inability to understand the proceedings and assist with defenses. ***Simon v. Epps***, 463 Fed.Appx. 339, 341-342, 348-349 (5th Cir. 2012); ***Thompson v. Bell***, 580 F.3d 423, 436 (6th Cir. 2009).

The Petition also brought forth that the Missouri Supreme Court made unreasonable determinations of the facts in light of the evidence presented in the State Court proceedings. The Missouri Supreme Court teased out Dr. Zapf's conclusions that Mr. Barton is free from delusions and can understand only the simplest of concepts, all in an effort to satisfy the standard suggested by Justice Powell in ***Ford***, but rejected in ***Panetti*** (Doc. 1, Appendix A, p. 7, fn. 5). In so doing, that Court has minimized or completely ignored the conclusions by Dr. Zapf which establish Mr. Barton's incompetence under the proper legal standards (Appendix B, p. 13-15). That Court has completely left out mention, much less consideration, of the unanimous conclusions of the psychiatrists, psychologists and brain imaging specialists about Mr. Barton's Major Neurocognitive Disorder and Traumatic Brain Injury conditions and sequelae (Doc. 1, Appendix B, p. 6-7). Instead, that Court has focused solely upon the prison records of Mr. Barton, which contain no reference to, acknowledgment about, or consideration of the Major Neurocognitive Disorder and Traumatic Brain injury diagnoses (Doc. 1, Appendix B, p. 2). And, that Court gave out-of-context significance to a comment by Mr. Barton which, in context, was described as "demonstrating some illogical thought process" (Doc. 1, Appendix B, p. 10).

Confronted with these issues, the short time available to properly consider the matters, and a request for Stay brought by Mr. Barton, the District Court granted the request for stay (Doc. 14)..

The Eighth Circuit Panel, instead, vacated the Stay, finding that the Missouri Supreme Court's unreasonable interpretation of the applicable standard to be correct, and that Court's unreasonable singling out of Dr. Zapf's one set of basic conclusions to be appropriate (Appendix B, p. 5).

3. The Matter of Actual Innocence related to blood spatter

At the Fifth Trial, evidence was adduced

a. that, Mr. Barton, along with a neighbor, Carol Horton, and a granddaughter, Debbie Selvidge, discovered the dead body of Gladys Kuehler in her blood-soaked bedroom, ***State v. Barton***, 698

b. that, at the time that Mr. Barton was being questioned about the death of Gladys Kuehler, police saw small stains on Barton's clothing, and took the clothes for scientific testing, ***State v. Barton***, 699

c. that, during police questioning, Mr. Barton explained that the stains must have happened when, at the time of the discovery of the body, he (Barton) slipped while pulling Debbie Selvidge away from the body, ***State v. Barton***, 699,

d. that, at time of questioning by police, Ms. Selvidge confirmed Mr. Barton's account, but at trial said that Barton never entered the room where the body was found, ***State v. Barton***, 698, 716,

e. that, DNA testing was performed on only one of the small stains, the shoulder portion of the shirt, and that testing developed a profile which corresponded to the profile of the victim's blood, ***State v. Barton***, 699,

f. that, this DNA testing on the shoulder portion of the shirt required the cutting out and using up that portion of the shirt, and therefore that portion of the shirt was

not available for any further testing of any kind (Fourth Trial Tr. 681, 683-684, 696-697, 698-701),

g. that, William Newhouse, an expert enlisted by the State, examined Mr. Barton's clothing, and opined that three stains, one on the lower left front of the shirt, and the others on the jeans, were the result of impact spatter, and could not have been created by rubbing up against already-present blood, as described by Barton, ***State v. Barton***, 699.

Prior to the fifth trial, Barton's Defense Counsel for that trial met, shared exhibit pictures with, and talked to, Lawrence Renner, a blood spatter expert; this occurred at a seminar at which Mr. Renner was lecturing and Counsel was attending; on the basis of this encounter, and personal study by Counsel, Counsel decided against using a defense blood spatter expert, and in favor of efforts to generally discredit the field of blood spatter analysis as "junk science" (2012 State Postconviction Hearing Tr. 411-412, 415-416), ***Barton v. State***, 432 S.W.3d 741, 755 (Mo.banc 2014).

Through the process of preparing Federal habeas corpus claims, Mr. Renner, an expert of high repute, with more than 40 years of experience, was finally given the opportunity to analyze the Barton clothing, and came to dramatically different conclusions from those of the State's expert, particularly

a. the clothing could not have been worn at the time of the killing of Gladys Kuehler by her killer because there were too few stains on the clothing, especially in light of the number and kinds of wounds inflicted on the body of Ms. Kuehler (Doc. 1, Appendix I[6], p. 5),

[6] This item has been directly supplied to this Court as Petition Appendix H.

b. there were no blood stain patterns at all on Mr. Barton's jeans, and that this was likely because whatever blood might have ever been present was used up in testing done before any blood spatter expert examined the clothing (Doc. 1, Appendix I, p. 2);

c. none of the stains on Mr. Barton's shirt were impact spatter stains, and rather all of the stains on the shirt were transfer stains, made by contact by the shirt with some substance (Doc. 1, Appendix I, p. 2);

d. a stain on the shirt singled out by Mr. Newhouse as supposedly being impact spatter is actually a transfer stain, and is so obviously so that no experienced examiner would mistake it for impact spatter (Doc. 1, Appendix I, p. 2);

e. the reasoning which Fifth Trial Defense Counsel said was employed in deciding to not use a blood spatter expert at the Fifth Trial was flawed, and reflected a lack of understanding of blood spatter analysis science (Doc. 1, Appendix I, p. 4-5).

In the habeas corpus petition brought to the Missouri Supreme Court on February 3, 2020, this information was detailed. In addition, the affidavits of a Juror who decided guilt and punishment was presented. That Juror, Ashleigh Bauernfeind, said that she found the new evidence "compelling" and opined that the new evidence would have impacted upon jury deliberations. Specifically, the Juror felt, at time of trial, that the State's blood spatter expert testimony "was the State's strongest evidence against [Barton]", especially since Fifth Trial defense counsel did nothing to counter that evidence; however, having now seen expert Lawrence Renner's affidavit regarding his analysis of the evidence, the Juror now believes "Mr. Renner's testimony to be compelling as it directly contradicts the State's theory that the blood

stains on Mr. Barton's clothing were impact spatter, and supports the defense theory that they were transfer stains…" (Doc. 1, Appendix K)[7].

The Missouri Supreme Court minimized the new evidence from Mr. Renner to supposedly be nothing more than him saying "…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" (Doc. 1, Appendix A, p. 3). In so characterizing the evidence, the Missouri Supreme Court never mentioned the Juror's opinion about the new evidence being "compelling".

In his Petition to the District Court, Mr. Barton contended that the Missouri Supreme Court made unreasonable findings of fact in light of the evidence presented to them. Mr. Barton also came forward with two more affidavits from Jurors who also found "compelling the new evidence from Mr. Renner (Doc. 1, Appendix U[8]; Doc. 1, Appendix V[9]).

Again, the District Court issued a Stay to allow full consideration of this Claim (Doc. 14). The Eighth Circuit Panel, instead, addressed the merits of the claim. In so doing, the Panel never once questioned the power of the evidence. Instead, the Panel held that, in light of a 2006 decision from that Court, the evidence should not be considered new because it was known at time of trial, and though not presented to the jury could not constitute proper evidence of actual innocence (Appendix B, p. 6-7).

4. The matter of actual innocence in light of the perjured testimony of key informer

At Mr. Barton's Fifth Trial, the State also called to witness one jailhouse informer, a woman who at the time called herself Katherine Allen, who testified that, on more than one occasion, Mr. Barton asked her if she knew the reason for which he (Barton) was in jail, and

[7] This item has been directly supplied to this Court as Petition Appendix A.
[8] This item has been directly supplied to this Court as Petition Appendix J.
[9] This item has been directly supplied to this Court as Petition Appendix K.

threatened that he (Barton) would kill her (Allen) "like he killed that old lady." ***State v. Barton***, 699. This was "…the only evidence of a so-called admission of guilt" presented at trial. ***State v. Barton***, 715.

Mr. Barton's fourth trial conviction and sentence were reversed because it was established that, at that trial, this informer had grossly understated her criminal conviction history, and more importantly had denied receiving a case dismissal benefit for her testimony when she did receive such benefit for testifying (Doc. 1, Appendix J). However, at the fifth trial, the prosecution suborned that same perjury, and so the Fifth Trial jury also never heard that critical information about the extent of her record and her *quid pro quo* agreement.

In denying relief to Mr. Barton, the Missouri Supreme Court fully conceded that the informer lied at the fourth trial that her number of convictions was only six, and at the fifth trial "again lied and said she had only six convictions" (Doc. 1, Appendix A, p. 4). The Court further found that, even though fifth trial defense counsel knew that the informer had "29 prior convictions" and that "certain additional criminal charges had been dismissed in return for her testimony", Fifth Trial Defense Counsel "chose to impeach her with 12" of her 29 convictions, and "did not mention the other convictions or the charges that had been dismissed" (Doc. 1, Appendix A, p. 4-5).

In upholding the Missouri Supreme Court judgment, the Eighth Circuit, as with the blood spatter, did not question the moment of the evidence, but found it could not be considered because it was known at time of trial, though not presented to the jury, and thus could not be considered new (Appendix B, p. 6-7).

REASONS IN SUPPORT OF GRANTING THE WRIT

In this case, the District Judge issued at Stay of the impending May 19, 2020 execution f Mr. Barton, expressing the belief that the issues, actual innocence and execution incompetence, were too complicated for one to make a creditable ruling upon the merits in the short time available (Doc. 14). The Eighth Circuit Panel eschewed those wise words, and in one day read briefs, decided the matters on the merits, and vacated the stay. The speed with which the matters were addressed by the Panel shows.

As to the matter of actual innocence, though the Eighth Circuit Panel pretty much conceded the power of the evidence, the Penal dismissed the claim calling the evidence not new enough because, though the evidence was never heard by the jury who tried the case, it was arguably available to have been presented had better counsel been trying the case for Mr. Barton (Appendix B, p. 6-7). The problem is that this Court, the Courts of Missouri and five of the Circuit Courts of Appeal define "new" to include the evidence in this case, that is any evidence which the trial jury did not hear. This Court should intervene to settle this matter of great importance.

As to the matter of execution incompetence, the Eighth Circuit Panel followed the mislead of the Missouri Supreme Court, applied a lower standard that that approved by this Court, and singled out small bits of the record to support that improper standard, all the while avoiding the mountain of opinions and evidence support the claim of execution competence. This Court should now intervene to correct these unreasonable interpretation of fact and law.

ARGUMENT-QUESTION ONE

Does "new evidence" of actual innocence, discussed in *Schlup v. Delo*, 513 U.S. 298, 327 (1995), require that it was not available at trial, as interpreted by the 8th Circuit, or that it was not presented at trial, as interpreted by the 2nd, 4th, 6th, 7th, and 9th Circuits?

A. The 8th Circuit Erroneously Concluded That Mr. Barton's Evidence May Not Be Considered To Establish The Actual-Innocence Gateway To Merits Review Of Procedurally Barred Claims Under *Schlup v. Delo*, 513 U.S. 298 (1995)

The erroneous Eighth Circuit precedent regarding its interpretation of ***Schlup v. Delo***, supra, is set forth in the opinion being challenged below:

> "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 v. Stange, 20-1985 (Appendix B, p. 6-7).

The Eighth Circuit Panel then concluded that Mr. Barton cannot satisfy this two-part test because the "evidence regarding his blood spatter expert's opinion is [ ] not 'new.'" (Appendix B, p. 6). In so holding, The Court determined counsel at the fifth trial knew about the expert before trial and had decided as a matter of strategy not to call him for fear a blood spatter expert's opinion would "be inconsistent with Barton's story regarding how the blood got onto his clothing." (Appendix B, p. 6), citing ***Barton***, 432 S.W.3d at 755. The Eighth Circuit held that "[t]his expert's 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" (Slip Op. at 6).

Based on this, the Court concluded that "[t]his evidence, then, is not 'new' and cannot support a claim of actual innocence. *See* ***Amrine***, 238 F.3d at 1029." *Id*. at 6-7.

1. The 8th Circuit's holding that the evidence of Mr. Barton's blood spatter expert could not be considered in assessing whether he presented a colorable claim of actual innocence is at odds with this Court's decision in *Schlup v. Delo*.

In ***Schlup v. Delo***, 513 U.S. 298 (1995), this Court clarified the standard of proof required to establish the miscarriage of justice exception to overcome a procedural bar to claims raised in federal habeas corpus proceedings. It held that a federal court may reach the merits of otherwise barred claims where new evidence establishes that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. To support a colorable claim of actual innocence the petitioner must come forward with "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." Id. at 324.

The Eighth Circuit acknowledged that ***Schlup*** permits courts to consider procedurally barred claims where "new" evidence establishes the petitioner's factual innocence but decided that Mr. Barton's evidence was not new because it was available at trial. The facts of ***Schlup***, however, demonstrate that the actual-innocence inquiry may indeed rely on previously available evidence that was not presented to the jury – as that is precisely the type of evidence Schlup presented. In granting relief to Schlup, despite his reliance on previously available evidence, the Court necessarily rejected the Respondent's argument that "evidence known to the petitioner before trial" could not satisfy the miscarriage of justice exception.

In ***Schlup***, as in Mr. Barton's case, the petitioner filed a defaulted claim that trial counsel had provided ineffective representation in failing to investigate and present available evidence of his innocence. Although readily discoverable evidence would have provided actual proof that

supported Schlup's innocence defense, his defense lawyer did not investigate and present it. The jury ultimately convicted Schlup and voted to impose the death penalty. *Id.* at 305.

In *pro se* postconviction pleadings that were ultimately unsuccessful, Schlup challenged his lawyer's failure to interview and call witnesses. *Id.* at 306. Later, with the assistance of counsel, he filed a second habeas petition in which he alleged that new evidence proved he was actually innocent, that he received ineffective assistance of counsel and that the prosecutor hid exculpatory evidence. *Id.* at 307. The district court dismissed the petition, holding that Schlup was procedurally barred from raising his claims and that, under the standard set forth in ***Sawyer v. Whitley***, 505 U.S. 333 (1992), he failed to establish that refusal to address the claims would result in a fundamental miscarriage of justice. *Id.* at 309. Over dissent, the Eighth Circuit affirmed. ***Schlup v. Delo***, 11 F.3d 738 (8th Cir. 1993).

This Court reversed, noting what it considered the "particularly relevant" items of evidence produced in habeas proceedings. But most, if not all, of the new evidence would have been available at the time of trial – counsel simply had to interview the witnesses, find out what they had to say, and present such evidence at trial – all steps counsel failed to take.

In identifying the required evidence as "either excluded or unavailable at trial," id. at 328, this Court has defined it broadly as evidence the jury did not hear, regardless of the reason. See also ***Calderon v. Thompson***, 523 U.S 538, 559 (1998) ("'To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial.'") (quoting ***Schlup***, 513 U.S. at 324). This Eighth Circuit determination that the actual-innocence showing cannot be made because it could "have been discovered earlier through the exercise of due diligence" is thus directly contrary to the ***Schlup*** language and reasoning.

2. The change in Missouri law and the circuit split regarding the definition of "new evidence" under ***Schlup*** weigh heavily in favor of considering Mr. Barton's proof.

In ruling that Mr. Barton's evidence could not be considered, the Eighth Circuit is at odds with many other circuits, as discussed below. In ***Amrine v. Bowersox***, 128 F.3d 1222, 1230 (8th Cir.1997), relied upon by the Eighth Circuit Panel below to vacate the District Court's stay of Mr. Barton's case, the Court held that an actual-innocence gateway claim may only be supported by evidence that could not have been discovered at the time of trial.

In ***Amrine***, the Eighth Circuit remanded to the district court to conduct an evidentiary hearing on the petitioner's gateway claim of actual innocence, concluding that he "has made a sufficient showing to require such a hearing since, if credited, his evidence could establish actual innocence." ***Amrine***, 128 F.3d at 1229. The court observed in passing that "evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence." 128 F.3d at 1230 (citing ***Bannister v. Delo***, 100 F.3d 610, 618 (8th Cir. 1996), and ***Smith v. Armontrout***, 888 F.2d 530, 542 (8th Cir. 1989)). The Eighth Circuit did not explain the basis of this ruling and one of the decisions on which it relied, ***Smith***, was decided prior to the Supreme Court's decision in ***Schlup***. Moreover, in the time since, the Missouri Courts have held the opposite, that new evidence for a claim of actual innocence includes any evidence that was not presented at trial. ***McKim v. Cassady***, 457 S.W.3d 831, 846 (Mo.App.W.D. 2015). In addition, no other circuit has adopted the ***Amrine*** holding.

On the other side of this circuit split are decisions from several circuits adopting the view that the only requirement for "new evidence" under ***Schlup*** is that it was not presented to the factfinder at trial. See e.g. ***Gomez v. Jaimet***, 350 F.3d 673 (7th Cir. 2003), ***Griffin v. Johnson***, 350 F.3d 956 (9th Cir. 2003); ***Cleveland v. Bradshaw***, 693 F.3d 626 (6th Cir. 2012) (the Sixth Circuit "agree[d] with the Seventh Circuit that '[i]f procedurally defaulted ineffective assistance of counsel claims may be heard only upon a showing of actual innocence, then it

would defy reason to block review of actual innocence based on what could later amount to the counsel's constitutionally defective representation.'" *Id.* at 637 n. 4 (quoting ***Gomez***, 350 F.3d at 680); ***Royal v. Taylor***, 188 F.3d 239 (4th Cir. 1999) (concluding that "[t]he ***Schlup*** Court adopted a broad definition of 'new' evidence to be considered in such cases: a petitioner must offer 'new reliable evidence . . . . that was not presented at trial.'" *Id.* at 244 (quoting ***Schlup***, 513 U.S. at 327); ***Rivas v. Fischer***, 687 F.3d 514, 543 (2d Cir. 2012) (holding that the petitioner satisfied the Schlup gateway standard and remanding for merits review, defined "new evidence" as "evidence not heard by the jury.")

This clear and obvious split among the circuits requires this Court to consider Mr. Barton's petition and determine whether the Eighth Circuit's interpretation of "new evidence" in ***Schlup*** should carry the day, against all others. These are weighty matters, indeed, as Mr. Barton's life will be imminently taken and he is innocent. Four jurors from his trial have filed affidavits indicating that the "new evidence" – evidence not presented at trial – is "compelling", they would have wanted it during their deliberations, and the foreman of the jury would not have voted for the death penalty had he heard it. The Eighth Circuit Panel, in deciding the matter against Mr. Barton, has essentially conceded the moment of this evidence (Appendix B, p. 6-7)

This Court observed that "the fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," and held that the lower standard of proof "properly strikes the balance when the claimed injustice is that constitutional error has resulted in the conviction of one who is actually innocent of the crime." ***Schlup***, 13 U.S. at 324. As the Court explained, "[c]laims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity than do claims that

focus solely on the erroneous imposition of the death penalty," because such claims are "rarely successful," and, more importantly, "the individual interest in avoiding injustice is most compelling in the context of actual innocence." *Id.* Indeed, the Court noted, "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Id.* at 325. As a result, the "overriding importance of this greater individual interest merits protection by imposing a somewhat less exacting standard of proof on a habeas petitioner alleging a fundamental miscarriage of justice than on one alleging that his sentence is too *severe*." *Id.*

In order for the State of Missouri to finally be able to take Mr. Barton's life away from him, it took decades, five trials (one mistrial, one hung jury, two reversals for prosecutorial misconduct), and commission of what Missouri Supreme Court Judges have called "…a trail of mishaps and misdeeds that, taken together, reflect poorly on the criminal justice system." ***State v. Barton***, 240 S.W.3d at 711-712. Even with all of the "misdeeds" perpetrated against Mr. Barton by Missouri prosecutors, the case for guilt and execution was, again in the words of Missouri Supreme Court Judges "certainly not overwhelming". ***Barton***, 713. In fact, the ultimate decision against Mr. Barton after his fifth trial was as close as close can be, with three Judges of the High Court convinced that the judgment and sentence should be set aside. ***Barton***, 711, 718-719.

The key pieces of evidence used to convict Mr. Barton, involved opinions by the State's blood spatter expert, about small stains found on Mr. Barton's clothes. *Id.* at 699.

The new evidence from Expert Renner, however, fully corroborates Mr. Barton's statement to police and his decades-long claim of innocence. Renner provides opposite conclusions from those of the State's expert, plus a bombshell of actual innocence: Barton's clothing could not have been worn at the time of the victim's clothing because there were too

few stains on the clothing, especially in light of the number and kinds of wounds inflicted on the body of Ms. Kuehler (Appendix I, p. 5).

New evidence also included affidavits of three of Mr. Barton's trial jurors, who found Mr. Renner's conclusions "compelling," (Appendix I, Appendix J, Appendix K).

As fully detailed above, Mr. Barton has always maintained his innocence and he has evidence to prove it – four of his actual trial jurors find it "compelling." Their affidavits show that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. This Court must reverse the Eighth Circuit and allow Mr. Barton's innocence claims to go forward.

ARGUMENT QUESTION TWO

Has the Missouri Supreme Court, and now the Eighth Circuit Panel, unreasonably interpreted atandards pronounced by this Court for determination of execution competence, employed the wrong standard, and thereby found an incompetent man to be competent.

A. Findings of execution competence are being based upon notions of law contrary to this Court's precedent

Proof positive about Mr. Barton's execution incompetence has been reported by Dr. Patricia Zapf (Doc. 1, p. 11-14). However, in judging Dr. Zapf's findings and conclusions, first, the Missouri Supreme Court, and now the Eighth Circuit Panel, have employed the wrong legal standard for competence, one suggested in dicta, but later rejected by this Court as a whole (Appendix B, p. 5; Doc. 1, p. 16-17).

From the first time that execution competence was addressed, right through the present, this Court has always held that "the Eighth Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane." ***Ford v. Wainwright***, 477 U.S. 399, 409-410 (1986); ***Panetti v. Quarterman***, 551 U.S. 930, 934 (2007); ***Madison v. Alabama***. 139 S.Ct. 718,

728 (2019). In the beginning, this Court did not have to decide the question of whether, in the execution competence context, the meaning of the term "insane" should be considered different from that in the trial competency context, and if so how different; nevertheless, Justice Powell, in a concurrence, saw fit to set forth dicta about his personal thoughts, that there should be a lesser standard at play for execution competence, to wit that "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." ***Ford v. Wainwright***, 422. That is precisely the standard which the Missouri Supreme Court, and now the Eighth Circuit Panel, have employed in deciding the question of Mr. Barton's execution competence (Appendix B, p. 5; Doc. 1, Appendix A, p. 7, fn. 5).

In ***Panetti***, this Court directly confronted and rejected an attempt to do precisely what the Missouri Supreme Court and Eighth Circuit Panel have done, that is follow as authoritative Justice Powell's lower standard; instead, this Court held that the standard is far broader such that one would be incompetent for execution if his mental conditions make him unable to "reach a rational understanding of the reason for the execution." ***Panetti v. Quarterman***, 958-959; ***Madison v. Alabama***, 726.

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

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

The Courts of Appeals have specifically clarified that lack of competence for execution, as this Court has defined it, includes the mental-illness-induced inability to understand the proceedings and assist with defenses. ***Simon v. Epps***, 463 Fed.Appx. 339, 341-342, 348-349 (5th Cir. 2012); ***Thompson v. Bell***, 580 F.3d 423, 436 (6th Cir. 2009).

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

Dr. Zapf diagnosed Mr. Barton as suffering from Major Neurocognitive Disorder due to traumatic brain injury; that conclusion was solidly based upon her expertise, her review of the records, her testing, and her in-person sessions with Mr. Barton (Doc. 1, p. 13; Appendix B, p. 10). Consequently, Dr. Zapf found that as a result of Major Neurocognitive Disorder, Mr. Barton is unable to understand the proceedings against him, is unable to assist with his defense, and is not competent for execution; specifically, Dr. Zapf attributed Mr. Barton's incompetence for execution to "… significant impairments in executive function, problem solving, attention, concentration, working memory, and abstract reasoning, which result in the inability to provide rational assistance to counsel and to engage in consistent, logical and rational decision making" (Doc. 1, p. 13; Appendix B, p. 14-15). Dr. Zapf went on to explain that these findings and conclusions are in keeping with prevailing professional norms on the subject (Doc. 1, Appendix B, p. 15). These findings clearly demonstrate a level of incompetence satisfying the standards for execution incompetence as set forth by the United States Supreme Court, and as refined by the lower Federal Courts. ***Panetti v. Quarterman***, 958-959; ***Madison v. Alabama***, 726; ***Simon v. Epps***, supra; ***Thompson v. Bell***, supra.

It is important to note that neither the Missouri Supreme Court nor the Eighth Circuit Panel questioned these professional conclusions by Dr. Zapf, and never took issue with Dr. Zapf's qualifications or methods (Appendix B, p. 5; Doc. 1, Appendix A, p. 6-9).

C. The Missouri Supreme Court, and now the Eighth Circuit Panel, reach conclusions contrary those of Dr. Zapf by employing a legal standard rejected by this Court, and then taking portions of the record out of the bigger context

The Missouri Supreme Court, and now the Eighth Circuit Panel, start by relying upon the standard for execution competence suggested by Justice Powell in his ***Ford*** concurrence; then, they tease out what they deem to be magic words from an aside offered by Dr. Zapf, that Mr. Barton's condition permits him to have "a rudimentary and non-delusional understanding of the punishment he is about to receive and the reasons for it" (Appendix B, p. 5; Doc. 1, Appendix A, p. 7-8; Doc. 1, Appendix B, p. 14-15). For the Missouri Supreme Court and the Eighth Circuit Panel, that is enough to fully support a finding of execution competence (Appendix B; Doc. 1, Appendix A, p. 7-8).

To the contrary, as explained above, the Justice Powell thoughts are nothing but dicta, and in fact dicta which has been rejected by the this Court. ***Panetti v. Quarterman***, 958-959; ***Madison v. Alabama***, 726. Moreover, as Dr. Zapf observed, the mental health professional community has roundly rejected, as flawed and incomplete, Justice Powell's simplistic notions about execution competence (Doc. 1, Appendix B, p. 15).

The Missouri Supreme Court, and now the Eighth Circuit Panel, aver that Dr. Zapf "admits" that her findings did not meet the ***Ford*** and ***Panetti*** standard (Appendix B, p. 5; Doc. 1, Appendix A, p. 7-9). Actually, what Dr. Zapf has conceded is that Mr. Barton's "rudimentary and non-delusional understanding of the punishment he is about to receive and the reasons for it", while not satisfying prevailing professional standards for execution competence, would

satisfy the low standard set forth in Justice Powell's ***Ford*** concurrence (Doc. 1, Appendix B, p. 15). However, as already noted above, that standard, embraced by the Missouri Supreme Court, and now by the Eighth Circuit Panel, has been rejected this Court (Appendix B, p. 5; Doc. 1, Appendix A, p. 7, fn. 5). ***Panetti v. Quarterman***, 958-959; ***Madison v. Alabama***, 726.

The Missouri Supreme Court and the Eighth Circuit Panel also point out Dr. Zapf's finding that Mr. Barton does not suffer from "delusional thinking" or "psychotic disorders" (Appendix B, p. 5; Doc. 1, Appendix A, p. 8). However, as noted above, this Court has directed the lower Courts to not get hung up on the existence or non-existence of any particular mental malady, and concentrate, instead, on any "downstream consequence" from the condition which does exist. ***Madison v. Alabama***, 728-729. Dr. Zapf provided detailed explanations about of the downstream consequences of Mr. Barton's condition (Doc. 1, Appendix B, p. 14-15). To repeat, Major Neurocognitive Disorder has saddled Mr. Barton with "… significant impairments in executive function, problem solving, attention, concentration, working memory, and abstract reasoning, which result in the inability to provide rational assistance to counsel and to engage in consistent, logical and rational decision making" (Doc. 1, Appendix B, p. 14-15).

The Missouri Supreme Court then paraphrased, and the Eighth Circuit Panel accepted that paraphrasing, of Dr. Zapf findings, which omitted critical portions of those findings; it was then faulted that the findings, as so paraphrased, are "insufficient" (Appendix B, p. 5; Doc. 1, Appendix A, p. 9). When Dr. Zapf's findings and conclusions are fully and fairly stated, and not truncated as the Missouri Supreme Court has done, they well meet the applicable legal standards for execution incompetence. ***Panetti v. Quarterman***, 958-959; ***Madison v. Alabama***, 726; ***Simon v. Epps***, 463 Fed.Appx. 339, 341-342, 348-349 (5th Cir. 2012); ***Thompson v. Bell***, 580 F.3d 423, 436 (6th Cir. 2009).

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

D. The Missouri Supreme Court, and now the Eighth Circuit Panel, employ unreasonable conclusions of fact in light of the state court record

In addition, the Missouri Supreme Court, and now the Eighth Circuit Panel, plucked a few facts from a voluminous record to claim support therefrom for their finding of execution competence (Appendix B, p. 5; Doc. 1, Appendix A, p. 9-10).

There is certainly a presumption of correctness owed to factual determinations by a state court, but such factual determinations, and the concomitant presumption of correctness, can be overcome with clear and convincing contrary evidence from that same record. 28 U.S.C. 2254(d)(2) and (e)(1); ***Miller-El v. Dretke***, 545 U.S. 231, 240-265 (2005); ***Holman v. Kemna***, 212 F.3d 413, 417-418 (8th Cir. 2000).

The selectively chosen facts, when examined carefully, do not actually support a finding of competence. Also, the selectivity caused them to not account the overwhelming other evidence in the record demonstrating incompetence.

There is read out of context, and dismissed as not supportive of execution incompetence, Mr. Barton's statement to Dr. Zapf's that "they're going to execute me if I can't prove my innocence" (Doc. 1, Appendix A, p. 10). The trouble is that no one, least of all Dr. Zapf, has ever claimed that this statement supports a finding of incompetence. Dr. Zapf viewed the statement as at best demonstrating the same, minimal level of concrete thinking she had acknowledged Mr. Barton could conjure, and at worst, in context of her discussions with Mr. Barton, "demonstrating some illogical thought process" (Doc. 1, Appendix B, p. 10).

The Missouri Supreme Court, and now the Eighth Circuit Panel, also strongly relied upon a handful of reports, written by those who provided prison medical treatment for Mr. Barton, that Mr. Barton "does not appear to have any clinically significant symptoms of a mental illness at this time" and "continues to make a good institutional adjustment" (Appendix B, p. 5; Doc. 1, Appendix A, p. 9). But this harkens to principles of law related to determinations of competence for trial, which are that some folks give certain surface signs of competence which hide serious mental illness and incompetence. ***State v. Tilden***, 988 S.W.2d 568, 575, 579-580 (Mo.App.W.D. 1999; ***Newman v. Harrington***, 726 F.3d 921, 933-934 (7th Cir. 2013); ***United States v. Salley***, 246 F.Supp.2d 970, 977-979 (N.D.Ill. 2003); ***Odle v. Woodford***, 238 F.3d 1084, 1088-1089 (9th Cir. 2001). These are the understandings in the law which must guide consideration of the reports singled out and relied upon so heavily by the Missouri Supreme Court and the Eighth Circuit Panel.

In those reports, it is reported that Mr. Barton is not displaying particularized, overt symptoms, like delusions or psychosis. But, as fully explained by Dr. Zapf, and repeated many times above, incompetence caused by Major Neurocognitive Disorder does not generate symptoms which are obvious on the surface, like delusions or psychosis. Therefore, the lack of such symptoms in Mr. Barton is meaningless. Never is it reported that these professionals at the Prison leveled queries at Mr. Barton so as to determine his competence for anything other than to "make a good institutional adjustment". What is more, a complete search of those prison records show that those records do not contain Dr. Zapf's report or any of the mountain of reports generated by imaging, neuropsychological and other testing which established Mr. Barton's brain damage and consequent mental illness (Doc. 1, Appendix B. p.12). Thus, the persons who wrote the reports referred to by the Missouri Supreme Court cannot be faulted for not knowing

the true extent of Mr. Barton's condition, and for not taking that into account in making their limited findings. However, under the circumstances, it is unreasonable for the Missouri Supreme Court, and now the Eighth Circuit Panel, to give the undue weight they have to these conclusions.

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

The Missouri Supreme Court certainly endeavored to belittle the conclusions from Dr. Zapf, but only by illicit means, unfairly recounting Dr. Zapf's conclusions by omitting key components of the findings, and then comparing the truncated version of the opinions against a debunked standard of review. This is contrary to and an unreasonable application of United States Supreme Court precedent, and also an unreasonable determination of the facts in light of clear and convincing contrary evidence from the record of the state court proceedings. ***Holman v. Kemna***, supra. That is something the Eighth Circuit Panel has wrongly permitted (Appendix B, p. 5).

E. Mr. Barton's incompetence looks very similar to the incompetence of Madison

Proof about Mr. Barton's disabilities are very much the same as those found by this Court to constitute a requisite showing of incompetence for execution in ***Madison v. Alabama***, supra. Mr. Madison suffered a series of strokes, and as a result developed disorientation, confusion, cognitive impairment and memory loss. ***Madison v. Alabama***, 723. Mr. Madison's expert

observed that Mr. Madison had lost all memory of the underlying criminal event; that expert also opined that Madison's condition caused significant cognitive decline, allowing him to concretely understand the nature of execution, but not the reasoning behind the state's efforts to execute him. ***Madison v. Alabama***, 724. The State's expert acknowledged Mr. Madison's strokes-induced cognitive decline and loss of memory regarding the event of the crime, but noted that Mr. Madison still had a grasp on his case and his legal situation; the State's expert did not address the impact of the strokes-induced cognitive decline upon Mr. Madison's competence, but instead emphasized that Mr. Madison did not show signs of psychosis, paranoia or delusion. ***Madison v. Alabama***, supra. In making findings of execution competence, the Alabama Court, like the State' expert, highlighted the absence of psychosis and delusion without addressing the consequences of the strokes-induced cognitive decline. ***Madison v. Alabama***, 724-725. This Court found that the Alabama Court was so focused on conditions that Mr. Madison did not have that that Court failed to consider the impact wrought by the serious condition which Mr. Madison did have; consequently, the matter was returned to the Alabama Court for that Court to properly consider the impact of Mr. Madison's actual condition upon his competence for execution. ***Madison v. Alabama***, 731.

Mr. Barton's situation is strikingly similar to that confronted in ***Madison***. Mr. Barton, like Mr. Madison, has a brain-damage-condition which has not created psychosis or delusions, and leaves him with some capabilities, but has inflicted profound deficits. To say it one more time, Major Neurocognitive Disorder has saddled Mr. Barton with "… significant impairments in executive function, problem solving, attention, concentration, working memory, and abstract reasoning, which result in the inability to provide rational assistance to counsel and to engage in consistent, logical and rational decision making" (Doc. 1, Appendix B, p. 14-15). The Missouri

Supreme Court, and now the Eighth Circuit Panel, like the Alabama Court, concentrated on the lack of psychosis and delusions, and the limited capabilities, and paid no attention to Mr. Barton's deficits and their impact on Mr. Barton's execution competence. Actually, the Missouri Supreme Court and the Eighth Circuit Panel took one wrong step more than the Alabama Court, unreasonably employing the wrong legal standard to judge the matter. Therefore, it would seem that Mr. Barton, just like Mr. Madison, would be entitled, at the very least, to a return of this matter to state Court for what this Court aptly termed "a do-over". ***Madison v. Alabama***, 730.

CONCLUSION

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

Respectfully submitted

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CERTIFICATE OF SERVICE AND COMPLIANCE

It is hereby certified

- that required privacy act redactions have been made to the foregoing,
- that this document complies with the typeface requirements of Supreme Court Rule 34.1(g) because the document was prepared in Microsoft Word using Times New Roman 12 font style and typesize,
- that, the portions of this document countable under Supreme Court Rule 33.2(b) contains less than 40 pages, and therefore this Petition complies with the dictates of Rule 33.2(b),
- that, this item was converted to pdf format for electronic filing and was properly scanned for viruses, with none being found, and
- that, copies of the foregoing were e-mailed to the following on this 18th day of May, 2020

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