

IN THE UNITED STATES SUPREME COURT

WALTER BARTON	)	
Petitioner	)	
	)	Case _____
v.	)	
	)	
	)	
WILLIAM STANGE	)	
Respondent	)	

**MOTION FOR STAY OF EXECUTION**

Comes now Walter Barton, by attorney Frederick A. Duchardt, Jr., and pursuant to this Court's Rule 23, does pray that a stay be entered stopping the execution of the sentence of death against Mr. Barton scheduled by the Missouri Supreme Court to occur in connection with case number SC87859 on May 19, 2020. The grounds for this request will be set forth in the subsequent numbered subparagraphs.

1. 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, in its case number SC87859, only by the slimmest of margins, 4-3 (Doc. 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).

2. The next day, on November 19, 2019, the State, in case number SC87859, 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). 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).

3. On February 18, 2020, in case number SC87859, the Missouri Supreme Court issued a warrant for Mr. Barton's execution, and set May 19, 2020 as the date for Mr. Barton's execution (Doc. 1, Appendix P). Thereafter, Mr. Barton requested from the Missouri Supreme Court a stay of execution in light of the COVID-19 pandemic, and the impact that was having on investigation for his pending Rule 91.01 matter and his request for executive clemency, as well as the impact that COVID-19-related restrictions would have on proper conduct of the scheduled execution (Doc. 1, Appendix Q).

4. On April 27, 2020, the same date that the Missouri Supreme Court overruled Mr. Barton's petition for habeas corpus relief, that Court also overruled Mr. Barton's motion for stay of execution (Doc. 1, Appendix R).

5. On May 4, 2020, one week after State remedies were so exhausted as to the execution incompetence and actual innocence claims, Mr. Barton brought an original 28 U.S.C. 2254 Petition raising those issues (Doc. 1). In that Petition, Mr. Barton particularly averred and demonstrated that his is an original Petition for 2254 relief, as those issues had not been ripe when his prior 2254 petition was being litigated (Doc. 1, p. 6-7). The District Court issued an Order to Show Cause (Doc. 6), and Appellant filed his Response to that Order on May 6, 2020 (Doc. 7). Mr. Barton speedily filed his Traverse to the Response on the morning of May 11, 2020 (Doc. 10).

6. At the same time as the filing of the new 2254 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).

7. 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*, 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). The District Court observed, in passing, that this conclusion about there not being enough time 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). Though the District Court issued the Stay pursuant to 28 U.S.C. 2251(a)(1) and *Lonchar v. Thomas*, supra, the Court still engaged in a balancing of equities requested by Respondent, finding that the balance supported the Order for Stay (Doc. 14, p. 7).

8. Respondent appealed, and on May 17, 2020, a Panel of the Eighth Circuit exercised their authority to independently judge the grounds for relief, expressed their belief that it is “readily apparent” that the grounds raised by Mr. Barton lacked merit, vacated the Stay entered by the District Court, and ordered dismissal of the petition (Appendix A).

9. In light of the short time given to the case, exactly one day, the Panel has inadvertently committed egregious errors of fact and law which undermine the determination which has been made. A Petition for Certiorari addressing those errors is being filed at the same time as this Motion for Stay. For the reasons set forth in that Petition, it is appropriate for this Court to order a stay to allow for this Court to consider and rule upon those issues.

10. Moreover, there are additional grounds for this Court to exercise its power to grant a stay in this case. Throughout most of the time after the setting of the date of execution, due to the COVID-19 pandemic, a state of emergency was in effect as declared by the President of the United States, by the Governor of the State of Missouri, and by the Governors of most of the fifty states. By order of the

Governor of the State of Missouri, effective through May 4, 2020, residents of the State of Missouri were directed to stay at home, all but essential businesses were shut down, and even essential businesses, including government operations, were required to maintain six feet separation between persons, and reduce total occupancy of areas of the businesses to 10% of their authorized occupancy (Doc. 1, Appendix S). Though these orders were somewhat modified on May 4, 2020 to ease the stay at home requirement for residents, the other restrictions have remained in place (Doc. 1, Appendix T).

11. Throughout the time since the state sought the setting of an execution date, undersigned counsel has been fully engaged in preparations for a proper presentation of habeas petition issues to the Missouri Supreme Court and to the Federal Courts, as well as for proper presentation of an executive clemency request to the Governor. However, those preparation efforts have been slowed to a crawl in critical ways by travel and meeting restrictions which have been imposed.

12. Prior to the COVID-19-neccessitated shelter-at-home orders entered by the Governor, contact information was obtained for the trial jurors in Mr. Barton's case. And, a meeting was conducted with one of the jurors, at which the juror was provided the new evidence of actual innocence brought forth to the Missouri Supreme Court, and an interview of the juror was conducted. That one Juror found the new evidence referred to in Count Two of the Petition "compelling" and opined

that the new evidence would have impacted upon jury deliberations (Doc. 1, Appendix K). Such evidence critically supports the argument of actual innocence contention that the new evidence is of kind and moment to warrant grant of relief.

13. Even with the restrictions in place, Mr. Barton's defense team have still tried to engage in necessary investigation. And, in some ways, that investigation has still borne fruit, bringing forth affidavits of two more of the fifth trial jurors to the same effect about the "compelling" nature of the new evidence (Affidavits). Just today, another Juror has confirmed his agreement about the compelling nature of the new evidence. Since he is in Texas, an affidavit has not yet been obtained from him. For now, in place of that juror's affidavit, the affidavit of Mr. Barton's investigator is being supplied about the substance of the Juror's opinions pending being able to travel to the Juror to obtain his affidavit.

14. However, the adverse conditions created by the COVID-19 restriction have stymied efforts to find and interview the remaining jurors. Also, the interviews conducted with the juror who completed the affidavits had to be done under terrible conditions, leaving undersigned counsel and his defense team unable to get even more detail about the Juror opinions. Affidavits from members of the defense team are appended to explain these difficulties.

15. For the reasons set forth in subparagraphs 12, 13 and 14 above, this Court should grant a stay to allow for completion of this critical investigation.

16. In addition, the planned execution itself would amount to an assembly in violation of the restrictions put in place due to the COVID-19 emergency, and should be stayed for that reason as well (Appendix T).

17. Moreover, because of this crisis, the Governor's agenda is obviously over-full. Thus, it would be fundamentally unfair to have the weighty issue of possible clemency for Mr. Barton come to the Governor at this time. Thus, a stay is warranted for that reason too.

WHEREFORE, Mr. Barton prays that this Honorable Court make and enter its order staying the execution of Mr. Barton.

Respectfully submitted

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was e-mailed to the following this 18<sup>th</sup> day of May, 2020

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FREDERICK A. DUCHARDT, JR.