CAPITAL CASE

No. 19-8483

IN THE SUPREME COURT OF THE UNITED STATES

WALTER BARTON

Petitioner

v.

WILLIAM STANGE

Respondents

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

PETITION FOR WRIT OF CERTIORARI
REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

FREDERICK A. DUCHARDT, JR.
COUNSEL OF RECORD
Mo.Bar Enrollment Number 28868
P.O. Box 216
Trimble MO 64492
Phone: 816-213-0782
Fax: 816-635-5155
e-mail: fduchardt@yahoo.com
ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ..... i-ii

Questions Presented for Review 1

Question Two Reply Argument 1-1

Conclusion 15

Certificate of Service and Compliance 16

TABLE OF AUTHORITIES

United States Supreme Court Decisions

Ford v. Wainwright, 477 U.S. 399 (1986) 10, 11

Madison v. Alabama. 139 S.Ct. 718 (2019) 10

Napue v. Illinois, 360 U.S. 264, 266-267, 269 (1959) 5

Schlup v. Delo, 513 U.S. 298 (1995) 7-9

United States Circuit Court Decisions

Amrine v. Bowersox, 238 F.3d 1023 (8th Cir. 2001) 6

Cleveland v. Bradshaw, 693 F.3d 626 (6th Cir. 2012 7

Gomez v. Jaimet, 350 F.3d 673 (7th Cir. 2003) 7

Griffin v. Johnson, 350 F.3d 956 (9th Cir. 2003) 7

Royal v. Taylor, 188 F.3d 239 (4th Cir. 1999) 7

Rivas v. Fischer, 687 F.3d 514 (2d Cir. 2011) 7

State Court Decisions

McKim v. Cassady, 457 S.W.3d 831, 846 (Mo.App.W.D. 2015) 7

State ex rel Amrine v. Roper, 102 S.W.3d 541 (Mo.banc 2003) 2007) 2

State ex rel Clayton v. Griffith, 457 S.W.3d 735 (Mo.banc 2015) 2007)..... 2

State ex rel Cole v. Griffith, 460 S.W.3d 349, (Mo.banc 2015) 2007) 2

State ex rel Middleton v. Russell, 435 S.W.3d 83 (Mo.banc 2014)..... 2

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.

REPLY ARGUMENTS

1. HOW IS IT THAT THIS CASE COMES TO THIS COURT WITH JUST HOURS BEFORE A SCHEDULED EXECUTION?

When a condemned man petitions this Court just a day before his execution is scheduled to occur, it is too easy for his opponents to claim that this Court should shun the arguments and scorn the petitioner due to the "last minute" way the matter has been presented (Brief in Opposition, p. 1, 3, 9, 16). Sometimes such an argument is fair, but not this time.

Six months ago, an execution date was sought against Mr. Barton just a day after prior habeas proceedings ended (Doc.. 1, Appendix N). Undersigned counsel informed that weighty issues were being investigated, and requested that no date

setting be made until a petition could be filed (Doc. 1, Appendix O). Then, on February 3, 2020, just three days after an expert opinion of execution incompetence was received (Appendix F), and just a day after a juror affidavit labeling new evidence of actual innocence "compelling"(Appendix I), a petition was brought to the Missouri Supreme Court. The matters of execution incompetence and actual innocence which were brought in that petition to the Missouri Supreme Court are ones which the Missouri Supreme Court allows, and even calls for, being brought at precisely such a juncture, ***State ex rel Middleton v. Russell***, 435 S.W.3d 83 (Mo.banc 2014); ***State ex rel Clayton v. Griffith***, 457 S.W.3d 735, 752 (Mo.banc 2015); ***State ex rel Cole v. Griffith***, 460 S.W.3d 349, 356 (Mo.banc 2015); ***State ex rel Amrine v. Roper***, 102 S.W.3d 541, 547 (Mo.banc 2003)

The trouble was that the Missouri Supreme Court, just two weeks later, on February 18, 2020, set a May 19, 2020 execution date without having addressed the Petition (Doc. 1, Appendix P). As it turned out, the issues were so weighty that, even though the Missouri Supreme Court refused to grant relief, it took them two-and-a-half months, until April 27, 2020 to consider the matters and render a judgment (Appendix C).

Just one week after state remedies were exhausted upon those issues, a Petition was brought to the District Court (Doc. 1). The District Court granted a

request for stay of execution, reasonably finding that, if the matters were weighty enough for the Missouri Supreme Court to take two-and-a-half months to resolve, it should not be surprising that more time than the mere days before the looming execution date would be needed to decide the case on the merits (Appendix A).

Upon appeal from that Order, the Eighth Circuit Panel decided they knew better, and with just two days left before the execution date, decided the merits of the claims, and lifted the stay (Appendix B). In just a day after that, the Petition for Certiorari was brought to this Court.

This is an example, not of a Petitioner's sloth, but of his tenacity and speed.

2. HOW IS IT THAT, DESPITE DECADES OF DELAYS CAUSED BY PROSECUTORIAL MISCONDUCT, RESPONDENT CAN STILL CLAIM A NEED FOR SPEED?

Sometimes, as this Court has observed, governing bodies "deserve better" than delays in justice caused them by obstreperous litigants (Brief in Oppostiion, p. 16-17). ***Bucklew v. Precythe***, 139 S.Ct. 1112, 1134 (2019). This is not one of those times.

In 2007, Missouri Supreme Court Judges called out Missouri prosecutors for their decades-long creation in this case of a "trail of mishaps and misdeeds which taken together, reflect poorly on the criminal justice system. ***State v. Barton***, 711-712. Now, in 2020, the Missouri Supreme Court has called out prosecutors once again, in this instance for suborning perjury, in two consecutive trials, from their

sole jailhouse informer, who claimed that she did not receive a dismissal of a prosecution against her in return for her testimony, when she really did, and prosecutors knew she did (Appendix C, p. 4).

And yet, after all of these delays occasioned by the prosecutors, the Respondent has the audacity to claim to this Court that the State has somehow been put upon by delays in this case (Brief in Opposition, p. 16-17). Go figure.

3. HOW IS IT THAT RESPONDENT CAN CLAIM THAT THE SORT OF PERJURY COMMITTED BY THE INFORMER IS JUST CUMULATIVE IMPEACHMENT WHEN THIS COURT HAS SAID DIFFERENTLY?

As noted above, the Missouri Supreme Court has confirmed that Missouri prosecutors suborned perjury from their informer not once but twice (Appendix C, p. 4). Respondent tries to minimize that the misconduct involved should be considered mere impeachment which would have been cumulative of other evidence had it been received (Brief in Opposition, p. 3, 13, 14). In making this argument, Respondent forgets to mention that Mr. Barton's fourth trial conviction was overturned because that Missouri Judge determined that the result of that trial would have been different had the perjured testimony by the informer been set straight (Doc. 1, Appendix J). Added to that is this Court's holding, from some sixty years ago, that prosecution-suborned perjury, denying that a benefit was given in return for testimony when that benefit was actually given, requires a new

trial. ***Napue v. Illinois***, 360 U.S. 264, 266-267, 269 (1959). There is no legitimate way to minimize the power of the truth about the informer.

4. HOW IS IT THAT RESPONDENT CONTINUES TO TOUT TRIAL DEFENSE COUNSEL'S MISPERCEPTIONS ABOUT LAWRENCE RENNER'S EXPERT OPINIONS WHEN WE NOW KNOW THOSE OPINIONS DEMONSTRATE ACTUAL INNOCENCE?

All know now that Lawrence Renner, the blood spatter expert, who was found but not used by Mr. Barton's fifth trial counsel, firmly demonstrates Mr. Barton's actual innocence. Mr. Renner's opinions are that the small stains on Mr. Barton's clothes would have been made precisely through the sort of accidental touching of objects in a blood-soaked room which Mr. Barton described in his statements to police (Appendix H). And, Mr. Renner's opinions are that Mr. Barton's clothes could not have been worn by the killer because the stains there were too few and too small in light of the number and severity of the wounds inflicted on the victim (Appendix H).

All Respondent can argue is that defense counsel mistook what Mr. Renner would have said (Brief in Opposition, p. 3, 13). If the question here was over the effectiveness of defense counsel, counsel's misperceptions would have some bearing. But this is a claim that the actual opinions, not misconceptions, firmly show actual innocence. That they do.

5. HOW IS IT THAT PROOF-POSITIVE ABOUT THE "COMPELLING" NATURE OF THE NEW EVIDENCE, THE JUROR AFFIDAVITS, CONTINUES TO BE IGNORED?

One of the reasons why the actual innocence claim was made when it was is that is when proof-positive was obtained about the power of the actual innocence evidence. At that point, a Juror affidavit was obtained, explaining that the Lawrence Renner expert opinions were "compelling" (Appendix I). Two more Juror affidavits to the same effect have been obtained since, and one more is in the process of being obtained (Appendix J, Appendix K, Appendix L).

The Eighth Circuit Panel never doubted the moment of the evidence, but simply dismissed it as not new enough, and so that Court did not have occasion to mention the Juror Affidavits (Appendix B). Respondent, on the other hand, does question the significance of the new evidence from Mr. Renner without once mentioning the words juror or affidavit (Brief in Opposition, p. 3, 12, 14). Thus, the proof-positive of the "compelling" nature of the evidence stands tall, and unanswered.

6. HOW IS IT THAT THE EIGHTH CIRCUIT PANEL, AND NOW RESPONDENT, CAN IGNORE HOLDINGS FROM MISSOURI COURTS AND FROM FIVE CIRCUITS THAT "NEW EVIDENCE" SIMPLY MEANS EVIDENCE NEVER HEARD BY THE JURY AT TRIAL

As mentioned just above, the Eighth Circuit Panel relied upon an older circuit holding related to another Missouri case and held that the blood spatter evidence, even if momentous, could not be considered because it was knowable at time of trial (Appendix B, p. 6). ***Amrine v. Bowersox***, 238 F.3d 1023, 1029 (8th

Cir. 2001). In his petition to this Court, Mr. Barton explained that this holding is opposite to more recent holdings by Missouri Courts, as well as the decisions by all five of the other Circuit Courts of Appeals who have weighed in on the subject, in addition to the original decision on the subject by this Court. All of the Courts, including this Court, have made clear that new evidence is defined as any evidence which the jury at trial did not hear. ***Schlup v. Delo***, 513 U.S. 298, 327 (1995); ***McKim v. Cassady***, 457 S.W.3d 831, 846 (Mo.App.W.D. 2015) ;***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); ***Royal v. Taylor***, 188 F.3d 239 (4th Cir. 1999); ***Rivas v. Fischer***, 687 F.3d 514, 543 (2d Cir. 2012).

That the Eighth Circuit Panel missed all of this is hardly surprising in light of the breakneck speed with which they tried to get the merits of this case decided. Since Respondent has the Petition staring him in the face, Respondent has no choice but to do the very least and acknowledge a split of authority (Brief in Opposition, p 14). Respondent urges that the split makes no difference because the new evidence would not be convincing to reasonable jurors (Brief in Opposition, p. 14). However, as noted above, this contention is debunked by the Jurors in this very case who term the new evidence "compelling" (Appendix I, Appendix J, Appendix K, Appendix L). What Mr. Barton trusts is that this Court will deem all of this to be a compelling case for a grant of certiorari.

7. HOW IS IT NOT CLEAR THAT THE SCHLUP ACTUAL INNOCENCE GATEWAY WAS CREATED TO REVIVE CLEARLY DEFAULTED CLAIMS?

Respondent vehemently urges that Mr. Barton should not be allowed to bring the issue about the prosecution's knowing presentation of perjury because it could have been brought before, but was defaulted, and so should not be heard now (Brief in Opposition, p. 14-15). However, it is the reviving of otherwise defaulted claims for which the so-called gateway was created. ***Schlup v. Delo***, 513 U.S. 298, 327 (1995).

8. HOW IS IT THAT THE CIRCUMSTANTIAL EVIDENCE IN THIS CASE CAN BE CONSIDERED STRONG WHEN THE WEAKNESSES OF THAT EVIDENCE CAUSED THE MISSOURI SUPREME COURT TO DIVIDE 4-3 OVER CONVICTION AND SENTENCE

Both the Eighth Circuit Panel and Respondent contend that the circumstantial evidence against Mr. Barton was strong, but mention none of it (Brief in Opposition, p. 14; Appendix B). The truth of the matter is that the inherent weaknesses in this evidence is what caused the Missouri Supreme Court to split down the middle on the sufficiency of the case, with the dissenters specifying the shortcomings of all of this supposedly strong evidence. ***State v. Barton***, 240 S.W.3d 693, 711, 718-719 (Mo.banc 2007).

9. HOW IS IT THAT RESPONDENT, FOR THE VERY FIRST TIME BEFORE THIS COURT, CAN TERM A PROPERLY BROUGHT FIRST PETITION "SECOND AND SUCCESSIVE"

Mr. Barton specifically alleged and showed in his Petition filed in the District Court that this is properly a first Petition for 2254 relief (Doc. 1, p. 6-7). In answering the District Court's Order to show cause, Appellant did not address or contest that this is a first 2254 Petition (Doc. 7). But now before this Court, for the very first time, Respondent seeks dismissal of this matter as supposedly "second and successive" (Brief in Opposition, p. 4, 15). Respondent apparently is grasping at straws since he gives no legal reasoning or citations to support his claim.

A 28 U.S.C. 2254 petition is considered to be a first petition so long as the issues raised became ripe after any previous petition for Federal habeas relief was litigated. ***Stewart v. Martinez-Villareal***, 523 U.S. 637, 642-644 (1998). As this Court has explained, even if the term "second" might be a correct way, in the strict English language sense, to describe a petition, that petition is allowed, just like any first petition, if the issue being raised was "unripe" when the previous Federal petition was litigated. As a general matter, both execution incompetence claims and actual innocence claims fall into this proper, first petition category, particularly when the issues, in the first instance, have been litigated in State Court. ***Schlup v. Delo***, 513 U.S. 298, 313 (1995); ***Stewart v. Martinez-Villareal***, supra. In the Petition to the District Court were the matters of execution incompetence and actual innocence which became ripe for the first time when the Missouri Supreme

Court ruled upon those matters on April 27, 2020 (Appendix C). Thus, this is clearly a first petition in addressing these newly exhausted issues.

10. HOW IS IT THAT THE MISSOURI SUPREME COURT CAN BE HONEST ABOUT HOW THEY USED THE WRONG STANDARD TO JUDGE EXECUTION COMPETENCE, BUT NO ONE ELSE CAN?

In their opinion at page 7, fn. 5, the Missouri Supreme Court freely admitted that, in finding Mr. Barton competent for execution, they were employing the very standard suggested by Justice Powell in his concurrence in ***Ford v. Wainwright***, 477 U.S. 399, at page 422, "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." The Missouri Supreme Court went on to find Mr. Barton competent for execution based upon one of the opinions expressed by Dr. Patricia Zapf that, if that was the standard for competence, Mr. Barton would be competent (Appendix F, p. 15). However, as Mr. Barton has already carefully explained in his Petition for Certiorari, this Court has made clear that is not the applicable standard, and that in light of other conclusions by Dr. Zapf, Mr. Barton is clearly not competent under applicable standards (Petition, p. 24-28). Mr. Barton even went so far as to explain, at pages 31-34 in his Petition to this Court, how his situation is strikingly similar to that for which relief was granted in ***Madison v. Alabama***. 139 S.Ct. 718, 728 (2019) (Petition, p. 31-34).

The Eighth Circuit, and now Respondent, cannot find candor similar to that of the Missouri Supreme Court. Instead, neither even mention ***Ford***, and both trying to convince that the very wording of the Missouri Supreme Court determination actually meets the correct standard (Brief in Opposition, p. 3, 6, 11). It clearly does not.

CONCLUSION

WHEREFORE, in light of the foregoing, and in light of the premises set for in Mr. Barton's petition to this Court, Mr. Barton prays that this Honorable Court enter its Order in this case granting to Mr. Barton its writ of certiorari to the Eighth Circuit Court of Appeals, and granting any further relief which this Court deems just and proper under the circumstances.

Respectfully submitted

/s/Frederick A. Duchardt, Jr.
FREDERICK A. DUCHARDT, JR.
COUNSEL OF RECORD
Mo.Bar Enrollment Number 28868
P.O. Box 216
Trimble MO 64492
Phone: 816-213-0782
Fax: 816-635-5155
e-mail: fduchardt@yahoo.com
ATTORNEY FOR MR. BARTON

CERTIFICATE OF SERVICE AND COMPLIANCE

It is hereby certified

- that required privacy act redactions have been made to the foregoing,
- that this reply complies with the typeface requirements of Supreme Court Rule 34.1(g) because the document was prepared in Microsoft Word using Times New Roman 14 font style and typesize,
- that, the countable portions of this reply number 11 pages, and therefore this reply complies with the dictates of Supreme Court Rules 33.2(b) and 34.1(g),
- 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 and postal mailed to the following on this 19th 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.