No. 19-8483; No. 19A1040

IN THE
SUPREME COURT OF THE UNITED STATES

THIS IS A CAPITAL CASE

WALTER BARTON
Petitioner,

v.

WILLIAM STANGE, WARDEN.
Respondent.

Combined Brief in Opposition to Motion for Stay of Execution
and Brief in Opposition to Petition for Writ of Certiorari

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Petitioner Walter Barton ("Barton") is under sentence of death in Missouri for the vicious stabbing murder of an 81-year-old acquaintance. He is scheduled to be executed on Tuesday May 19, 2020, at 6:00 pm Central time. He seeks a last-minute stay of execution to review two claims—a competence-to-be-executed claim and a gateway actual innocence claim. This Court should deny a stay of execution and deny the petition for writ of certiorari. Barton's competence-to-be-executed claim is plainly meritless because Barton's own expert witness conceded that Barton has a rational understanding of his punishment and why the State seeks to execute him, which satisfies this Court's standard for competency to be executed. *Madison v. Alabama*, 139 S. Ct. 718, 726-27 (2019). Barton's actual innocence claim does not warrant a stay of execution because the factual predicate for the claim has been available for 14 years, since his criminal trial in 2006, and yet he waited until after his execution was scheduled in February 2020 to raise the claim. The actual-innocence claim is also meritless because it relies heavily on impeachment evidence of a cooperating witness who was thoroughly impeached on the same point, and on the opinion of a blood-spatter expert whom Barton's trial counsel opted not to call because the testimony threatened to undermine the credibility of Barton's own account of how the victim's blood got on Barton's clothes. And, in his first federal habeas petition, Barton never raised the underlying claim of prosecutorial misconduct to which he now seeks a "gateway" through his actual-innocence claim.

Barton cannot raise that prosecutorial-misconduct claim in a second or successive petition under 28 U.S.C. § 2244(b)(2)(B)(i) because the factual predicate of the claim has been available since 2006, so his attempt to raise a "gateway" claim is inherently futile.

FACTUAL AND PROCEDURAL BACKGROUND

Barton was convicted in 2006 of murdering the 81-year-old manager of a trailer park by stabbing her over 50 times, slitting her throat, and eviscerating her. *See State v. Barton*, 240 S.W.3d 693, 696–700 (Mo. banc 2007). Barton filed multiple applications for post-conviction review in state court, and a federal habeas petition, all of which were denied. *See Barton v. Stange*, No. 20-1985 (8th Cir. May 17, 2020), Slip op., at 2 ("8th Cir. Slip Op."). In February 2020, after his post-conviction review applications became final, the Missouri Supreme Court scheduled Barton's execution for May 19, 2020. *Id.*

Barton then filed a new state-court habeas corpus application in the Missouri Supreme Court, raising two claims: (1) a claim that he is incompetent to be executed, and (2) an actual innocence claim that he asserted as a gateway to an underlying claim of prosecutorial misconduct. *See id.* The Missouri Supreme Court denied this habeas application on April 27, 2020. *Id.*

Barton then filed a federal habeas action in the U.S. District Court for the Western District of Missouri, seeking collateral review of the Missouri Supreme

Court's resolution of his competence-to-be-executed and actual-innocence claims. On May 4, 2019, Barton sought from the district court a stay of his execution scheduled for May 19, 2020. *Barton v. Stange*, 20-1985, 20-1985, Slip op. at 2 (8th Cir. May 17, 2019). On May 15, 2020, four days before Barton's scheduled execution, the district court issued a stay solely because it felt it needed more than the fifteen days between the filing of the stay motion and accompanying habeas petition to evaluate the matter. *Id*. at 2. The district court did not evaluate the traditional equitable factors governing stays of execution or find any likelihood of success on the merits for any of Barton's claims; rather, it merely decided that it required more time to consider the matter. *Id.*

Missouri filed an immediate notice of appeal and moved to vacate the stay of execution in the U.S. Court of Appeals for the Eighth Circuit. On May 17, 2020, the Eighth Circuit issued its opinion vacating the stay of execution and remanding the case to the district court with instructions to dismiss Barton's habeas petition. *Id*. at 7. The Eighth Circuit did not decide whether the district court had authority to grant a stay of execution without finding any likelihood of success on the merits or considering equitable factors. Instead, the Eighth Circuit held: "Because the district court found itself without time to consider the merits at all, we have carefully reviewed them ourselves to determine if a stay is warranted. We find the merits

'readily apparent' and therefore vacate the stay and remand with instructions to dismiss the petition." *Id.* at 3-4.

Regarding Barton's competence-to-be-executed claim, the Eighth Circuit held that the Missouri Supreme Court had reasonably applied this Court's standards for competency for execution, as set forth in *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019), and *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007). *Id.* at 4–5. The Eighth Circuit noted that this Court's cases prohibit the execution of a prisoner "whose mental illness prevents him from rationally understanding why the State seeks to impose that punishment." *Id.* at 4 (quoting *Madison*, 139 S. Ct. at 722). The Eighth Circuit noted that the Missouri Supreme Court had correctly observed that "Barton's own expert concluded in her report that Barton 'demonstrated a rudimentary factual understanding of the punishment he is about to receive and the reasons for it'"; that the Missouri Supreme Court had "also noted [Barton's expert's] conclusion that Barton 'demonstrated a simplistic, but rational understanding of the punishment he is about to receive and the reasons for it'"; and that the Missouri Supreme Court "noted [the expert's] conclusion that Barton 'did not demonstrate any delusional thinking or loss of contact with reality and no perceptual disturbances were noted.'" *Id.* at 5. Because Barton's own expert's report had demonstrated that he was not incompetent to be executed under this Court's standard, the Eighth Circuit concluded that the Missouri Supreme Court's rejection of the competence-to-be-executed claim

did not involve any unreasonable application of this Court's precedents. *Id.* at 5; *see also* 28 U.S.C. § 2254(d)(1). As the Eighth Circuit noted, Barton's expert's report "demonstrates that Barton rationally understands why the State is imposing the death penalty. Barton's expert's conclusion that he was not competent under standards that are not controlling cannot change the clear dictates of the United States Supreme Court." 8th Cir. Slip Op., at 5.

Regarding the gateway actual-innocence claim, the Eighth Circuit held that this claim was meritless because it did not rely on "new reliable evidence that was not available at trial." *Id.* at 6 (quoting *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001)). The Eighth Circuit noted that Barton "identifies four bases for his actual innocence claim: (1) the opinion of a blood spatter expert that would rebut the testimony of the State's blood spatter expert at Barton's fifth trial; (2) seventeen prior convictions [cooperating witness Katherine Allen] had at the time of the fifth trial that were not presented to the jury; (3) an agreement between the State and Allen to dismiss charges against her in exchange for her testimony; and (4) Allen's 2016 federal conviction for identity theft and mail fraud." *Id.* at 5-6. The Eighth Circuit held that Allen's prior convictions, and her alleged deal with the State to dismiss charges in exchange for testimony, did not constitute "new evidence" because all that information was available at Barton's trial. *Id.* at 6. The Eighth Circuit held that the blood spatter expert's opinion was not "new evidence" because

Barton's trial counsel had interviewed that expert prior to trial but made a strategic decision not to call him as a witness, out of concerns that the expert would contradict Barton's own account of how the victim's blood got on his clothing. *Id.* at 6-7. And the Eighth Circuit held that the evidence of the additional prior conviction of Allen, when she had been cross-examined on 13 prior convictions involving acts of dishonesty, was plainly cumulative and likely would not have made any difference to the outcome of the trial. *Id.* at 7; *see also State ex rel. Barton v. Stange*, No. SC98343, 2020 WL 1987819, at*1–3 (Mo. banc April 27, 2020) (per curiam) (Missouri Supreme Court opinion rejecting the same claims).

For these reasons, the Eighth Circuit held that it saw "no possibility of success on the merits" in either of Barton's claims, vacated the stay of execution, and ordered the dismissal of the habeas petition. 8th Cir. Slip Op., at 7 (citing *Middleton v. Roper*, 759 F.3d 867, 868 (8th Cir. 2014) (per curiam) (holding that it was an abuse of discretion to grant stay on habeas petition that had no substantial likelihood of success on the merits), and *Green v. Thaler*, 699 F.3d 404, 408 (5th Cir. 2012) (vacating stay and remanding with instructions to dismiss).

REASONS FOR DENYING THE STAY OF EXECUTION AND REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. This Court Should Deny Barton's Last-Minute Application for Stay of Execution and Deny the Petition for Writ of Certiorari Because Barton Raises No Issue That Warrants This Court's Review.

An applicant for stay of execution in this Court must satisfy the traditional equitable factors, including likelihood of success on the merits, balancing of harms, and the public interest. *See, e.g., Hill v. McDonough*, 547 U.S. 573, 584 (2006) ("[A] stay of execution is an equitable remedy. It is not available as a matter of right…."); *Murphy v. Collier*, 139 S. Ct. 1475, 1480 (2019) (Alito, J., dissenting) ("An applicant for a stay of execution must satisfy all the traditional stay factors"). The applicant for a stay of execution "therefore must show that there is 'a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari,' that there is 'a fair prospect that a majority of the Court will vote to reverse the judgment below,' and, in a close case, that the equities favor the granting of relief." *Id.* (Alito, J., dissenting) (quoting *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam)). And this Court applies "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004); *see also Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of

the judicial process may be grounds for denial of a stay). Barton's application fails to satisfy these demanding standards.

A. This Court is unlikely to grant a writ of certiorari to review Barton's claims, and the Court would be very unlikely to reverse if it did so.

Barton cannot show either (1) that this Court is likely to grant his petition for certiorari, or (2) that there is any "fair prospect" that this Court would reverse the judgment below even if it did so. *Hollingsworth*, 558 U.S. at 190. Barton's petition presents fact-bound claims that seek error correction of an Eighth Circuit decision that is well-reasoned and correctly decided, and that reviewed, under highly deferential AEDPA standards, a Missouri Supreme Court decision that was also well-reasoned and correctly decided.

1. Barton's competence-to-be-executed claim is meritless and does not warrant this Court's review.

First, there is no merit to Barton's competence-to-be-executed claim, and the claim does not warrant this Court's review. The Missouri Supreme Court correctly rejected this claim, citing the controlling standards from this Court in *Madison* and *Panetti*. *See State ex rel. Barton v. Stange*, 2020 WL 1987819, at *3–4. The Missouri Supreme Court correctly observed that this Court held in *Madison* and *Panetti* that the standard for competence to be executed depends on whether the inmate has a "rational understanding" of the reasons for his punishment. *Id.* at *3 (quoting *Madison*, 139 S. Ct. at 723). The Missouri Supreme Court noted that

Barton's own expert had opined that Barton had "a simplistic, but *rational understanding* of the punishment he is about to receive and the reasons for it." *Id.* at *4 (emphasis added). On collateral review, the Eighth Circuit correctly held that the Missouri Supreme Court's decision did not involve any unreasonable application of this Court's precedents, since the state-court decision involved a straightforward application of that standard. 8th Cir. Slip Op., at 4–5. Barton's own expert had conceded that he was competent under the standard in *Madison*. *Id.* Accordingly, Barton seeks this Court's review of a fact-bound claim challenging an unquestionably correct state-court decision that was correctly rejected by the Eighth Circuit under the extremely deferential collateral-review standards of § 2254(d). Barton's competence-to-be-executed claim does not warrant this Court's review, and he would have no plausible prospect of success if it did.

In his petition for certiorari, Barton argues principally that he is incompetent to be executed under prevailing *medical* standards, not this Court's legal standards. *See* Pet. at 27 (arguing that "the mental health professional community" would deem Barton incompetent). But Barton provides no plausible argument that he is incompetent to be executed under the legal standard that this Court announced in *Madison* and *Panetti*. On the contrary, the portion of his expert's testimony that Barton quotes actually confirms that he has a rational understanding of the reasons for the punishment that the State seeks to impose. *See id.* at 27 (admitting that

Barton's expert conceded that Barton has a "rudimentary and non-delusional understanding of the punishment he is about to receive and the reasons for it"). This statement effectively concedes that Barton is competent to be executed under *Madison* and *Panetti*. *See Madison*, 139 S. Ct. at 726–27 (holding that "a person lacking memory of his crime may yet *rationally understand why the State seeks to execute him*; if so, the Eighth Amendment poses no bar to his execution") (emphasis added).

2. Barton's actual-innocence claim is meritless and does not warrant this Court's review.

Similarly, Barton's actual-innocence claim does not warrant this Court's review. First, as to the opinion of the blood-spatter expert, the Missouri Supreme Court correctly noted that "Barton's counsel considered hiring the very expert on whose testimony it now relies but decided that it would be more effective to just impeach the State's expert." *State ex rel. Barton*, 2020 WL 1987819, at *2 (citing *Barton v. State*, 432 S.W.3d 741, 755 (Mo. banc 2014)). The Missouri Supreme Court also observed that Barton's trial counsel made a strategic decision not to call the blood-spatter expert because his testimony could have contradicted Barton's own account of how the victim's blood got on his clothes: "[A]t the time [of trial] counsel believed the testimony might be inconsistent with Barton's explanation of how the blood got on his clothes." *Id.* (citing *Barton*, 432 S.W.3d at 756). And the Eighth Circuit correctly concluded that this evidence—which has been known since the

time of Barton's trial in 2006—was not "new reliable evidence" that could support an actual-innocence claim. 8th Cir. Slip Op., at 6–7.

Likewise, as to the impeachment evidence of prior convictions of the State's cooperating witness, the Missouri Supreme Court correctly rejected this claim. As the Missouri Supreme Court noted:

> [T]he evidence of the full extent of Ms. Allen's prior convictions was known to Barton's counsel before his fifth and final trial. When she again lied [on the stand] and said she had only six prior convictions, defense counsel chose to impeach her with 12 of her prior convictions for forgery, fraud, bad checks and similar crimes going to lack of truthfulness. He did not mention the other convictions or the charges that had been dismissed, nor was this issue raised in his post-conviction motion. The issue was raised but relief was denied in his federal habeas proceedings.

State ex rel. Barton, 2020 WL 1987819, at *2. The Missouri Supreme Court reasoned that the additional convictions, which were known to Barton's counsel at the time of trial, did not establish Barton's "innocence." Instead, they merely constituted impeachment material that was plainly cumulative of the extensive impeachment that trial counsel did conduct: "Taking Barton's claims about Ms. Allen's convictions as true, such evidence does not support a finding of actual innocence. While counsel might have discredited Ms. Allen even more at the trial, the impeachment he did undertake demonstrated for the jury that she had been convicted of multiple crimes involving untruthfulness." *Id.* at *2.

Likewise, the Eighth Circuit correctly rejected these claims on the ground that there was nothing "new" about them. 8th Cir. Slip Op., at 6-7. In addition, the

Eighth Circuit agreed with the Missouri Supreme Court's determination that the impeachment evidence on which Barton relies would have plainly been cumulative of the extensive impeachment on prior convictions that Barton's trial counsel did conduct. *Id.* at 7. Like the Missouri Supreme Court's opinion, the Eighth Circuit's resolution of these issues was correct.

Barton argues that there is a circuit split on whether the new evidence supporting actual innocence had to be unavailable at the time of trial, or merely not presented to the jury at the time of trial. Even if Barton were correct about this circuit split, it would make no difference here and this case would thus be a poor vehicle to review it, for at least two reasons. First, as the Missouri Supreme Court indicated, the evidence of "actual innocence" on which Barton relies does not satisfy the requirement that no reasonable juror would have convicted him in light of the new evidence. This is especially true because the additional circumstantial evidence against Barton was strong.

Second, more fundamentally, a *gateway* actual innocence claim must provide a gateway to a potentially meritorious claim. But the claim to which Barton seeks a gateway is the claim that the prosecutor in his 2006 trial committed misconduct by failing to correct the record when the cooperating witness, Allen, falsely testified that she had only six prior convictions. *Barton v. Stange*, 20-8001, District Court Order at 4. But Barton never raised that claim in his first federal habeas petition.

Thus, in order to raise it is in a second or successive petition as he now attempts to do, Barton must satisfy the standard for raising claims in second or successive petitions set forth in 28 U.S.C. § 2244(b)(2)(B)(i)-(ii). As relevant here, that statute requires that a second or successive habeas petition "shall be dismissed" unless "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(b)(i). Here, Barton cannot plausibly allege that "the factual predicate" for his prosecutorial-misconduct claim "could not have been discovered previously through the exercise of due diligence," *id.*, because his trial counsel knew of Allen's additional convictions at the time of trial. In other words, the factual predicate of the prosecutorial-misconduct claim—the claim to which Barton seeks a gateway—has been known and available to Barton since 2006, and he cannot raise that claim in a second or successive habeas petition. *Id.* Thus, the gateway Barton seeks to establish leads nowhere.

B. The balancing of harms and the public interest weigh heavily against a stay of execution because Barton's actual-innocence claims could have been raised many years ago.

"A stay of execution is an equitable remedy," and an inmate is not entitled to a stay of execution "as a matter of course." *Id.* at 583–84. This is because "both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Id*. at 584. There is a strong equitable presumption against granting

a stay of execution where a litigant could have raised the claim in time to have it adjudicated without a stay of execution. *Id.*

This Court criticized the offender in *Bucklew* for his eleventh hour stay-of-execution motions, noting that his surviving victims deserve better. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). This Court found that last-minute stays of execution should be the "extreme exception, not the norm," and the fact that a claim could have been raised earlier may itself be an adequate reason to deny a stay. *Id*.

Here, the principal factual predicates for Barton's actual-innocence claims and his underlying prosecutorial-misconduct claim—*i.e.*, the opinion of the blood-spatter expert, and the impeachment material regarding the State's cooperating witness—have all been known and available to Barton for at least 14 years, since the time of his trial in 2006. Barton has no valid justification for waiting to raise these claims until February 2020, after the Missouri Supreme Court had already set his execution date for May 19, 2020.

In sum, this case bears a striking resemblance to *Bucklew*. As in *Bucklew*, Barton's claims "in the end amount[] to little more than an attack on settled precedent, lacking enough evidence even to survive summary judgment—and on not just one but many essential legal elements set forth in our case law." *Bucklew*, 139 S. Ct. at 1134. Such last-minute claims do not warrant a stay of execution after many years of direct and collateral review testing the sufficiency of Barton's conviction

and sentence. *Id.* Both the State of Missouri and Missouri crime victims "deserve better." *Id.*

CONCLUSION

Missouri respectfully requests that this Court deny the application for stay of execution and deny the petition for writ of certiorari.

Respectfully submitted,

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