IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

WALTER BARTON,	)
	)
Petitioner,	)
	) No. 20-1985
v.	) Dist. Ct. No. 4:20-CV-8001-BCW
	) Execution Scheduled May 19, 2020
WILLIAM STANGE,	)
	)
Respondent.	)

MOTION TO VACATE STAY OF EXECUTION

I. Case Summary

Walter Barton sought a last-minute stay of his scheduled May 19, 2020 execution from the district court. His motion was based on a second federal habeas petition that contains two claims that fail as a matter of law, and therefore have no significant possibility of success on the merits. One claim was a claim of incompetence to be executed. The other claim alleges actual innocence, apparently as a gateway to two claims that were found to be insubstantial in the first petition, and to a third that was not presented in the first petition and is therefore defaulted.

As to the incompetence-to-be-executed claim, Barton's own expert opined that he is competent to be executed under the controlling standard

determined by the United States Supreme Court, but disputed whether courts should follow that standard. Therefore, the claim cannot succeed.

As to the gateway actual innocence claim, it presents nothing new, and it is alleged to be a gateway to two claims that have already been rejected in an earlier habeas petition as insubstantial, and to one defaulted claim. Actual innocence analysis here would be analysis of an alleged gateway to nowhere. Moreover, the additional evidence Barton presents does not come close to showing that no reasonable juror would convict, so no gateway is available to Barton.

There is nothing that supports a stay here. But, nevertheless, the district court granted a stay of execution–not because it found that Barton had met the standard for a stay as set out in the applicable case law–but instead only because it wanted more time to consider his claims. Missouri respectfully submits that the 28 years since Barton's horrific crimes have provided sufficient time for review of his conviction and sentence. This Court should vacate this stay and permit the execution to proceed as scheduled.

II. Statement of Exhibits

1. Respondent's Exhibit 1 is the Missouri Supreme Court decision

denying habeas relief on Barton's current claims in *State ex rel. Barton v. Stang*e, SC98343, District Court Doc. 7–1.

2. Respondent's Exhibit 2 is the evaluation by Dr. Zapf finding Barton competent to proceed, filed as Exhibit 14 by Barton in *State ex rel. Barton v. Stang*e, SC98343, District Court Doc. 7–2.

3. Respondent's Exhibit 3 contains prison mental health records of Mr. Barton, filed as Exhibit A by the Warden in *State ex rel. Barton v. Stang*e, SC98343, District Court Doc. 7–3.

4. Respondent's Exhibit 4 is the order of the United States District Court for the Western District of Missouri denying habeas relief in *Barton v. Steele*, 14-8001, District Court Doc. 7–4.

5. Respondent's Exhibit 5 is the judgment of this Court denying a certificate of appealability in *Barton v. Griffith*, 18-2241, District Court Doc. 7–5.

6. Respondent's Exhibit 6 is the opinion of the Missouri Supreme Court finding that post-conviction counsel did not abandon Barton in *Barton v. State*, SC95139, District Court Doc. 7-6

7. Respondent's Exhibit 7 is the opinion of the Missouri Supreme Court denying post-conviction relief in *Barton v. State*, SC93371

District Court Doc. 7–7.

8. Respondent's Exhibit 8 is the opinion of the Missouri Supreme Court affirming Barton's conviction in *State v. Barton*, SC87859. District Court Doc. 7–8

9. Respondent's Exhibit 9 is the habeas petition filed by Barton in the United States District Court for the Western District of Missouri in *Barton v. Stange*, 4:20-cv-08001-BCW,[1] District Court Doc. 1.

10. Respondent's Exhibit 10 is Respondent's response to the district court's show cause order in *Barton v. Stange*, 4:20-cv-08001-BCW, District Court Doc. 7.

11. Respondent's Exhibit 11 is Barton's traverse in *Barton v. Stange*, 4:20-cv-08001-BCW, District Court, Doc. 10.

12. Respondent's Exhibit 12 is Barton's stay motion in *Barton v. Stange*, 4:20-cv-08001-BCW,[2] Doc. 3.

13. Respondent's Exhibit 13 is the district court's order granting a stay of execution in *Barton v. Stange*, 4:20-cv-08001-BCW, District Court Doc 14.

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[1] Barton's caption reads "Case # 6:20-CV-3130."
[2] Barton's caption reads "Case # 6:20-CV-3130."

III. Barton is not entitled to a stay of execution.

The standard for a stay of execution is high, and Barton does not come close to meeting it. The district court granted a stay without properly analyzing the stay factors, so this Court should review the factors de novo and reverse. *Bowersox v. Williams*, 517 U.S. 345, 346 (1996).

The four factors considered in evaluating a claim for a preliminary injunction are: 1) the threat of irreparable harm to the movant; 2) the balance of this harm against the injury to the other litigant; 3) the probability the movant will succeed on the merits; and 4) the public interest. *See Dataphase Systems, Inc. v. CL Systems, Inc.,* 640 F.2d 109, 112 (8th Cir. 1981). The United States Supreme Court has held that a litigant seeking a stay of execution must meet *all* the requirements for an injunction, including showing a significant possibility of success on the merits. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). The Court cited *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam), for the proposition that a "preliminary injunction [is] not granted unless the movant, by a clear showing, carries the burden of persuasion." *Hill*, 547 U.S. at 584.

"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.*

The United States Supreme 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). The 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.*

Generally, this Court reviews stays of execution under an abuse-of-discretion standard. *Nooner v. Norris*, 491 F.3d 804, 807 (8th Cir. 2007). But in circumstances where a court did not properly analyze the stay motion, this Court reviews the stay de novo. *Bowersox v. Williams*, 517 U.S. at 346. In *Bowersox v. Williams*, the United States Supreme Court

considered a case in which a lower court issued a stay of execution without explicit analysis of the factors for granting a stay. *Id.* at 345–46. The Court found that when a court issuing a stay does not set out reasons justifying it, the Court must itself review the record to see if such reasons exist. *Id*. at 346. The Court found that it must review the magistrate's report rejecting the underlying claims, and the district court order adopting the report, to determine if there is a proper basis for stay. *Id.* After reviewing the record, the Court found no basis for a stay and vacated the lower court's order. *Id.* at 346–47.

Similarly, the district court order granted a stay here without analyzing all the stay factors, and so this Court must review the record below to determine if there is a basis for a stay of execution. There is not.

A. Barton's long delay before raising his claim of actual innocence weighs heavily against granting a stay.

As discussed below, the actual innocence and incompetence claims are clearly meritless, and have no significant possibility of success on the merits. *See infra*, Parts V, VI. The only real result of a stay on this record would be a delay for the consideration of claims that fail as a matter of law. That satisfies none of the *Dataphase* factors.

Notably, Barton's actual innocence claim rests on a factual basis that existed and was known to Barton and his attorneys before his criminal trial and before all the subsequent state and federal proceedings. There is no plausible reason to have waited to raise this claim until the State sought an execution warrant, many years after the trial. If Barton had raised the innocence claim at the first opportunity, instead of as part of a delay strategy that he initiated only after a warrant was requested, there would be no need to delay the execution for analysis of the claim. Staying Barton's execution based on a claim that Barton held long in reserve until shortly before his execution contradicts the equitable factors. "The people of Missouri, the surviving victims of [Barton's] crimes, and others like them deserve better." *Bucklew*, 139 S. Ct. at 1134.

The district court held that "no filing delay militates against a stay" because Barton filed his current federal habeas petition within a week of the Missouri Supreme Court's denial of the same claims. Ex. 13, District Court Doc. 14 at 7. But the district court overlooked that the factual predicate for Barton's actual-innocence claim was available long before he filed it in the Missouri Supreme Court in February 2020—that factual

predicate has been available for years, since before Barton's trial. Contrary to the district court's reasoning, Barton's extraordinary filing delay weighs heavily against granting a stay. *Bucklew*, 139 S. Ct. at 1133-34.

B. Barton is not entitled to a stay based on the coronavirus.

Barton also alleged below that he should not be executed because of the coronavirus. He seemed to make three main arguments: 1) his execution might violate social distancing protocols; 2) he could get more affidavits saying former jurors are impressed by his blood spatter expert if he could interact with people in person; and 3) the Governor might spend more time on his clemency application if he did not have responsibilities regarding the coronavirus. Resp. Ex. 12, Doc. 3 at 4–6. These reasons are improper bases for a stay.

Whether to halt the execution for public safety reasons is a matter for the executive branch of the State of Missouri. Barton should not be able to use the current situation as a weapon to defeat timely punishment for his crime. This is not a proper reason for a judicial stay under the *Hill* standard. It is the job of the State, not Barton, to decide whether to delay

the execution or modify procedures because of the coronavirus.

Barton's juror affidavits relate to his actual innocence claim. That claim has no significant possibility of success, no matter how many affidavits he gets. *See infra*, Part VI. So, a stay for that reason would be futile and contrary to law. Additionally, nothing about the coronavirus impairs Barton's ability to use electronic methods to conduct whatever legal work or investigation needs to be done.

Barton has no due process or other constitutional right to dictate how or for how long the Governor will review his application for clemency. *See Roll v. Carnahan*, 225 F.3d 1016 (8th Cir. 2000) (dismissing complaint about governor considering clemency applications in an election year for failing to state a claim on which relief can be granted); *Winfield v. Steele*, 755 F.3d 629 (8th Cir. 2014) (en banc) (vacating stay of execution based on clemency procedures as claim had no significant possibility of success). As discussed below, nothing in the habeas corpus litigation itself justifies a stay.

IV. The state court decisions denying Barton relief on the claims he now raises before this Court are entitled to great deference.

State court decisions on federal issues are entitled to great

deference under 28 U.S.C. § 2254(d). A state court decision must be left undisturbed unless the decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or the decision was based on an unreasonable determination of the facts in light of the evidence presented in state court. *Colvin v. Taylor*, 324 F.3d 583, 586–87 (8th Cir. 2003).

A decision is contrary to United States Supreme Court precedent if it decides a case based on a different rule of law than the rule dictated by United States Supreme Court precedent, or if it decides a case differently than the United States Supreme Court did on materially indistinguishable facts. *Id.* A decision may only be overturned as an unreasonable interpretation or application of clearly established United States Supreme Court precedent if the decision is both wrong and an objectively unreasonable interpretation or application of United States Supreme Court precedent. *Id.* A federal habeas court may not disturb an objectively reasonable state court decision on a question of federal law, even if the decision is, in the federal court's view, wrong under Eighth Circuit precedent, and even if the habeas court would have decided the

case differently on a clean slate. *Id*.

Further, failure to extend a United States Supreme Court precedent is not an objectively unreasonable interpretation or application of that precedent. "Section 2254(d)(1) provides a remedy for instances in which a State court unreasonably *applies* [the United States Supreme Court's] precedent; it does not require state courts to *extend* that precedent or license federal courts to treat failure to do so as error." *White v. Woodall*, 572 U.S. 415, 426 (2014) (emphasis in original). State court factual determinations are presumed to be correct and this presumption can only be rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Merits analysis turns on whether the *decision* of the state court is consistent with an objectively reasonable application of United States Supreme Court precedent. Under this standard, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of that decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "If this standard is difficult to meet, that is because it was meant to be." *Id*. "It preserves authority to issue the writ in cases where there is no possibility that

fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents. It goes no further." *Id*.

When a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel, the federal courts use a "doubly deferential" standard of review that gives both the state court and the defense attorney the benefit of the doubt. *Burt v. Titlow*, 571 U.S. 12, 15 (2013).

"The AEDPA standard is difficult to meet as it is intended as a guard against extreme malfunctions in state criminal justice systems, not as a substitute for ordinary error correction through appeal." *Nash v. Russell*, 807 F.3d 892, 897 (8th Cir. 2015) (internal quotation marks omitted). "Accordingly, we assume that any facts found by the state court were correct, and the petitioner bears the burden to show us by clear and convincing evidence that such factual conclusions below were incorrect." *Id*.

V. Barton's competence-to-be-executed claim is clearly meritless.

In finding Barton competent to be executed, the Missouri Supreme

Court quoted *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019), for the proposition that the Eighth Amendment prohibits the execution of a person who does not have a rational understanding of why the State seeks to impose capital punishment. Resp. Ex. 1, Doc. 7–1 at 6. The Missouri Supreme Court also cited *Madison* at page 723 for the proposition that the prisoner must prove a psychotic disorder that makes him unaware of the reasons for his punishment or causes him not to have a rational understanding of it. The Missouri Supreme Court also relied on *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (Powell, J., concurring). It found that *Panetti* and the concurrence in *Ford* require Barton to demonstrate a substantial threshold showing of insanity for the matter to proceed further. Resp. Ex. 1, Doc. 7–1 at 6.

The Missouri Supreme Court found that Barton's expert, Dr. Zapf, opined that Barton *is* competent under Justice Powell's concurrence in *Ford*. Resp. Ex. 1, Doc. 7–1 at 7. The Missouri Supreme Court quoted from sections of Dr. Zapf's report in which she found that Barton had a factual and rational understanding of his punishment, as well of the reasons for it, and found that he did not suffer from delusional thinking,

loss of contact with reality, or perceptual disturbances. Resp. Ex. 1, Doc. 7–1 at 8. The Missouri Supreme Court also cited to Barton's prison mental health records, which indicated no clinically significant symptoms of mental illness.

Dr. Zapf concluded that Barton was competent to be executed under *Ford* and *Panetti*. Resp. Ex. 1, Doc. 7–1 at 7; Resp. Ex. 2, Doc. 7–2 at 15. While Barton relies on Dr. Zapf's conclusion that he would be incompetent to proceed under the standard used in *Dusky v. United States,* 362 U.S. 402 (1960), that standard does not control here. *Panetti,* 551 U.S. at 949. Based on Dr. Zapf's affidavit, this Court cannot find Barton incompetent to be executed without overruling or extending United States Supreme Court precedent and applying a different standard to evaluate his competency. The Missouri Supreme Court declined to depart from clear federal precedent, and this Court should defer to that decision. 28 U.S.C. § 2254(d); *White v. Woodall*, 572 U.S. at 426.

Both this Court and the United States Supreme Court have upheld state-court decisions applying *Ford* and *Panetti*. In *Dunn v. Madison*, 138 S. Ct. 9, 12 (2017), the Supreme Court reversed the Eleventh Circuit and

found that a state court reasonably applied *Ford* and *Panetti* in finding an offender competent to be executed where the offender recognized he would be put to death for the murder he was found to have committed, even if he had no memory of committing the murder. This Court vacated a district court's stay of execution in *Cole v. Roper*, 783 F.3d 707, 709–12 (8th Cir. 2015), where the Missouri Supreme Court reasonably found that the offender rationally understood his death sentence and the reason for it.

Dunn and *Cole* control here. The record here, including the report of Barton's own expert, supports the reasonable factual conclusion that Barton has a factual and rational understanding that he is to be executed for the murder that he was convicted of committing. United States Supreme Court precedent dictates no more, and habeas corpus cannot be used to extend United States Supreme Court precedent. The decision of the Missouri Supreme Court is reasonable and must be left undisturbed.

VI. Barton's actual innocence claim is clearly meritless.

Claims of freestanding actual innocence are not cognizable in federal habeas, and Barton does not come close to meeting the gateway actual innocence standard for review of defaulted claims. The district

court has already rejected as insubstantial two claims to which Barton seeks a gateway to review, and the third claim never appeared in Barton's earlier petition, barring it from review.

In *Clay v. Dormire*, 37 S.W.3d 214, 217–18 (Mo. 2000), the Missouri Supreme Court adopted federal actual innocence analysis for reviewing defaulted claims in habeas corpus. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215 (Mo. 2001) (stating "[t]his Court in *Clay v. Dormire* adopted the federal standard for manifest injustice…"). The standard for actual innocence review of a defaulted claim is set out in *Schlup v. Delo*, 513 U.S. 298, 327 (1994). "[T]he petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327.

The United States Supreme Court noted in *Schlup* that the standard allows the court to consider the probative force of evidence admitted at trial that is now alleged to have been illegally admitted, as well as evidence "tenably" claimed to have been wrongfully excluded or to have become available only after trial. *Id.* at 326. The Court found that such evidence must be "new reliable evidence." *Id.* at 324. A court is not to use its independent judgment about whether reasonable doubt exists

in considering an actual-innocence claim, because the standard is instead whether "no reasonable juror would have found the defendant guilty." *Id.* at 329. This standard requires a "court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.*

Actual innocence analysis involves analysis of all the evidence, including that alleged to have been illegally admitted, that alleged to have been wrongly excluded, and that which has been newly discovered. *Schlup,* 513 U.S. at 327–28. Actual innocence analysis focuses on new, reliable, evidence of factual, not legal, innocence—such as credible declarations of guilt by another, trustworthy eyewitness accounts, and exculpatory scientific evidence. *Pitts v. Norris*, 85 F.3d 348, 350–51 (8th Cir. 1996). New evidence in this context means evidence that could not previously have been discovered through due diligence. *Meadows v. Delo*, 99 F.3d 280, 282 (8th Cir. 1996).

Conflicting testimony that would create a "swearing match" between witnesses does not establish innocence under the no-reasonable-juror-would-vote-to-convict standard. *Moore-El v. Luebbers*, 446 F.3d 890, 902–03 (8th Cir. 2006); *In re McKim v. Cassady*, 457 S.W.3d 831,

843–52 (Mo. App. W.D. 2015) (presentation of new expert evidence that conflicts with the testimony of the state's expert at trial does not meet the gateway innocence standard, much less the higher freestanding innocence standard). One must actually present new evidence of actual innocence in order to make a viable claim of actual innocence, and allowing well-drafted allegations to take the place of the actual presentation of evidence establishing innocence would "make a mockery of the Supreme Court's concern for finality, comity, and judicial economy..." *Weeks v. Bowersox*, 119 F.3d 1342, 1352 (8th Cir. 1997) (en banc).

In *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. 2003), the Missouri Supreme Court held that, unlike in the federal habeas review system, an inmate may use habeas corpus to raise a freestanding claim of actual innocence, seeking discharge from confinement in a *Missouri state* habeas capital case. But he must meet a higher standard than the *Schlup/Clay* standard under Missouri law to receive relief on a freestanding innocence claim, by undermining confidence in the verdict through clear and convincing new evidence. *Id.* Clear and convincing evidence "instantly tilts the scales in the affirmative when weighed

against the evidence in opposition, and the fact finder is left with an abiding conviction that the evidence is true." *Id*. Freestanding and gateway innocence claims depend on the same "new evidence" of actual innocence, and "it is axiomatic" that if the evidence fails to meet the lower gateway innocence standard, then it does not meet the higher freestanding innocence standard. *McKim*, 457 S.W.3d at 843.

Freestanding claims of actual innocence are *not* cognizable in federal habeas corpus review. "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Burton v. Dormire*, 295 F.3d. 839, 848 (8th Cir. 2002) (quoting *Meadows v. Delo*, 99 F.3d 280, 283 (8th Cir. 1996) (quoting *Herrera v. Collins*, 506 U.S. 390, 400 (1993)).

In addition, review of gateway innocence claims is inappropriate where the claims to which the gateway is alleged to lead have been determined to be without merit, so actual innocence review would not aid the petitioner in gaining a writ. *Burton*, 295 F.3d at 848 (declining to conduct gateway-actual innocence review where the underlying legal claims lacked merit, and actual innocence review was legally

unnecessary).

Barton's claim of freestanding actual innocence is not cognizable here, the claims for which Barton seeks gateway innocence review are meritless, and Barton presents no new evidence to support them either. The Missouri Supreme Court rejected Barton's claims of gateway and freestanding innocence in his state court habeas petition. Resp. Ex. 1, Doc. 7–1 at 3–6. As a threshold matter, the Missouri Supreme Court pointed out actual innocence analysis involves new evidence that was not available at trial. *Id*. at 3 n.4; *See Meadows*, 99 F.3d at 282. There is nothing new here. As the Missouri Supreme Court pointed out, Barton's innocence claim relies on a blood spatter expert of whom counsel was aware before trial but who counsel made a strategic decision not to retain and call. Resp. Ex. 1, Doc. 7–1 at 3. It also relies on additional impeachment of a jailhouse informant who understated her prior convictions at trial even though there is no dispute that counsel knew her full criminal history at the time of trial, and impeached her with a dozen of her convictions. Resp. Ex. 1, Doc. 7–1 at 4 ("the full extent of Ms. Allen's convictions was known to counsel before his fifth and final trial").

Barton appeared to raise two claims of ineffective assistance of trial

counsel that he alleged could be reached through gateway actual innocence analysis. These are: 1) that trial counsel failed to properly confront the jailhouse informant with all her prior convictions and the deal for her testimony (Resp. Ex. 9 Doc. 1 at 25); and 2) a claim that trial counsel was ineffective for failure to develop and present testimony from blood spatter expert Mr. Renner (Resp. Ex. 9 Doc. 1 at 21), which Barton alleges is the same claim he presented in his first federal habeas petition. But the district court already considered those claims in the first habeas petition and found them insubstantial.

The district court that rejected Barton's original federal habeas petition analyzed the ineffectiveness claim regarding the informant at length. Resp. Ex. 4, Doc. 7–4 at 18–22. The district court rejected the claim as being insubstantial, cutting off cause and prejudice review. *Id*; *Martinez v. Ryan,* 566 U.S. 1, 14 (2012) (to overcome procedural default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-counsel claim is substantial). Barton argued that the ineffectiveness claim regarding blood spatter that he presented in his first and second petitions to the district court is different from the claim he presented to the Missouri Supreme Court on direct appeal. But the

district court already rejected that argument, stating "the Court finds that Barton is advancing his previous argument, and the Court can only reverse the Missouri Supreme Court's decision if it resulted from an unreasonable application of constitutional law or involved an unreasonable finding of fact." *Id.* at 24. In an alternate holding, the district court found that if the claim was not preserved, it was not substantial, and that reasonable jurists could not disagree on the point. *Id.* at 25.

Insofar as the ineffectiveness claim regarding blood spatter has already been rejected on the merits, 28 U.S.C. § 2444(b)(1) prevents this Court reviewing it again. Similarly, claims that the district court found to be insubstantial under a cause and prejudice analysis are still insubstantial under a gateway innocence analysis. They still cannot entitle him to a writ.

Barton also alleged he meant to open a gateway to a claim that was defaulted in state court, but not presented in an earlier federal petition. Specifically, Barton raises a claim that the prosecutor failed to correct inaccurate testimony about the number of the jailhouse informant's prior convictions. Resp. Ex. 11, Doc. 10 at 24. But Barton did not raise that

claim in his earlier habeas petition. Resp. Ex. 4, Doc. 7–4 at 7–8 (listing claims raised). He cannot raise it for the first time here. *See Gonzalez v. Crosby*, 545 U.S. 524, 530–33 (2005) (distinguishing between the presentation of a claim which would be barred by 28 U.S.C. § 2244(b), and an allegation of a defect in the integrity of a prior habeas proceeding).

In theory, if Barton could show a sufficient extraordinary circumstance, which he cannot, he could reopen his petition through a Rule 60(b) motion for analysis of the propriety of the district court's finding that claims were defaulted. But he cannot simply raise a new claim that he did not raise in the earlier petition, which is what he seeks to do here. 28 U.S.C. § 2244(3)(A). And the district court found the ineffectiveness claims insubstantial in rejecting the first petition. Barton's assertion of gateway innocence alleges a gateway to nothing on which a habeas court may grant a writ.

Finally, the Missouri Supreme Court correctly and reasonably found that Barton has failed to show that no reasonable juror would now vote to convict. Resp. Ex. 1, Doc. 7–1 at 3–6. The Missouri Supreme Court found that, even taking the additional evidence as true, one could not find by a preponderance of the evidence that no reasonable juror would

convict, let alone the higher standard required to show freestanding innocence. *Id*. at 3–6.

In rejecting an argument about the alleged weakness of the State's case in a challenge to the proportionality of the sentence, the court noted that, "[t]o the contrary, the circumstantial evidence was strong." Resp. Ex. 8, Doc. 7–8 at 27–8. The court summarized the strength of the evidence supporting the proportionality of the death sentence, including: the victim's blood on Barton's clothing, blood spatter evidence, the fact that Barton lied to the police about when he was in the victim's trailer, Barton's mood change, Barton's spending excessive time in the neighbor Horton's bathroom, Barton's trying to prevent Horton from going to the victim's trailer, Barton's trying to prevent Selvidge from going to the victim's bedroom, Barton's disposal of a check from the victim in a ditch, and Barton's threat to the jailhouse informant. *Id*. See also Resp. Ex. 1, Doc. 7–1 at 5–6 (the Missouri Supreme Court's finding that there was substantial evidence supporting guilt).

Even if the offered evidence were new, which it is not, and even if Barton had a meritorious defaulted claim, which he does not, he would not prove that no reasonable juror would vote to convict in light of his

additional evidence.

Conclusion

This Court should vacate the motion for stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed by using the CM/ECF system and thereby served to counsel for Petitioner this 15th day of May, 2020.

/s/ Michael J. Spillane
Michael J. Spillane
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