No. 4:20-CV-018001-BCW
CAPITAL CASE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

WALTER BARTON,

Petitioner,
v.

WILLIAM STANGE, WARDEN,

Respondent.

ON MOTION FOR STAY OF EXECUTION TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

SUGGESTIONS IN OPPOSITION TO STAY MOTION

Respectfully submitted,
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v.	)	Case No. 4:20-CV-BCW-8001
	)	Execution Scheduled
	)	May 19, 2019
WILLIAM STANGE,	)	
	)	
Respondent.	)	

SUGGESTIONS IN OPPOSITION TO MOTION FOR STAY OF EXECUTION

I. Case Summary

Walter Barton seeks a stay of his scheduled May 19, 2019 execution. His motion is based on a habeas petition that contains two claims that fail as a matter of law, and therefore have no significant possibility of success on the merits. Barton's own expert opines that he is competent to be executed under the controlling standard, but disputes whether courts should follow that standard. The innocence claim presents nothing new, it is alleged to be a gateway to claims that have already been rejected by this Court as insubstantial, and it does not come close to showing no reasonable juror would convict. There is nothing that supports a stay here.

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.
2. Respondent's Exhibit 2 is the competency evaluation by Dr. Zapf as Exhibit 14 in in *State ex rel. Barton v. Stang*e SC98343.

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

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.

5. Respondent's Exhibit 5 is the judgment of the United States Court of Appeals for the Eighth Circuit denying a certificate of appealability in *Barton v. Griffith*, 18-2241.

6. Respondent's Exhibit 6 is the opinion of the Missouri Supreme Court in the post-conviction appeal in *Barton v. State*, SC95139.

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

8. Respondents Exhibit 8 is the opinion of the Missouri Supreme Court in the direct appeal in *State v. Barton*, SC87859.

III. Federal habeas courts give great deference to state decisions.

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* this Court's [the United States Supreme Court's] precedent; it does not require courts to **extend** that precedent or license federal courts to treat failure to do so as error." *White v. Woodall*, 134 S.Ct. 1697, 1706 (2014) (emphasis and bold 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 Missouri courts 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 habeas relief so long as fair minded jurists could disagree." *Harrington v. Richter*, 131 S.Ct. 770, 786 (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 fair-minded jurists could disagree that the state court decision conflicts with this Court's [the United States Supreme Court's] precedents. It goes no farther." *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 corrections 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*.

IV. The 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 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 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. 949 (2007) and *Ford v. Wainright*, 477 U.S. 399, 426 (1986) (Powell, J., concurring). The Missouri Supreme Court 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 at 6.

The Missouri Supreme Court found that Barton's expert, Dr. Zapf, found that Barton *is* competent under Justice Powell's concurrence in *Ford*. Resp. Ex. 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 at 8. The Missouri Supreme Court also noted Barton's prison mental health records, which indicated no clinically significant symptoms of mental illness

The United States Supreme Court in *Dunn v. Madison*, 138 S. Ct. 9, 12 (2019) reversed a circuit court of appeals 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. The United States Court of Appeals for the Eighth Circuit vacated a district court 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. *Madison* & *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. So, as a matter of law the decision of the Missouri Supreme Court is reasonable and must be left undisturbed.

V. There is no free-standing innocence in federal habeas, Barton does not come close to meeting the gateway innocence standard for review of defaulted claims, and this Court already rejected the claims to which Barton seeks a gateway to review as insubstantial in his previous federal habeas petition.

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 Court noted that the standard allows the court to consider the probative force of evidence admitted at trial that is now alleged to have be 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 that "no reasonable juror would have found the defendant guilty." *Id*. at 329. Rather, the standard requires a "court to make a probabilistic determination about what a reasonable properly instructed juror 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 327-328. 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 the factual basis of which 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, 843–852 (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 free-standing 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 free–standing 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 free-standing innocence claim, by undermining confidence in the verdict through new clear and convincing 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*. Free-standing 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 it does not meet the higher free-standing innocence standard. *McKim*, 457 S.W.3d at 843.

But free-standing 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 *Herrara v. Collins*, 506 U.S. 390, 400 (1993).

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. *Burto*n, 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).

The Missouri Supreme Court rejected Barton's claims of gateway and free-standing innocence in his state court habeas petition. Resp. Ex. 1 at 3–6. As a threshold matter the Missouri Supreme Court pointed out actual innocence involves analysis of 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, the innocence claim relies on a blood spatter expert that counsel was aware of before trial but made a strategic decision not to retain and call. Resp. Ex. 1 at 3. It also relies on additional impeachment of a jail-house 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 to which she did not admit on direct examination. Resp. Ex. 1 at 4 ("the full extent of Ms. Allen's convictions was known to counsel before his fifth and final trial").

There is no such thing as a free-standing innocence claim in federal habeas corpus review. And gateway innocence analysis is only meaningful if there is some meritorious defaulted claim for which a successful innocence claim would permit review. Barton appears to allege two claims of ineffective assistance of trial counsel that he alleges could be reached through gateway actual

innocence analysis. These are a claim that trial counsel was ineffective for failure to develop and present testimony from his current blood spatter expert Mr. Renner (Habeas Petition at 21), which Barton alleges is the same claim he presented in his last federal habeas petition, and that trial counsel failed to properly confront the jail-house informant with all her prior convictions and the deal for her testimony (Habeas Petition at 25). But this Court already considered those claims.

This Court analyzed the ineffectiveness claim for not better impeaching the informant at length. Resp. Ex. 4 at 18–22. This Court rejected the claim as not being substantial, cutting off cause and prejudice review. *Id*. Barton argues here that the blood spatter ineffectiveness claim that he presents here and that he presented in the earlier petition to this Court is different than the claim he presented to the Missouri Supreme Court. But his 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 this 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 blood spatter ineffectiveness claim has already been rejected on the merits 28 U.S.C. 2444(b)(1) prevents this Court reviewing it again. Similarly, claims that this Court found to be insubstantial in rejecting review of the claims under cause and prejudice analysis are still insubstantial if Barton seeks to reach them through gateway innocence analysis. They still cannot entitle him to a writ.

Finally, the Missouri Supreme Court correctly and reasonably found that Barton has failed to show that no reasonable juror would now wrote to convict. Resp. Ex. 1 3–6. The Missouri

Supreme Court found that even taking the additional evidence not presented 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 free-standing 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 at 7–8. 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, Barton lying to the police about when he was in the victim's trailer, Barton's mood change, Barton spending excessive time in the neighbor Horton's bathroom, Barton trying to prevent Horton from going to the victim's trailer, Barton trying to prevent Selvidge from going to the victim's bedroom, the disposal of a check from the victim in a ditch, and the threat to the jailhouse informant, Allen. *Id*.

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 meet the standard that of proving that no reasonable juror would vote to convict in light of his additional evidence.

VI. The standard for a stay of execution is high, and Barton does not come close to meeting it.

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. 1980). 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 *Mazurka 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 crime victims 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.*

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

Additionally, 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 the claim until the State sought an execution warrant. Barton criticizes the Missouri Supreme Court for taking two and one half months to issue an opinion deciding his habeas case. But if he had raised the innocence claim

at the first opportunity, instead of as part of a strategy that was only executed after a warrant was requested, that two and one half months would not be an issue. And it is really not an issue anyway as both Barton's claims fail as a matter of law.

Barton also alleges that he should not be executed because of the coronavirus. He seems to make three main arguments. His execution should not occur because it might violate social distancing. He could get more affidavits saying former jurors are impressed by his blood spatter expert if not for the coronavirus. And the governor is probably busy and might spend more time on his clemency application but for the coronavirus.

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 affidavits relate to his actual innocence claim. That claim has no significant possibility of success, no matter how many affidavits he gets. So, a stay for that reason would be pointless and contrary to law.

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. 2001) (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).

Conclusion

This Court should deny the motion for stay of execution.

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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 6th day of May, 2020.

/s/ Michael J. Spillane
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