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

WALTER BARTON, Petitioner,	)	
v.	)	Case No. 20-8001-CV-W-BCW
WILLIAM STANGE Respondent	)	

PETITIONER'S REPLY TO RESPONDENT'S SUGGESTIONS IN OPPOSITION TO MOTION FOR STAY

Comes now Walter Barton, by attorney, and does offer reply to Respondent's suggestions in opposition to Mr. Barton's Motion for Stay of Execution (Doc. 3; Doc. 9).

A. Summary of the Grounds for Grant of Stay of Execution

On May 4, 2020, Mr. Barton brought his Petition for habeas corpus relief pursuant to 28 U.S.C. 2254 (Doc. 1). In his Petition, Mr. Barton established that he was not bringing a second or successive petition, but rather an original matter upon grounds just decided in state court a week before, on April 27, 2020 (Doc. 1, p. 5-7). On May 4 as well, Mr. Barton requested that this Court grant a stay of execution in the underlying state criminal case pursuant to the power granted to the Court in 28 U.S.C. 2251(a)(1) (Doc. 3). In the Motion for Stay (Doc. 3, p. 2-5), Mr. Barton explained that

- on February 4, 2020, a state habeas corpus petition was brought on behalf of

Mr. Barton, and the matter was speedily and fully briefed by the parties by February 10, 2020, and this all happened prior to the setting of an execution date,

- on February 18, 2020, the Missouri Supreme Court set a May 19, 2020 execution date for Mr. Barton, but required until April 27, 2020 to consider and rule upon the habeas petition,
- once state remedies were so exhausted, it took undersigned counsel only one week to prepare and file the Petition in this case raising those newly exhausted issues, but that left only two weeks and one day until the scheduled execution date, and more time than that will be necessary for this Court to lawfully and fully consider and rule upon Mr. Barton's properly filed Petition,
- additional time for this case is also required because Mr. Barton's investigation in support of his Petition is ongoing, and has a strong probability of developing additional, critical evidence in support of his Petition, but is being stymied due to the COVID-19 pandemic and concomitant rules restricting travel and interaction,
- separate and apart from the needs in this case, the equities and interests of justice require issuance of a stay because of COVID-19-related problems with the Executive Clemency process and with the process of the execution.

B. Applicable Principles of Law

Mr. Barton reminds once again what he noted in his Petition at page 7, that this is not a second or successive request for Federal habeas relief, but rather an original petition addressing issues newly considered and decided by the Missouri Supreme Court. ***Stewart v. Martinez-Villareal***, 523 U.S. 637, 641-646 (1998); ***Morgan v. Javois***, 744 F.3d 535, 537-538 (8th Cir. 2013). Respondent apparently agrees since he did not contest this point in his answer to the order to show cause (Doc. 9).

As a consequence, Mr. Barton is entitled to the full and fair consideration upon all of the issues he has raised in the Petition in the fashion as one who has brought his first Federal habeas case. ***Lonchar v. Thomas***, 517 U.S. 314, 320 (1995). These rights include the grant of a stay for a pending execution if the time between the filing of the petition and the execution date is not sufficient for a full and fair disposition on the merits of the matters set forth in the petition. ***Lonchar v. Thomas***, supra; 28 U.S.C. 2251(a)(1). Particularly, unless examination of the petitioner's petition, appendices and suggestions warrant the District Court to make a merits determination that no claim is raised upon which relief can be granted, the case must proceed, and a stay must issue. ***Lonchar v. Thomas***, supra; Rule 4 of the Rules Governing 2254 Proceedings. Respondent does not mention the first two of these points, but agrees with the third, though stating the rule in its inverse, i.e.

that Mr. Barton cannot have a stay if the Court makes findings against Barton under Rule 4 (Doc. 9, p. 10-11)[1]. Respondent also claims other rules and cases, addressing stays considered in 1983 actions, should apply here. Respondent is wrong about that, and those contentions by Respondent will be addressed later.

Respondent is using his response to the request for stay as a second vehicle to argue about the merits of the Petition. In these regards, Respondent's representations about applicable law are essentially the same ones made in his answer to the Order to show cause, and so Mr. Barton would refer to that discussion by Respondent as well as the discussion of the matter contained in Mr. Barton's Petition and Traverse (Doc. 1, p. 10, 16; Doc. 7, p. 2-3; Doc. 9, p. 2-3; Doc. 10, p. 1-2).

Respondent also refers to a "doubly deferential" standard of review which is to be applied to allegations of ineffectiveness of counsel (Doc. 9, p. 4). Since no allegations of ineffectiveness of counsel have been made, Respondent's observations in this regard are surplusage.

C. Respondent has simply repeated here, verbatim, the same fallacious contentions made in his response to the order to show cause

Respondent made his response to the Court's Order to show cause, and

[1] There is a glitch in the pagination for Respondent's pleading, with ECF counting by number prefatory pages for which Respondent used a lettering system. When a page number in that pleading is referred to in this Reply, the number used is the number assigned by Respondent, and not the number assigned by ECF.

therein made his arguments, such as they were, against the two Counts of Mr. Barton's Petition (Doc. 7, p. 5-10). Respondent has, word for word, lifted those items from that pleading to drop them into this context (Doc. 9, p. 1, 4-10).

On behalf of Mr. Barton, undersigned counsel was sorely tempted to go tit for tat, and set forth all of the arguments from the Traverse which demonstrate the sheer folly of Respondent's posturings of fact and law (Doc. 10, p. 2-33). Undersigned counsel, instead, has let his better angels prevail, will not give this Court all of that extra, repetitive reading, and instead asks that this Court address all of the repetitive arguments Respondent makes here in their proper context, that is in consideration of the Petition, Answer and Traverse. Undersigned will, instead, concentrate on the few, somewhat new points Respondent has made in his suggestions in opposition to stay.

D. In this context as well, Respondent asks this Court to do the impossible, to liken Mr. Barton's case to that confronted in *Cole v. Roper*

Actually, the first of the new points made by Respondent is just an extension of something raised in his answer to the order to show cause; that is his burning desire to liken Mr. Barton's case to ***Cole v. Roper***, 783 F.3d 707 (8th Cir. 2015) (Doc. 7, p. 5). In this context, Respondent particularly notes that, in ***Cole***, the Eighth Circuit vacated a District Court order for stay based upon the record made for that case in the Missouri Supreme Court; Respondent goes on that the result in ***Cole*** should "control here" (Doc. 9, p. 5). Mr. Barton begins his reply by

repeating what he has said before, that it would be difficult for Respondent to find a case more clearly distinguishable than ***Cole***.

To remind, Mr. Cole faced execution, and presented an expert finding by William Logan, M.D. that Cole, due to mental-illness-generated psychosis and hallucinations, was not competent for execution. ***Cole v. Roper***, 709. The opinions of Dr. Logan were addressed directly by a prison psychologist, Dr. Allyn Whitehead; in a fifteen minute interview with Dr. Whitehead, Mr. Cole "denied any hallucinatory experiences"; in that fifteen minutes, Dr. Whitehead specifically looked for but did not find the overt symptom of the psychosis reported by Dr. Logan. ***Cole v. Roper***, supra. Also, there was other evidence in direct contravention of Dr. Logan's conclusions about execution incompetence, and those were recordings of phone conversations in which Mr. Cole expounded upon legal issues related to the execution procedures to be used against him as well as the execution protocols from other states. ***Cole v. Roper***, supra. On top of all of that, Dr. Logan was deemed not credible in light of the Court's prior, untoward experiences with questionable methods employed by Dr. Logan. ***Cole v. Roper***, 719, fn. 6. On these bases, it was found that Mr. Cole failed to meet his burden to make a threshold showing of execution incompetence. ***Cole v. Roper***, 713-714.

The ***Cole*** facts are distinguishable in literally every way. Whereas the expert supporting Cole's incompetence was deemed not credible, the expertise, methods

and diagnoses by Dr. Patricia Zapf, the professional who evaluated Mr. Barton, were never doubted by the Missouri Supreme Court. Whereas Mr. Cole was specifically and independently assessed and found free of the conditions which Dr. Logan purportedly found, no one has tried to claim that Mr. Barton has somehow been cured of his brain damage and the resultant Major Neurocognitive Disorder diagnosed by Dr. Zapf; all that has been contended is the irrelevant, that Mr. Barton's condition still leaves him able to be compliant with the conditions of his incarceration. And no one has claimed that Mr. Barton has ever carried on the sort of sophisticated discussion about execution dynamics like that overheard from Mr. Cole.

Put simply, what happened in ***Cole*** does not "control here".

E. Respondent finally mentions the Juror Affidavits

In his Traverse, Mr. Barton explained what powerful support has been offered by the affidavits from three Jurors about the "compelling" nature of the new evidence of actual innocence (Doc. 10, p. 31-32). Copious searching of Respondent's answer to the order to show cause yields not one word about the Juror affidavits.

In the opposition to the Motion for Stay, Respondent finally acknowledges the existence of the three Juror affidavits, and the slowing of the process to obtain more affidavits caused by the COVID-19 crisis (Doc. 9, p. 12). However, the only

retort Respondent makes harkens to his other arguments about the actual innocence claim, all refuted in the Traverse, coupled with the boast that the claim should lose "no matter how many affidavits he (Barton) gets" (Doc. 9, p. 12). What Respondent ignores is what this Court surely sees, that each Juror who labels the new evidence of actual innocence as "compelling" acts to undermine confidence in the very conviction and sentence for which they originally voted. ***Schlup v. Delo***, 513 U.S. 298, 317, 327 (1995).

F. It is impossible to satisfy one who now argues that Mr. Barton's claims have come too late, whereas argument was previously made that the claims came too early

In Respondent's suggestions, it is urged that a stay be denied because, supposedly, undersigned counsel could have and should have sometime earlier brought the claims in the Petition (Doc. 9, p. 11-12). This argument about the counts coming too late is the polar opposite of an argument made while the case was pending before the Missouri Supreme Court, that the counts were coming too soon. Either way, Respondent has never provided a hint of legal support for his proposal that Mr. Barton should be punished for bringing the action at any time other than when he did. That is because there is no authority whatsoever for such a contention. Besides all of that, the facts and the law demonstrate that the Counts were brought at precisely the right time, exactly when the law and the facts allowed.

As for the question of execution competence, the Missouri Supreme Court has repeatedly held that such claims become ripe only upon the completion of Rule 29.15 proceedings and Federal habeas review. ***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). Mr. Barton's Missouri Petition was filed, with permission of the Missouri Supreme Court, about two-and-a-half months after completion of those post-conviction proceedings, and right when Dr. Patricia Zapf completed her report of Mr. Barton's execution incompetence (Appendix B).

Respondent skips over the obvious propriety of the timing of the execution incompetence count; Respondent instead focuses on the matter of actual innocence, expressing the opinion "(t)here is no plausible reason to have waited to raise that claim" (Doc. 9, p. 11). This argument ignores the very Juror affidavits the existence of which, as noted above, Respondent has finally acknowledged. The first of those affidavits, establishing the "compelling" nature of the new evidence of actual innocence, was obtained at the time that the Petition was filed (Doc. 1, Appendix K).

Actually, under the circumstances, Respondent could flipflop to the previous argument that this claim has come too soon, since Mr. Barton is still struggling to get more Jurors apprised of the "compelling" new evidence and add their affidavits

to the burgeoning stack. What all of this shows is that the new evidence of actual innocence count clearly has come at the factually proper time.

G. Respondent relies on a host of inapt cases to claim the burden for stay is higher than it is

In the Traverse, there was noted Respondent's penchant for cherry-picking language deemed helpful from cases which have no connection, in fact or law, to this one (Doc. 10, p. 27). Respondent continues that habit here.

This time around, Respondent is arguing that a stay should be refused, and cites in supposed support language used in ***Bucklew v. Precythe***, 139 S.Ct. 112 (2019). In so doing, Respondent has actually managed to find a case even less apt than the previously discussed ***Cole v. Roper***.

Russell Bucklew, a Missouri death row inmate who fully conceded that he had been lawfully convicted for murder and sentenced to death, brought a 1983 civil rights action challenging that, because of his long standing, peculiar medical conditions, the lethal injection protocol of Missouri would cause him a death which would be cruel and unusual. ***Bucklew v. Precythe***, 1118. For Mr. Bucklew, this was the last step in a decades-long string of litigation in which he challenged Missouri's death penalty protocols in a host of different ways. ***Bucklew v. Precythe***, 1119-1120. Though Mr. Bucklew's condition was well-known to him and his legal team, he never raised the issue in the prior litigation, but waited until 12 days before his scheduled execution date to bring this last lawsuit. ***Bucklew v.***

Precythe, 1120. Despite all of this, Mr. Bucklew was granted a stay to properly plead and litigate his claim. ***Bucklew v. Precythe***, 1121-1122. After Mr. Bucklew was denied relief, he brought appeal on a variety of grounds, and was granted yet another stay to allow consideration of those appeals to be completed. ***Bucklew v. Precythe***, 1122. One issue which was not raised upon appeal was the propriety, or lack of same, for the stays of execution which were granted. Nevertheless, in a classic case of judicial venting of the pent up anger over the long and troubled history of lethal injection protocol challenges, the majority issued dicta railing against the delays afforded Mr. Bucklew over a case which, in the end, could not even survive a motion for summary judgment. ***Bucklew v. Precythe***, 1134.

There is absolutely no fact in the ***Bucklew*** case remotely similar to the facts in this case. However, Respondent likes the words of the dicta, vented in anger, and so they show for really no reason other than that.

Cited too are Respondent's notions that rules applicable to stays in other 1983 cases should somehow apply to a properly brought, original 2254 actions like this one (Doc. 9, p. 10-11). Respondent does not provide one wit of authority for such a notion, because it does not exist. At noted already above, the proper standards are those set forth in ***Lonchar v. Thomas*** and 28 U.S.C. 2251(a)(1).

H. Respondent's claim that this Court cannot grant a stay based upon issues related to the COVID-19 pandemic are wrong

Respondent does not deny the monumental burdens heaped upon Mr. Barton's defense by the COVID-19 crisis; rather Respondent attempts to convince this Court that it has no authority to grant a stay based upon such problems (Doc. 9, p. 12). Interestingly enough, Respondent takes his cavalier stance about Mr. Barton's problems just after arguing that equitable principles should guide the Court in deciding whether to grant a stay (Doc. 9, p. 11). Regardless of Respondent's inconsistency on the subject, there is no question but that this Court has the power to grant the request based upon the grounds raised by Mr. Barton.

28 U.S.C. 2251(a)(1) gives the Court before whom a habeas corpus proceeding is pending *carte blanc* authority to stay any state court proceeding involved in the habeas proceeding, period. The why for the stay is strictly up to the Court, with the only limitation being that the matter must be pending. ***Lonchar v. Thomas***, supra.

I. Conclusion

WHEREFORE, in light of the foregoing, and in light of the premises set forth in the original motion on the subject (Doc. 3), Mr. Barton prays that this Honorable Court direct a stay of Mr. Barton's execution.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was e-mailed to the following this 11th day of May, 2020

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