****THIS IS A CAPITAL CASE-EXECUTION SET FOR SEPTEMBER 24, 2024****

Case No. 24A_____
(CONNECTED CASE 24____)

IN THE
SUPREME COURT OF THE UNITED STATES

MARCELLUS WILLIAMS, Petitioner,

v.

DAVID VANDERGRIFF,
Warden, Potosi Correctional Center, Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 24-2907

Marcellus S. Williams,

Appellant,

v.

David Vandergriff,

Appellee.

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Filed: September 21, 2024

Before COLLOTON, Chief Judge, SHEPHERD and KELLY, Circuit Judges.

ORDER

Appellant Williams's application for a certificate of appealability has been considered by the court and is denied. Williams has not shown that jurists of reason could disagree with the district court's conclusion that his motion under Federal Rule of Civil Procedure 60(b) was an unauthorized successive habeas application or that the issues presented are adequate to deserve encouragement to proceed further.

A Rule 60(b) motion advances a "claim" that was presented in a prior habeas application, and thus constitutes a successive application, if it "present[s] new evidence in support of a claim already litigated" or "attacks the federal court's previous resolution of a claim on the merits." *Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005). In his Rule 60(b) motion, Williams presented new evidence in support of a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), that was already litigated in 2010, and he attacked the district court's previous resolution of that claim on the merits. Williams maintains that the district court's ruling in 2010 denying his *Batson* claim did not resolve the claim on the merits because the district court applied 28 U.S.C. § 2254(d) and the deference required by the statute. That argument is contrary to *Gonzalez*, where the Supreme Court explained that "resolution of a claim on the merits" refers to "a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." 545 U.S. at 532 & n.4; *see Ward v. Norris*, 577 F.3d 925, 933 (8th Cir. 2009).

The appeal is dismissed. *See United States v. Lambros*, 404 F.3d 1034, 1036-37 (8th Cir. 2005). The motion for stay of execution is denied. The State's motion to dismiss is dismissed as moot.

Any petition for rehearing must be filed by 12:00 noon on September 22, 2024. If a petition is filed, then a response is ordered and must be filed by 5:00 p.m. on September 22, 2024.

KELLY, Circuit Judge, concurring.

On the narrow issue before us, I agree that neither a certificate of appealability nor a stay is warranted. Williams' requests do not satisfy the stringent standards required for this type of relief, and I concur in the court's judgment. However, I write separately because the concerns surrounding this case are not limited to the issues

presented here. Rather, they are much broader in scope and call into question the fundamental fairness of Williams' proceedings.

Starting with the issue raised in the requests for a certificate of appealability and a stay, Williams' allegation—a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986)—raises the prospect that racial bias infected his trial from the start. Williams cites to August 2024 testimony from the original prosecuting attorney as evidence that race was a factor in striking at least one Black juror. This comes just a few months after the St. Louis County Prosecuting Attorney's Office filed a motion, pursuant to section 547.031 of the Missouri code,[1] to vacate judgment in Williams' case based in part on the assertion that there was "clear and convincing evidence" that the original prosecution team purposely and unconstitutionally excluded other potential Black jurors as well. As the Supreme Court has expressly stated, "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Buck v. Davis*, 580 U.S. 100, 124 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). And "[r]elying on race to impose a criminal sanction 'poisons public confidence' in the judicial process." *Id.* (quoting *Davis v. Ayala*, 576 U.S. 257, 285 (2015)). The fact that both St. Louis County and Williams have raised this issue in more than one proceeding tells us it is a matter that—but-for the procedural bar—warrants further and careful examination. *See Buck*, 580 U.S. at 124; *see also Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) ("We must continuously bear in mind that 'to perform its high function in the best way justice must satisfy the appearance of justice.'" (citations omitted) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

[1]Pursuant to this recently enacted statute, a prosecuting or circuit attorney "may file a motion to vacate or set aside the judgment at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted." Mo. Ann. Stat. § 547.031.1 (West 2024). The prosecuting attorney or circuit attorney has the "right to file and maintain an appeal of the denial" of such a motion, and "[t]he attorney general may file a motion to intervene." *Id.* § 547.031.4.

According to the parties, the evidence in this case also looks different today than it did at the time of trial. Williams was not arrested until a year after the murder, when the only two witnesses to place Williams at the scene of the crime came forward. St. Louis County has pointed to recently discovered evidence that undermines the reliability of these witnesses, as well as to additional DNA testing results on the physical evidence. It asserts that this new evidence "casts inexorable doubt" on Williams' convictions and sentence and has represented that it is in the process of investigating "an alternative perpetrator in this matter."

As to a motion for stay,[2] we look to, among other things, any delay in seeking the requested relief. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006) ("A court considering a stay must also apply '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.'" (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004))). The request here comes late. The Missouri Attorney General blames Williams for the delay; and Williams counters that the Attorney General "engaged in dilatory tactics," at least as it relates to his section 547.031 litigation. But both parties have been involved in a complicated array of state and federal motions, petitions, and appeals. In a procedurally complex case such as this one, it would be difficult to conclude that delay is a reason to deny a stay here.

Nor does the threat of harm necessarily support denying a stay. It is true that we must "be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. Here, however, the harm to the State's interest in less clear. As noted, in January 2024, St. Louis County filed a motion to vacate Williams' convictions and death sentence.

[2]The court denies Williams' motion for a stay because it denies his request for a certificate of appealability, but the considerations necessary to support a stay provide context for the proceedings in Williams' case.

When that motion was denied, St. Louis County and Marcellus Williams reached an agreement whereby Williams would enter an *Alford* plea to one count of first-degree murder and receive a sentence of life imprisonment without parole. According to the record, it is the victim's "family's desire that the death penalty not be carried out." The Attorney General then successfully challenged the parties' agreement. These circumstances do not portray a unified State interest. The threat of irreparable harm to Williams, in contrast, is "necessarily present." *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("The [] requirement [] that irreparable harm will result if a stay is not granted [] is necessarily present in capital cases."). The harshest punishment available in our criminal justice system is at stake here. *Gregg v. Georgia*, 428 U.S. 227, 230 (1976) (Brennan, J., dissenting) ("Death is [] an unusually severe punishment, unusual in its pain, in its finality, and in its enormity[.]"). And I am not convinced that proceeding forthwith properly accounts for the real threat of irreparable harm.

I agree that we are foreclosed from granting Williams the relief he seeks in this court. While I remain deeply troubled by many aspects of the proceedings that have taken place thus far, there is nothing about our ruling today that rules out other potential avenues of relief for Marcellus Williams.

I reluctantly concur.

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARCELLUS WILLIAMS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 4:05 CV 1474 RWS
	)	
DAVID VANDERGRIFF[1],	)	
	)	
Respondent.	)	

ORDER

Petitioner Marcellus Williams was convicted of first degree murder in Missouri state court and sentenced to death. After exhausting his state court remedies Williams filed a federal habeas petition in this Court. On March 26, 2010, I denied Williams' habeas petition on his underlying conviction but granted the petition on the penalty phase of the trial. The United States Court of Appeals for the Eighth Circuit reversed my decision regarding the penalty phase and Williams' habeas petition was denied in its entirety.

Williams' execution is set on September 24, 2024. On September 17, 2024, Williams filed a motion for relief from judgment under Fed.R.Civ.P. 60(b)(6). Williams' motion requests that I set aside the judgment in this matter and reopen

[1] Williams is now confined in the Missouri Department of Corrections' Potosi Correctional Center facility. The warden of that facility is David Vandergriff. As a result, David Vandergriff is hereby substituted as the Respondent in this matter.

this habeas case to address Williams' Batson[2] challenge raised in his habeas petition. The basis for Williams' 60(b)(6) motion is the recent testimony at a state court hearing by Keith Larner, the lead prosecutor at Williams' trial. Williams asserts that Larner's recent testimony undermines the Missouri Supreme Court's resolution of his Batson claim on direct appeal. I will deny Williams' motion because it is a successive habeas petition which I cannot entertain absent permission from the United States Court of Appeals for the Eighth Circuit. Moreover, the motion fails to establish grounds for relief under Rule 60(b)(6).

Successive habeas petition

On March 26, 2010, I issued a memorandum opinion that rejected Williams' Batson challenge directed at African American venirperson Henry Gooden. Prosecutor Larner had used a peremptory strike to exclude Gooden from the jury. The trial court denied Williams' Batson challenge. Williams raised the issue on direct appeal before the Missouri Supreme Court. The State of Missouri articulated three "facially permissible" explanations for the strike of venireperson Gooden: his demeaner and appearance and clothing "too closely" resembled Williams', his job as a postal worker, and his views on the death penalty. With respect to Gooden's demeaner and appearance, the Missouri Supreme Court noted that Larner "stated that the venireperson resembled Williams, had the same glasses,

[2] Batson v. Kentucky, 476 U.S. 79 (1986).

and had a similar demeanor." The Court concluded that "[t]hese reasons are not inherently race based." State of Missouri v. Williams, 97 S.W.3d 462, 472 (Mo. 2003).

In my memorandum opinion I stated that:

> The Missouri Supreme Court found that the prosecutor's explanations for the [] challenged peremptory strike[] [was] facially race-neutral and [was] not inherently discriminatory. Williams, 97 S.W.3d at 471- 472. This decision is supported by the record and Williams has failed to overcome the presumption that this determination was correct by clear and convincing evidence. I find that Williams has not established that the Missouri Supreme Court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, or resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

Williams v. Roper, No. 4:05CV1474 RWS, 2010 WL 11813203, at *13 (E.D. Mo. Mar. 26, 2010), rev'd and remanded on other grounds, 695 F.3d 825 (8th Cir. 2012).

Williams' motion seeks to relitigate my Batson decision. As noted above I found that the Missouri Supreme Court's decision was supported by the record. This was a merits decision of Williams' claim. A Rule 60(b) motion is deemed to be a successive habeas petition if it "attacks the federal court's previous resolution of a claim on the merits." Gonzalez v. Crosby, 545 U.S. 524, 525 (2005). Because Williams' motion seeks to revisit a claim that I have already denied on the merits, 28 U.S.C. § 2244(b)(3)(A) requires Williams to obtain an authorization from the United States Court of Appeals for the Eighth Circuit Court to proceed with his

motion as a successive habeas petition. Williams had failed to obtain this authorization and his motion will be denied on this ground.

Rule 60(b)(6) analysis

"Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence. Rule 60(b)(6), … permits reopening when the movant shows 'any ... reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rules 60(b)(1)-(5)." Gonzalez, 545 U.S. at 528–29. A motion under Rule 60(b) that seeks to present newly discovered evidence in support of a claim previously denied is a successive habeas petition. Id. at 531. "Relief under Rule 60(b)(6) is available only in 'extraordinary circumstances.'" Buck v. Davis, 137 S. Ct. 759, 766 (2017) (quoting Gonzalez, 545 U.S. at 535).

Williams' Rule 60(b) motion asks me to consider the testimony of prosecutor Larner obtained at a hearing in the Circuit Court of St. Louis, Missouri on August 28, 2024. Larner was examined about his decision to strike Gooden. When explaining that one reason for the strike was that Gooden looked very similar to Williams, Larner testified how Gooden and Williams had similar types of glasses and the same type of piercing eyes. He testified that that looked like they were "brothers." "Familial brothers." [ECF 121-1 at 212] Larner clarified, "I don't mean black people. I mean, like, you know, you got the same mother, you

got the same father. You know, you're brothers, you're both men, you're brothers." [Id.] When Larner was asked "[s]o you struck them because they were both young black men with glasses?" Larner responded, "Wrong. That's part of the reason. And not just the glasses. I said the same type glasses. And I said they had the same piercing eyes." [Id.]

Williams asserts that Larner's use of the term "brothers" indicates racial animus because he was using the term to indicate unrelated black men. That reading is not supported by the testimony

Williams asserts that Larner's statement, "Wrong. That's one of the reason." in response to the question, "[s]o you struck them because they were both young black men with glasses?" shows that one of the reasons Gooden was struck was because he was black. That also is a mischaracterization of Larner's testimony. Larner had just previously stated that Gooden and Williams looked very similar. The fact that they wore similar glasses was one reason for striking Gooden. Larner's testimony does not support Williams' inference that the fact that Gooden was black was "one reason" for striking him. As a result, Williams' motion for Rule 60(b)(6) relief regarding Larner's testimony is unsupported and will be denied.

Accordingly,

IT IS HEREBY ORDERED that Petitioner Marcellus Williams' motion for relief from judgment [121] is **DENIED**.

IT IS FURTHER ORDERED that the Clerk of Court shall substitute David Vandergriff as the Respondent in this matter.

RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 19th day of September, 2024.

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

In Re: Prosecuting Attorney, 21st Judicial Circuit, ex rel. Marcellus Williams,	)	
Movant/Petitioner,	)	
v.	)	Case No. 24SL-CC00422
State of Missouri,	)	Division 13
Respondent.	)	

CONSENT ORDER AND JUDGMENT

Marcellus Williams was charged and convicted in St. Louis County Cause No. 99CR-5297 with one count of murder in the first degree (Count II), one count of first-degree burglary (Count I), one count of first-degree robbery (Count IV), and two counts of armed criminal action (Counts III and V), and was subsequently sentenced to death on Count II on August 27, 2001 along with consecutive terms of 30 years (Count I), 30 years (Count III), Life (Count IV), and 30 years (Count V).

On January 26, 2024, the State of Missouri filed a Motion to Vacate or Set Aside Judgment and Suggestions in Support pursuant to Section 547.031, RSMo.

This Court set a hearing on this motion for August 21, 2024.

The Court has been informed the State of Missouri, through the St. Louis County Prosecuting Attorney, and Williams, have agreed to settle this matter as follows: that the conviction and sentence as to Count II only shall be vacated, conditional upon Williams pleading to the charged offense of murder in the first degree pursuant to *North Carolina v. Alford,* 400 U.S. 25 (1970), with a negotiated sentence of **life without the possibility of**

parole for the charge of murder in the first degree, with the other counts, upon which Williams was found guilty after a trial and subsequently sentenced, remaining unchanged.

The Court finds that the State of Missouri, through the St. Louis County Prosecuting Attorney, concedes that constitutional errors did occur in the original trial that undermine confidence in the original judgment.

The Court finds that, following discussions between a representative of the victim's family and both the Prosecuting Attorney's Office and the Attorney General's Office regarding this Consent Judgment, the Court held a telephonic conference in chambers with that representative on August 21, 2024, wherein the representative expressed to the Court the family's desire that the death penalty not be carried out in this case, as well as the family's desire for finality.

The Court has been informed that Williams acknowledges, understands, and agrees that by being resentenced pursuant to this Judgment, he waives his right to appeal or collaterally attack the judgment resentencing him following the entry of this Judgment, except on grounds of newly discovered evidence or changes in the law made retroactive to cases on collateral review.

The Court finds that the State of Missouri, through the St. Louis County Prosecuting Attorney, and Williams are the proper parties to this negotiated settlement of this matter pursuant to Section 547.031.

The Court finds a consent judgment is a proper remedy in this case.

The Court further finds, in accordance with RSMo. § 547.031(2) the Attorney General has been given notice of the Motion to Vacate previously filed, has entered its

appearance and has participated in all proceedings to date, including providing its objections to the instant Consent Order and Judgment.

The Court, after taking judicial notice of the Motion to Vacate, the evidence presented at the original trial, direct appeal, and post-conviction proceedings, including all state or federal habeas actions, finds this Consent Order and Judgment is supported by the record.

The Court further finds that all other pending matters or motions before the Court in this proceeding are hereby denied.

WHEREFORE, the Court vacates the conviction of Marcellus Williams for murder in the first degree (Count II) on the condition that Marcellus Williams accepts a plea of murder in the first degree and a sentence of life without the possibility of parole be imposed.

IT IS SO ORDERED.

8/21/2024

Date

Div. 13

Bruce Hilton, Circuit Judge

Marcellus Williams, Relator

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
TWENTY-FIRST JUDICIAL CIRCUIT
Division No. 13
The Honorable Bruce F. Hilton, Presiding

IN RE:	)
PROSECUTING ATTORNEY,	)
21ST JUDICIAL CIRCUIT,	)
ex rel. MARCELLUS WILLIAMS,	)
	)
MOVANT/PETITIONER,	)
	)
vs.	)CAUSE NO. 24SL-CC00422
	)
STATE OF MISSOURI,	)
	)
RESPONDENT.	)

ON BEHALF OF STATE OF MISSOURI:
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St. Louis MO 63105

ON BEHALF OF MARCELLUS WILLIAMS:
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Kansas City, MO 64112

TRANSCRIPT OF HEARING

AUGUST 21, 2024

Reported By:
Rhonda J. Laurentius, CCR, RPR
Official Court Reporter
Twenty-First Judicial Circuit

THE COURT: We're on the record in Cause Number 24SL-CC00422, in re: The Prosecuting Attorney for the Twenty-First Judicial Circuit, ex rel. Marcellus Williams vs State of Missouri.

Let the record reflect this matter was set for an evidentiary hearing this date, August 21, 2024.

On or about January 26, 2024, the Prosecuting Attorney's Office filed a motion to vacate or set aside judgment and suggestions in support pursuant to Section 547.031 RSMo.

Let the record further reflect that the Court's interpretation of the statute is that there must be a hearing on this matter, and the Court scheduled this for a hearing this date.

Is there an announcement?

MR. JACOBER: Good afternoon, Your Honor. Matthew Jacober. I, along with my colleagues, Alana McMullin and Teresa Hurla, are special counsel for Innocence for St. Louis County's Prosecuting Attorney's Office. In addition, Jessica Hathaway from the St. Louis County Prosecuting Attorney's Office is with us.

There is an announcement, Your Honor. There has been a resolution of the case. The Court

has been presented with a consent order and judgment signed by Mr. Williams. And I would like to make a record at this time, after all counsel have entered their appearance for the record, regarding the circumstances of this consent order and judgment.

THE COURT: Thank you. And that's an oversight on my part.

Let the record further reflect that the Attorney General is here and represented by Michael Spillane. And if there are any other attorneys that want to be acknowledged on the record I'll so note that.

MR. CLARK: Your Honor, I will be arguing today. Andrew Clark, assistant attorney general on behalf of the State of Missouri.

THE COURT: Thank you.

The Court has been presented with a consent order and judgment purportedly signed by Mr. Williams as relator to resolve all issues pertaining to this motion, which the Court actually has very little direction due to the fact that it's only been in existence since 2021. And this consent order and judgment has been furnished to the Court by the Prosecuting Attorney's Office and

by Mr. Williams. It's my understanding that the Attorney General believes that I don't have jurisdiction to enter this consent order and judgment and appropriate remedies will be pursued in obviously a different proceeding.

Let the record further reflect that in anticipation of this hearing today the following facts are not disputed. Following a jury trial the Circuit Court sentenced Mr. Williams to death for first degree murder. The Court affirmed Mr. Williams' conviction and affirmed the judgment, denying any post-conviction relief.

In December of 2014 the Court issued a warrant of execution setting a January 28, 2015, execution date. Mr. Williams then filed a petition for writ of habeas corpus in the Court alleging that he was entitled to initial DNA testing to demonstrate actual innocence. The Court vacated Mr. Williams' execution date and appointed a Special Master to ensure complete DNA testing and report the results of the additional DNA testing. The Special Master provided the Supreme Court with the results of additional DNA testing conducted on hair and fingernail samples from the crime scene and the knife used in the murder.

The parties fully briefed their arguments to the Special Master. After reviewing the Master's files, the Court denied Mr. Williams' habeas petition because the additional DNA testing did not demonstrate Mr. Williams' actual innocence.

In 2017 Mr. Williams filed another petition for writ of habeas corpus again alleging DNA testing demonstrated his actual innocence by excluding him as a contributor of DNA found on the knife used in the murder. The Court denied said relief.

In 2023 Mr. Williams filed a petition for declaratory judgment alleging that the governor lacked authority to rescind an execution order appointing a board of inquiry pursuant to Section 552.070 and staying Mr. Williams' execution until a final clemency determination.

On June 4, 2024, the Supreme Court issued a permanent writ of prohibition barring the Circuit Court from taking further action other than granting the governor's motion for judgment on the pleadings and denying Mr. Williams' petition for declaratory judgment.

Prior to the Court's order and warrant, the Prosecuting Attorney for the Twenty-First

Judicial Circuit filed a motion to vacate Mr. Williams' first degree murder conviction and death sentence pursuant to Section 547.031 authorizing the Prosecuting Attorney or Circuit Attorney to file a motion to vacate or set aside the judgment at any time upon information the convicted person may be innocent or may have been erroneously convicted.

This Court has reviewed probably close to 8,000 pages, which I am guided to do so under the statute, including the original trial transcript which lasted some 14 days, the post-conviction relief proceedings, and all the cases that have been decided previously by courts that are higher than this.

The Court finds that this statute is civil in nature. It is not post-conviction relief. The Court has been provided no authority to suggest that I cannot enter this consent order and judgment. And the Court is going to enter this consent order and judgment.

And further, Mr. Jacober, you may make a record with respect to this consent order and judgment.

MR. JACOBER: Thank you, Your Honor.

Is it okay if I stand here?

THE COURT: You can stand, sit, whatever is your preference.

MR. JACOBER: I'll stand.

Your Honor, just by way of record, again Matthew Jacober on behalf of the St. Louis County Prosecuting Attorney's Office.

The DNA evidence developed did not fully support our initial conclusions. Additional investigation and testing demonstrated the evidence was not handled in accordance with proper procedures at the time of Mr. Williams' charge and conviction. As a result, the additional testing was inconclusive and did not allow the St. Louis County Prosecuting Attorney's Office to rely on its theory Mr. Williams' exclusion as a contributor to the DNA on the murder weapon as a significant factor supporting his innocence.

It is clear, based on testing, Mr. Williams' DNA is not on the murder weapon which was tested in 2016, long after the crime occurred, and long after the trial was concluded. The murder weapon was handled without proper procedures then in place. As a result DNA was likely removed and added during the investigation and prosecution of

Mr. Williams during the time span of 1998 through 2001. The St. Louis County Prosecuting Attorney's Office regrets its failure to maintain proper protocols surrounding the key physical evidence in this heinous crime, the murder weapon.

The majority of the additional investigation was conducted in the last 60 days and promptly provided to Mr. Williams and the Attorney General's Office. As a result of this evidence and concerns regarding the investigation and trial of Mr. Williams impacting his rights as a charged individual, St. Louis County Prosecuting Attorney determined there were constitutional errors undermining our confidence in the judgment.

St. Louis County Prosecuting Attorney's Office engaged in settlement discussions with Mr. Williams and his counsel. These discussions began on August 20, 2024, and culminated on August 21, 2024, in which Mr. Williams is agreeing to plead pursuant to North Carolina vs. Alford in exchange for a sentence of life without the possibility of parole.

We have discussed with the victim's husband, Dr. Daniel Picus, who has indicated he does not support the application of the death

penalty to Mr. Williams. As the Court is aware, Dr. Picus expressed this sentiment to the Court and all counsel in chambers during a telephone call earlier today. Mr. Williams is further waiving all appellate and post-conviction remedies except those afforded via newly discovered evidence or a retroactively adopted and applied law. This brings much needed and deserved finality to this case and Mrs. Gayle's family.

Despite the above, it's our understanding the Attorney General's Office objects to this resolution. Taking the above record and everything that the Court has reviewed to date, which includes all of the documents in this matter and all of Mr. Williams' direct and indirect appeals to his conviction, the St. Louis County Prosecuting Attorney's Office requests the Court accept the consent order and judgment, accept Mr. Williams' plea pursuant to North Carolina vs Alford, and resentence Mr. Williams on Count II of the underlying indictment to life without the possibility of parole.

Ms. Hathaway will proceed forward with the allocution and the plea proceedings.

THE COURT: Thank you.

MR. JACOBER: Thank you, Your Honor.

THE COURT: Mr. Williams.

MARCELLUS WILLIAMS: Yes, sir.

THE COURT: Can you rise and raise your right hand.

MARCELLUS WILLIAMS,

having been sworn, testified as follows:

THE COURT: You may.

MS. HATHAWAY: Your Honor, as a preliminary matter, I prepared a memorandum that would withdraw the State of Missouri's previously filed notice of intent to seek the death penalty.

THE COURT: Thank you.

Mr. Williams, I have before me, which I guess we can mark as Circuit Attorney's Exhibit 1, a consent order and judgment. Circuit Attorney's Exhibit 1 references a signature signed by Marcellus Williams, relator. Did you sign this document?

MARCELLUS WILLIAMS: I did.

THE COURT: I'm going to ask you a series of questions. If at any time you don't understand any of my questions please get my attention and I'll rephrase.

MARCELLUS WILLIAMS: (Nods head.)

THE COURT: Can you please state your full legal name for the record?

MARCELLUS WILLIAMS: Marcellus Scott Williams.

THE COURT: Thank you. And how young a man are you?

MARCELLUS WILLIAMS: Fifty-five.

THE COURT: Highest level of education you've achieved?

MARCELLUS WILLIAMS: GED.

THE COURT: With that GED you're capable of reading, writing, and understanding the English language?

MARCELLUS WILLIAMS: I am.

THE COURT: You just heard the Circuit Attorney announce that you would like to enter an Alford plea with respect to the agreement that has been reached between you and the Circuit Attorney, is that accurate?

MARCELLUS WILLIAMS: Yes.

THE COURT: Any problems with your hearing today?

MARCELLUS WILLIAMS: None.

THE COURT: You are a U.S. citizen?

MARCELLUS WILLIAMS: Yes.

THE COURT: Are you under the influence of any drugs or alcohol today?

MARCELLUS WILLIAMS: No.

THE COURT: You understand that pursuant to this consent order and judgment you are agreeing to plead guilty to the charge of first degree murder pursuant to North Carolina vs Alford with the negotiated sentence of life without the possibility of parole?

MARCELLUS WILLIAMS: I understand.

THE COURT: Did you have enough time to review this consent order and judgment before you signed it?

MARCELLUS WILLIAMS: Yes.

THE COURT: Have any threats or promises been made to you to get you to go ahead and sign this?

MARCELLUS WILLIAMS: No.

THE COURT: Have any threats or promises been made to your family to entice you or intimidate you into signing this agreement?

MARCELLUS WILLIAMS: No.

THE COURT: You understand, Mr. Williams, that your agreement with the Prosecuting Attorney's Office will become the

sentence and judgment of the Court if I accept this consent order and judgment?

MARCELLUS WILLIAMS: I do.

THE COURT: You heard the prosecutor's statement regarding the issue of the sentence ordering the death penalty is being withdrawn by the Prosecuting Attorney --

MARCELLUS WILLIAMS: Yes.

THE COURT: -- in exchange for your agreement to plead under North Carolina vs. Alford to life without parole?

MARCELLUS WILLIAMS: Yes.

THE COURT: The additional counts remain unchanged.

MARCELLUS WILLIAMS: Yes.

THE COURT: Based upon the prosecutor's statement, do you believe that you will be found guilty by a jury or the trial court if you went to trial since you've already been found guilty?

MARCELLUS WILLIAMS: State that again, Your Honor.

THE COURT: You've already been found guilty, correct?

MARCELLUS WILLIAMS: Right.

THE COURT: And this was back in

2000 --

MARCELLUS WILLIAMS: -- 1.

THE COURT: 2001. And you've exhausted all of your remedies available under the law --

MARCELLUS WILLIAMS: Yes.

THE COURT: -- correct?

MARCELLUS WILLIAMS: (Nods head.)

THE COURT: Do you believe that it's in your best interest, given the evidence, to enter a plea of guilty pursuant to the case of North Carolina vs Alford?

MARCELLUS WILLIAMS: Yes, I do.

THE COURT: Have your attorneys explained to you the effect of your plea of guilty pursuant to the case of North Carolina vs. Alford?

MARCELLUS WILLIAMS: Yes.

THE COURT: What is your understanding of that case?

MARCELLUS WILLIAMS: My understanding of the case is that it's a no contest, I plead to no contest to the charge.

THE COURT: You understand that it has the same legal effect as a guilty plea?

MARCELLUS WILLIAMS: Yes.

THE COURT: Is the consent order and

judgment part of your reason for the Alford plea?

MARCELLUS WILLIAMS: Yes.

THE COURT: Do you have any questions about your Alford plea before we proceed?

MARCELLUS WILLIAMS: I don't.

THE COURT: Is it your desire under the effect of the Alford plea to continue this proceeding and accept the agreement -- the consent order and the agreement contained within the consent order and judgment?

MARCELLUS WILLIAMS: Yes.

THE COURT: You heard the Prosecuting Attorney through Mr. Jacober, that you understand that there is no DNA evidence that affects your claim of innocence?

MARCELLUS WILLIAMS: Yes.

THE COURT: Knowing all that do you wish to continue?

MARCELLUS WILLIAMS: Yes.

THE COURT: Mr. Williams, how do you plead to Count II, the charge of first degree murder?

MR. CLARK: Your Honor, sorry. At this point we would object that this Court has no authority in its civil case, in the 547 case to

take this plea. And in the criminal case it has no authority or jurisdiction to unsettle the previous conviction. These are the same arguments we raised in chambers.

Just for the record, Your Honor, as to the civil case, State ex rel. Bailey vs. Sengheiser, 2024, Westlaw 358 8726, indicates this Court has no authority in this case to resentence anyone. That in the criminal case, State ex rel. Zahnd vs. Van Amburg, 533 S.W.3d 227 Mo. 2017, State ex rel. Fike vs. Johnson, 530 S.W.3d 508, and State ex rel. Poucher vs. Vincent, 258 S.W.3d 62. Those are all Missouri Supreme Court cases that indicate that when a criminal court sentences someone like Mr. Williams for the first time in 2001 it's exhausted of its jurisdiction and authority to act over the criminal judgment.

Here that jurisdictional authority has not been reinvigorated. This Court does not have the authority to first - These are wrapped together - to first to enter the consent judgment in this case and then to use that consent judgment to unravel the sentencing of the first case, of the criminal case.

As for whether the civil case, the

post-conviction remedy, State ex rel. Bailey vs. Fulton, 659 S.W.3d 909, says that 547 actions are civil remedies in the nature of post-conviction and that this Court has the obligation and responsibility to enforce the post-conviction rules, the mandatory post-conviction rules to enforce the finality and the orderly administration of justice.

Now I have a record about the consent judgment. I don't know if you want me to make it now or make it later.

THE COURT: You can.

MR. CLARK: All right, Your Honor.

THE COURT: This goes to your issue that I raised earlier as to whether or not you even have standing to object, correct?

MR. CLARK: Well both. I think, Your Honor, we'd like to make a record about the DNA evidence and to make a record about who the parties are, which I think is the standing question. So with the Court's indulgence...

THE COURT: You may proceed.

MR. CLARK: As to the party question, civil cases are litigated by the parties in interest. No matter how they're captioned, no

matter how they're titled, no matter what the parties think they are, they are governed by the parties in interest, who has an interest in the case. And here it's clear who has an interest in the case; Marcellus Williams and the State of Missouri.

Now in enacting 547.031 the legislature gave the Prosecuting Attorney the authority to the representational capacity of Marcellus Williams to raise claims as he saw fit. It does not give him the authority to raise that claim and then concede it on the other side. 547 does not allow that. And in fact in the case of State vs. Planned Parenthood of Kansas, 66 S.W.3d 16, it says for one attorney to give instruction to both sides of litigation as to the claims and the remedies in the case may ensure a predictable outcome but it will not ensure a just outcome. And the Supreme Court said, to put it bluntly, the Attorney General there but here the Prosecuting Attorney, must choose a side regarding the legality of the contracts there - Here Marcellus Williams' conviction - and act consistently with that position in the Courts.

So here the Prosecuting Attorney cannot raise a claim on behalf of Marcellus Williams and

then put its prosecutor hat on and concede the claim. He's on both sides of the V at that point. So it is our position that the 547 action the parties are Marcellus Williams represented by the Prosecuting Attorney, not as his friend, not as, you know, his attorney, but he's been given representational capacity. Like I told you in chambers, under Randall Aluminum, that used to occur in employment discrimination cases.

Now the question is who is the judgment against. The State of Missouri. It has to be. Because this Court could not vacate a conviction if it wasn't -- or vacate the conviction if the judgment wasn't entered against the State. And here the Prosecuting Attorney can't represent both sides of the V. So that falls to the Attorney General. So whether this Court can enter a consent judgment or not, it can't under 547.031 both on authority here and jurisdiction and authority in the criminal case.

Now as for the DNA evidence, just to be clear about what happened in this case, what's been marked as Respondent's Exhibit FF is a supplemental DNA case report from BODE Technology dated August 19, 2024. And in that report provided by

Mr. Williams' counsel BODE was asked to consider an analysis of Short Tandem Repeat loci on the Y chromosome - Y-STR - for two individuals, Keith Larner, the individual who prosecuted this case, and Edward Magee, the chief investigator at the time. And they returned that, those standards with the information, and when I believe the parties compared that BODE Technology report to the reports of Fienup from the Special Master report and from Dr. Rudin, which was the Prosecuting Attorney's witness both in this action and Marcellus Williams' witness in other actions. When he compared there, Dr. Fienup, 15 of 15 loci are Edward Magee, the chief investigator. And when you compare it to Dr. Rudin's it's even worse; 21.

So what happened here is the Prosecuting Attorney made an allegation about the DNA evidence. They made an allegation that the DNA evidence exonerated or may exonerate Marcellus Williams. After investigating that they found out that the DNA on the knife swab is consistent with Edward Magee. And rather than do the right thing and dismiss the case they asked this Court to do something by consent that it can't do by consent and couldn't do after a hearing.

As the Missouri Supreme Court said in its opinion on the motion to recall the mandate -- or recall the warrant filed by Mr. Williams, it said this Court is equally aware prosecutor's motion is based on claims this Court previously rejected in Williams' unsuccessful direct appeal, unsuccessful Rule 29.15 motion for post-conviction relief, and its unsuccessful petitions for writ of habeas corpus. Moreover, there is no allegation of additional DNA testing conducted since the Master oversaw DNA testing and this Court denied Williams' habeas petitions.

What happened here is that the Prosecuting Attorney's raised claims have been denied many times, again and again and again. And they raised a DNA claim that upon further investigation didn't pan out, and rather than dismiss it because it didn't exonerate Mr. Williams they asked this Court to do it by consent. It can't. And it violates Article 5, Section 2 of the Missouri Constitution which makes the Supreme Court the Supreme Court of Missouri. That court has denied these claims many times.

And on that, Your Honor, we'd ask both that the consent judgment not be entered and that

Mr. Williams not be resentenced because this Court lacks authority in the civil case, authority and jurisdiction - I'm sorry - authority in the civil case, authority and jurisdiction in the criminal case, and the actions of this Court violate Article 5, Section 2 of Missouri's constitution.

THE COURT: Thank you, Mr. Clark. You're not suggesting the Court upon a hearing and obviously by stipulation of counsel couldn't make a finding that there may be error in the original trial?

MR. CLARK: Yes, well, the Court could by stipulation find an error. Well, not by stipulation of two parties on the same side of the v.

THE COURT: Okay. Thank you. Any response?

MS. HATHAWAY: State of Missouri would take issue with the characterization that we do not represent the interest of the State of Missouri in this matter.

I would also suggest to the Court that the consent order has the effect of reopening the original criminal case. So for purposes of the record the Court might want to at least -- or note

that. And when we proceed with the plea the State of Missouri is prepared to make a factual basis for the plea as would, you know, happen normally in a plea.

THE COURT: So it's my understanding that, and pursuant to the consent judgment, you are asking me to make findings that the Prosecuting Attorney concedes that constitutional errors did occur in the original trial that undermine confidence in the original judgment?

MS. HATHAWAY: Yes, Your Honor.

THE COURT: The Court also finds, following discussions between representatives of the victim's family both with the Prosecuting Attorney's Office and the Attorney General's Office regarding this consent judgment, the Court held a telephonic conference in chambers with that representative on August 21, 2024, wherein the representation expressed to the Court the family's desire that the death penalty not be carried out in this case, as well as the family's desire for finality.

The Court having been informed that Mr. Williams acknowledges, understands, and agrees that being resentenced pursuant to this judgment he

voluntarily waives the right to appeal or collaterally attack the judgment sentencing him following the entry of this judgment except on grounds of newly discovered evidence or changes in the law made retroactive to the cases on collateral review.

The Court further finds that the State of Missouri through the St. Louis County Prosecuting Attorney and Mr. Williams are the proper parties to this negotiated settlement of this matter pursuant to Section 547.031, noting your objection for the record. The Court finds the consent judgment is a proper remedy in this case.

The Court further finds in accordance with Section 547.031(2) the Attorney General has been given notice of the motion to vacate previously filed and enters their appearance and has participated in all proceedings to date, including providing its objections to the consent order and judgment.

The Court has taken judicial notice of the entire consents of its files and notes that the Attorney General filed a very well written and argued motion to dismiss which the Court took with this case.

The Court, after taking judicial notice of the motion to vacate the evidence presented in the original trial, direct appeal, and post-conviction proceedings, including all state or federal habeas actions, finds the consent order and judgment is supported by the record.

The Court further finds that other pending matters or motions before the Court in this proceeding are hereby denied.

The Court will defer sentencing of Mr. Williams until 8:30 a.m. tomorrow so we can hear from the victim's family.

Any additional record need to be made?

MR. CLARK: For the record, Your Honor, as discussed in your chambers, I request at this time a stay of the consent judgment. The Attorney General demonstrated all four database factors that a stay is necessary and needed; namely, that the likelihood of success on any appeal or writ is high and that this Court should issue a stay.

THE COURT: The Court will grant your request. Obviously the dilemma the Court has been under since the inception of this matter being assigned to me is the timing of all of this. So that's why I'll grant your stay. And I hope this

is expedited by the Supreme Court.

It's also this Court's opinion that the Supreme Court should have original jurisdiction on all these matters. But of course that's not what the statute says. Subject to anything further?

MS. HATHAWAY: Your Honor, was it Your Honor's intention that Mr. Williams plead guilty to murder in the first degree?

THE COURT: It is.

MS. HATHAWAY: Do you believe there needs to be an additional record made more like a standard plea of guilty since the original conviction and sentence has been vacated?

THE COURT: Well I think in order to make the record clear and Mr. Williams' rights are protected I believe that he's already indicated to the Court that he does plead guilty.

MS. HATHAWAY: Your Honor, some of the other lawyers are mentioning that we think it could have been interrupted by an objection.

THE COURT: Oh.

MS. HATHAWAY: Maybe just to make the record extra clear.

MS. HURLA: Your Honor, if I may, I believe also in addition to what the Attorney

General is arguing, at this moment in this proceeding, in the civil proceeding the Court is vacating the conviction, but I believe we may then have to end this proceeding and call up the original criminal case in order to take a plea.

THE COURT: That's my understanding.

MS. HURLA: So we are not currently in the criminal case so the plea would have to be taken.

THE COURT: In that case, that's correct.

MR. CLARK: Just procedurally, Your Honor - I'm sorry - you granted the stay. The effect of granting the stay would mean that the Court cannot take up the plea because the civil consent judgment doesn't take effect under the stay, unless that's not the intent of the stay.

THE COURT: That's not the intent of the stay.

MR. CLARK: Okay. Just so the record is clear, the stay is denied as to resentencing and conviction?

THE COURT: Correct. So I guess with that said, I guess you'll present to me tomorrow the criminal file so that I can resentence and take

the plea? Or you want to do that now?

MS. HATHAWAY: I think what we envisioned is we would do the guilty plea today and defer sentencing until tomorrow.

THE COURT: All right.

MS. HURLA: Your Honor, I do just want to clarify that we been hearing the words guilty plea but this is an Alford plea, a no contest plea, and that is what Mr. Williams has agreed to.

THE COURT: Right. Let me pull that up.

In Cause 99CR-5297 - Again I'll remind you, Mr. Williams, you're under oath - how do you plead to the charge of first degree murder under North Carolina vs. Alford.

MARCELLUS WILLIAMS: No contest.

THE COURT: Anything further?

MR. CLARK: Your Honor, we've switched case numbers here. The Attorney General would just reassert its prior objection in full. I won't restate it, but the prior objection in the civil case and stipulate this Court has no jurisdiction or authority in the criminal case.

THE COURT: I appreciate that, Mr. Clark. We'll go ahead and do sentencing first

thing in the morning after I hear from the victim. At that time I'll also do my examination under Rule 24.035.

MS. HATHAWAY: Thank you, Your Honor.

THE COURT: Anything further from anyone?

MR. CLARK: Your Honor, just to make the record clear, I would ask that Exhibit FF be admitted in these proceedings.

THE COURT: Any objection?

MS. HATHAWAY: No, Your Honor.

THE COURT: Exhibit FF will be received. Any objection to I guess Exhibit 1 being received, which is the consent?

MR. CLARK: Other than the objection we raised, no.

THE COURT: Thank you. That will also be received. That will conclude the record. Anything further? Thank you. Court will be in recess until tomorrow morning at 8:30.

***

REPORTER'S CERTIFICATE

I, Rhonda J. Laurentius, a Certified Court Reporter and Registered Professional Reporter, hereby certify that I am the official court reporter for Division 13 of the Circuit Court of the County of St. Louis, State of Missouri; that on the 21st day of August, 2024, I was present and reported all the proceedings had in the case of IN RE: PROSECUTING ATTORNEY, 21ST JUDICIAL CIRCUIT, ex rel. MARCELLUS WILLIAMS, MOVANT/PETITIONER, VS. STATE OF MISSOURI, RESPONDENT, CAUSE NO. 24SL-CC00422.

I further certify that the foregoing pages contain a true and accurate reproduction of the proceedings had that day.

I further certify that this transcript contains pages 1 through 30 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

/s/ Rhonda J. Laurentius, CCR #0419
Official Court Reporter
Twenty-First Judicial Circuit
(314) 615-8070

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
TWENTY-FIRST JUDICIAL CIRCUIT
Division No. 13
The Honorable Bruce F. Hilton, Presiding

IN RE:		
PROSECUTING ATTORNEY,	)	
21ST JUDICIAL CIRCUIT	)	
ex rel, MARCELLUS WILLIAMS	)	**Cause #24SL-CC00422**
	)	
	)	
MOVANT/PETITIONER,	)	
	)	
vs.	)	
STATE OF MISSOURI,		
RESPONDENT.		

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TRANSCRIPT OF HEARING

Volume 2 of 2

AUGUST 28, 2024

Susan Lucht, CCR#332
Official Court Reporter
Twenty-First Judicial Circuit
St. Louis, Missouri

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VOLUME 2

With that said, let's go back on the record. We're back on the record in Cause 24SL-CC00422. According to the clock on my computer it's approximately 1:50 p.m. this 28th day of August 2024. With that said, Mr. Jacober.

MR. JACOBER: Your Honor, at this time the State would call Keith Larner. Mr. Potts will be taking the lead on that examination.

THE COURT: Thank you.

STATE'S EVIDENCE

KEITH LARNER,

Having been sworn, testified:

DIRECT EXAMINATION BY MR. POTTS:

Q. Good afternoon.

A. Good afternoon.

Q. One last time, would you mind stating your name for the record?

A. Keith Larner.

Q. Mr. Larner, you're a former assistant prosecuting attorney for St. Louis County; correct?

A. That's correct.

Q. What years were you an assistant prosecutor?

A. June 7th, 1982, until May 1st, 2014.

Q. You were also the trial prosecutor in the Marcellus Williams case when he was tried for the murder of Felicia Gayle?

A. Correct.

Q. Ms. Gayle was murdered in August of 1998. Does that sound right?

A. August 11th.

Q. When were you first assigned on this case?

A. After the case was indicted in 1999. I'm guessing November or December of '99. Whenever the indictment occurred. I was not involved prior to that time.

Q. So by November or December of 1999 how many murder cases have you tried in your career?

A. Between two and three dozen.

Q. By that point in your career how many felony cases had you tried?

A. Well, I tried between 95 and 100. Back then I would have tried probably more than half of those trials. So 50 or more.

Q. Let's talk about Laura Asaro and Henry Cole. As you have been preparing to testify today have you gone back and looked through any of your records?

A. I have looked at the trial transcript for Henry Cole. I have not looked at the trial transcript for Laura Asaro.

Q. Beyond the trial transcript have you reviewed anything to prepare for your testimony today?

A. I read Ed Magee's statement that he made back in two thousand -- I don't know when he made it -- 2015, 2018. 2018 he made it.

Q. Anything else?

A. No. Just the trial transcript and that.

Q. Ms. Asaro and Mr. Cole weren't the two strongest witnesses you've ever had in a murder case, right?

A. I think they were probably the two strongest witnesses I've ever had in a murder case. Yes, they were.

Q. They were?

A. And I'll tell you why if you want to know. Whenever you want.

Q. We'll get there. Now, Ms. Asaro was a crack cocaine addict, right?

A. Yes.

Q. And Ms. Asaro was also a sex worker?

A. She was a prostitute.

Q. Mr. Cole had about 12 criminal convictions?

A. I'd say that's a fair amount. True.

Q. Those convictions included robberies, possession of stolen property, and carrying concealed weapons?

A. I don't think he had any robbery first degrees. I don't think he was one that would carry knives and guns. Robbery second degree maybe. He had a drug problem. He did crimes to pay for his drug addiction. Lots of them, like you said.

Q. Lots of them. Right. And he was facing a robbery charge when he was released in June of 1999 right before he went to the police department about this case, right?

A. What kind of robbery are you talking about? Robbery what, first or second?

Q. Well, it was a robbery charge. Right?

A. Well, I told you it wasn't a robbery first. I wasn't aware that he was facing any charges. I knew he had been in the city jail and he had been released on June 4th, 1999. He immediately went to the police with his story. I don't know what the crimes he was charged with.

Somehow he got out on bond that day or he was released that day for different reasons.

Q. Okay. And Mr. Cole also had a history of drug addiction, correct?

MR. SPILLANE: I'm going to object to asked and answered.

THE COURT: Overruled.

A. Yes.

Q. (By Mr. Potts) Both of the witnesses expressed interest in the family's monetary reward?

A. At some point -- not Laura Asaro at the beginning. Then she found out about the reward. And when she found out about it, yes, she was interested. But that's not why she came forward. Henry Cole on the other hand came forward predominantly for the reward.

Q. Yeah.

A. And to tell the truth.

Q. And he was promised $5,000 for his deposition testimony in April of 2001, right?

A. After he did his deposition in New York, he had to come back -- that was a deposition conducted by the defense. And then we were going to do a deposition to preserve testimony in

St. Louis, which was going to be video recorded. And we did do that. And he was promised the 5,000 after he did that.

Q. And so he did get the $5,000?

A. After the trial.

Q. Okay. And you actually approached Dr. Picus, the victim's husband?

A. I'm sorry. I think he got it before the trial.

Q. Oh, he got it before the trial?

A. I think he got it after the deposition that he did in St. Louis a month or so prior to the trial. We gave him the $5,000. That was a promise we made to him. And we said, please come back for the trial.

Q. Yeah.

A. We've given you the money. Please come back. And he did.

Q. So he had that $5,000 in his pocket before he showed up to testify?

A. No. He testified under oath twice, but not testified at trial. He had the money before he testified at trial. That's correct.

Q. And you approached Dr. Picus about giving that portion of reward money to Mr. Cole

about four to six weeks before the deposition?

A. Probably so. I had to get his permission. It was his money, I believe.

Q. Yeah. And Dr. Picus actually met with Mr. Cole at the St. Louis Prosecuting Attorney's Office to physically hand him that $5,000 in cash, right?

A. That's true.

Q. And those were the two strongest witnesses you've ever had in a murder trial?

A. Informants? Absolutely.

Q. Now, there were no eyewitnesses -- Excuse me. Strike that. There were no eyewitnesses to the murder, right?

A. That's correct. That's correct.

Q. The murder weapon in the Gayle case was a knife. Right?

A. Yes. It was a butcher knife.

Q. It was a violent murder, right?

A. The most violent murder I've ever seen in 40 years. That is correct.

Q. And that knife was examined and tested by the St. Louis County Laboratory personnel for fingerprints and other evidence before you were involved in the case. Right?

A. That's correct. It was tested by Detective Krull for fingerprints one day after the murder. It was brought there from the autopsy by Dr. Wunderlich. He seized it from the body. Dr. Nanduri took the knife out of Ms. Gayle's neck, handed it to Detective Wunderlich. Detective Wunderlich put it in an envelope, sealed it, and signed his name. He hand carried that over to Detective Krull, who is the fingerprint expert for St. Louis County. And Detective Krull looked at that knife handle, and he found no fingerprints whatsoever on that knife handle. The knife blade had blood on it.

It was then sent over to the County Lab to test for blood. It tested positive for blood. It was Ms. Gayle's blood. The knife was all the way into her neck.

Then that knife was packaged by the St. Louis County Lab in a box, and it was sent then over to U City to wait until they found someone that committed the crime.

So this was all within two or three days. That knife had been fully forensically tested. Sufficient for me and sufficient for the defense attorneys. We were all satisfied with the

testing. Neither side asked for any additional testing at any time prior to that trial.

Q. You said that was all within three days?

A. I know the fingerprints was within one day. And I know that it went from there to the -- to the lab to test for blood. And I don't know for sure that it was within three days.

If you show me the box that it was in, it's probably labeled and dated by the lady or the man that tested it at the lab. I'm guessing between within three days. I'm pretty darn sure it was within a week. There was a rush on this. This was not something to sit and wait.

Q. And so that would have been back in when? What month and year?

A. August of two thousand -- I'm sorry, August of 1998.

Q. So as far as you were concerned the forensics were finished in August of 1998?

A. I wasn't going to ask for any more forensic testing. The St. Louis County Lab are the experts, and they did what they could do. I was satisfied with that. I was not going to ask for any more testing.

However, I always knew that the other

side, whoever they may be, and they were appointed shortly after indictment too, may want to test it. And so I kept it pristine. I had not taken it out of that box. It was sealed. That box was sealed from the St. Louis County Lab with tape. And I waited until I knew that they were not going to ask for any further testing, that they were satisfied with the tests that were done. Yes, I knew that to be the case before I touched the knife.

Q. When did you touch the knife?

A. Well, I got the evidence, I'm guessing, I said in my affidavit about a year before the trial. The trial occurred two years and ten months after the murder. So you can do the math. But I would like to see the evidence receipt which is State's Exhibit 91 to see what date my investigator brought that from U City Police Department to the prosecutor's office. I'm thinking it was sometime approximately a year before the trial I had possession of that knife, enclosed in the box from the lab, sealed. Completely. One hundred percent enclosed in that box. Not sticking out of the box in any way, shape, or form.

Q. Okay. Mr. Larner, who is Ed Magee?
A. My investigator at the time.
Q. When you say your investigator, what do you mean?
A. He was assigned to help me on this case.
Q. What does an investigator -- so who employed Mr. Magee?
A. St. Louis County Prosecuting Attorney's Office.
Q. So he wasn't a police detective, right?
A. I don't know if they were licensed police officers. I know he carried a gun. I don't know if he was licensed by St. Louis County. He came from the City where he had a career in the City as a lieutenant with the Metropolitan Police Department. Then he came out to the prosecutor's office to work until he retired.
Q. So what are the types of duties that an investigator had with the St. Louis County Prosecuting Attorney's Office?
A. Basically anything I asked him to do. Talk to witnesses, locate witnesses, handle evidence, discuss strategy with me. Anything that could help me, he was going to do, within the law.
Q. Was it you or Mr. Magee who originally

took possession of the knife?

A. I think it was Magee. He got it from the U City Police Department. Brought it to me in the prosecutor's office. We lock it in a room right down the hall from my office. I had a key and Magee had a key, and I believe that's all.

Q. All right. So let's back this up a little bit. So Mr. Magee took possession of the evidence from University City Police Department?

A. I believe that's correct.

Q. And then he brought it directly to the St. Louis County Prosecuting Attorney's Office?

A. That's what I asked him to do, yes.

Q. All right. And would Mr. Magee have been the one who walked it into the building personally?

A. Yes.

Q. Okay. And then Mr. Magee would have taken it to this locked room that you're describing, right?

A. That's right.

Q. And you said that both you and Mr. Magee had keys to that room?

A. Mr. Magee gave me a key, and so I had a key. He was the chief investigator. Although, at

that time he was probably not the chief investigator in the prosecuting attorney's office. Maybe he was. I don't recall when he became the chief.

Q. So that was a locked room?

A. It was.

Q. There were only two keys?

A. That I knew of, yes.

Q. One key for you, and one key for Mr. Magee?

A. I believe that's true.

Q. Now everything that we're talking about, you've already disclosed this in an affidavit. Correct?

A. Not everything. Are you kidding? We're going to talk for an hour. My affidavit is a page and a half.

Q. Well, what I'm saying is you've at least previewed these issues for everyone in your affidavit, correct?

A. Some of them. I don't know which issues you're talking about. Could you be more specific?

Q. Yeah. Well, I mean, we were talking about how the evidence actually made its way to the St. Louis County Prosecuting Attorney's

Office, right? Talked about that in your affidavit?

A. Well, I know I didn't get it from U City. I believe it was Mr. Magee.

Q. And you were truthful in your affidavit, correct?

A. With regard to what point? I made a mistake in there, and I'm willing to admit it right now. Let's talk about it.

Q. Are you aware of any subsequent DNA testing on the knife?

A. Yes. I think testing was done by, I don't know, the defendant's -- I say, the defendant. I mean Mr. Williams, his attorneys, in around 2015.

Q. Okay.

A. Approximately.

Q. Are you aware of additional testing that came out last week?

A. I was told that Mr. Magee's DNA is on the knife handle, and that's all I know.

Q. What did you learn about your DNA?

A. I don't know if my DNA is on there or not. I would like to know. Was it? I'd love to know. I touched the knife. I touched the knife

at some point before two thousand -- before the trial.

Q. And when you touched the knife before trial, you touched it without gloves?

A. Yes.

Q. How many times before trial did you touch the knife without gloves?

A. I touched it when I put the Exhibit 90 sticker on there. I touched it when I showed it to State's witnesses before they testified. That's about all I can recall, touching it twice -- or not twice, but there were many witnesses that I showed it to and touched it in preparation for their testimony a month or two before trial.

Q. Okay. So you're saying that there are two different categories of occasions when you were handling the murder weapon without gloves. The first is when you were affixing the exhibit sticker, and the second is when you were discussing the weapon with witnesses. Correct?

A. Yes.

Q. And that process started approximately two months before the trial?

A. Hard to say. I just don't want to be so

definite. I know I met with witnesses before trial. Several times I met with each witness, I would say, in the case. I would have showed the knife to Detective Krull. I would have shown it to Dr. Picus. I would have shown it to Detective Wunderlich, and I would have showed it to Dr. Nanduri, the medical examiner. I would have showed it to them. Whether I handed it to them at that time, I can't say for sure. I know I touched it at that time, and I'm sitting across the table from them, and I'm holding the knife. Did I hand it to them at that time? I do not recall.

Q. So I want to make sure I got this list correct. So I heard that you handled the knife without gloves when you were with Detective Krull, Dr. Picus, Detective Wunderlich, and Dr. Nanduri. Is that right, those four people?

A. That's right.

Q. All right. How many times did you meet with Detective Krull when you were handling the knife?

A. Just the one time to show him the knife. I met with him several times about his testimony.

Q. How many times did you meet with

Dr. Picus when you were handling the knife without gloves?

A. One time, and I did not have him touch the knife. It would have been too painful to have him touch his wife's murder weapon. I showed it to him because I wanted him to identify it in court, if he could.

Q. And how many times when you met with Detective Wunderlich did you handle the knife without gloves?

A. Once. Again, with Krull and Wunderlich I was going to have them identify it if they could at court in trial. So I wanted to show it to them before they testified.

Q. And then how many times did you meet with Dr. Nanduri when you were handling the knife without gloves?

A. One time.

Q. So I want you to --

A. She also identified the knife in court. I wanted her to be able to do that. And so I met with her and showed her the knife. I don't remember if I handed it to her or not.

Q. Okay. So I just want to make sure I got this right. I've got five different occasions

where you handled the knife without gloves. Once with Detective Krull, once with Dr. Picus, once with Detective Wunderlich, once with Dr. Nanduri, and once when you were affixing the exhibit sticker. Is that correct?

A. Yes.

Q. Can you think of any other times when you were handling the knife without gloves?

A. Not until the trial.

Q. Okay.

A. Again, the defense attorneys at that point had said they didn't want any testing on the knife. The knife was fully tested. I also knew at that time that the killer wore gloves. So whether -- I knew the killer's DNA and the killer's fingerprints would never be found on the knife because the killer wore gloves. And I knew the killer wore gloves before I touched the knife. So I knew that that knife was irrelevant in that regard.

Q. That's really interesting.

A. In my opinion. In my opinion.

Q. So you knew or it was your opinion that the killer wore gloves?

A. Oh, I knew because I had talked to

Detective Creach. He laid it out in his trial testimony. And I met with him before trial. On Page 2001, 2002, 2003, and 2004 of the trial transcript Detective Creach tells you exactly how he knew that the person that broke into the house wore gloves. And you let me know when you want me to tell you what he said.

Q. So you say you knew --

A. I also knew --

Q. Excuse me.

A. -- for other reasons.

Q. Excuse me one second. We'll get there.

A. Okay.

Q. You weren't an eyewitness to the murder?

A. I beg your pardon?

Q. You were not an eyewitness to the murder, correct?

A. Correct.

Q. You did not see what happened inside that house? Correct?

A. No. Not when it happened I didn't. No.

Q. So what you're saying is, you just decided that your opinion gave you the right to handle the knife?

A. You know --

MR. SPILLANE: I'm going to object to that. That's misstating his testimony.

A. Detective Creach --

Q. (By Mr. Potts) Fair question --

THE COURT: Hold on. Hold on. Let me rule. Overruled.

A. Detective Creach is the one that told me that the killer wore gloves. He was a crime scene investigator for the St. Louis County Police Department. On the day of the crime he did the crime scene investigation on this case along with other crime scene investigators. But he looked at the window that was broken out, the glass pane of window, which was the point of entry. He looked at the glass that was broken, and he found no fingerprints on the glass whatsoever.

He did find two clear marks on -- if this phone was a piece of glass. There was a piece of glass -- you mind if I go into this now?

Q. (By Mr. Potts) Let's stop right there.

MR. SPILLANE: Your Honor, can he answer the question?

MR. POTTS: It was not responsive.

MR. SPILLANE: He's been stopped twice from explaining why he believed that the killer

wore gloves. Each time he tries to answer he's stopped.

MR. POTTS: That wasn't the question.

THE COURT: You can rehabilitate him. Next question.

Q. (By Mr. Potts) I want to go back to when you were handling the knife without gloves prior to trial.

Now, I can tell you the knife is right there. I'm not going to get it out because I don't think we need to do that.

What I'm interested in is --

MR. POTTS: You mind if I -- may I approach the witness? May I approach the witness, Your Honor?

THE COURT: For what purpose?

MR. POTTS: I was going to have him show how he was handling the knife.

THE COURT: I'm sorry?

MR. POTTS: I was going to have him show us how he handled the knife.

THE COURT: All right.

Q. (By Mr. Potts) Just, will you show me, when you were handling -- I'm just going to hand you this.

A. I touched the knife handle. I did not touch the knife blade.

Q. Okay.

A. How did I touch it? I don't even have any idea how I touched it. But I touched it enough to be able to hold it.

Q. Did you lift it up?

A. To show, yes.

Q. How long would you hold it for in your hand?

A. Well, when I took it to put the State's Exhibit 90 sticker on there, I pulled it out of the box. That would have been the first time I took it out of the box.

Q. Okay.

A. And I probably set it down on the table.

Q. Okay.

A. I got out State's Exhibit Number 90, wrote the word -- numbers 90 on it, and I stuck that sticker onto the knife handle. And I did see the knife this morning. I know exactly what it looks like just from today.

Q. And what about with Detective Krull, would you hold it up again?

A. About the same.

Q. Yeah. Hold it up? With Dr. Picus did you hold it up?

A. That's correct.

Q. With Detective Wunderlich you picked it up, held it in your hand by the handle?

A. Correct, before he testified at trial.

Q. With Dr. Nanduri, picked it up, held it in your hands with the handle?

A. Same way, same place, on the end, on the handle end.

Q. And for each of those people you were also open to them handling the knife if they wanted to?

A. At that point in time, yes, I was open to it. I didn't give it to Dr. Picus for the reason I stated. I didn't let him touch it.

Q. You didn't make them wear gloves?

A. Not that I recall.

Q. Did you ever see anyone handle the knife with gloves?

A. I did handle it with gloves with a witness during the trial.

Q. During trial?

A. During the trial. One of the witnesses I did. That would have been Dr. -- I'm sorry,

would have been Detective Wunderlich. I gave him gloves not to handle the knife, but because after he handled the knife he was going to handle the State's Exhibit 93, which was the bloody purple shirt that the victim was wearing. That had dried blood on it, and I thought he wouldn't want to touch that, and neither did I. So we both put on gloves for his testimony. And I state that in the record when I say "put these on". I'm saying gloves, in case you didn't know.

Q. Now, by the time of the Williams trial you had been a prosecutor for about 17 years, right?

A. That's the math.

Q. Okay. Before then have you ever had a trial that resulted in a hung jury?

A. Yes.

Q. Had you ever had a judge declare a mistrial for any other reason?

A. I think the very first case I ever tried was a misdemeanor DWI. And I asked the defendant, because he said he didn't drink, and I said, well, you just got out of inpatient treatment for alcoholism. He was trying to imply that he never drank. And I said that. And the judge said,

that's a mistrial. And you know what? I retried it and won. That's the way it goes. That's the only time other than hung juries.

Q. Have you ever had a case reversed on appeal?

A. Not for anything that I did personally, but yes, I've had two.

Q. Okay.

A. I recall two. One of them we didn't instruct down to voluntary manslaughter. I convicted him of murder second. The Supreme Court said you should have instructed down one more time to voluntary manslaughter, and they reversed it for that.

The second one was a case where the judge -- I won the motion to suppress regarding the defendant's statement. And the Court -- the Supreme Court said the judge -- you should have lost that motion to suppress.

By the way, I didn't try that motion to suppress. That was another prosecutor in the office that did that. I didn't get on the case until after that. That prosecutor left the office. Then I got on the case. But that was the case I was involved with that was reversed.

Q. In all those instances the end result is you have to go retry the case, right?

A. That's right.

Q. You ever had a defendant seek post-conviction or habeas corpus relief after one of your trials?

A. I'm sorry. What was that?

Q. Have you ever had a defendant seek post-conviction --

A. Seek it?

Q. Yeah.

A. Yes. They all do.

Q. Yeah. They all do?

A. They all do, yeah.

Q. Have you ever had defense counsel ask for a trial continuance?

A. Of course.

Q. All the time, right?

A. Not all the time, but sometimes.

Q. Yeah. And sometimes those are granted, right?

A. Not in this case they weren't. They asked for a continuance. They didn't get it. So no, it was not in this case. In some other case -- I mean, I tried a hundred cases so I'm

sure.

Q. But in other cases they are granted, right?

A. They can be, and they have.

Q. So at what exact point of these proceedings did you believe that it was appropriate for you to contaminate the murder weapon?

MR. SPILLANE: I'm going to object to the form of the question, Your Honor. There's been no foundation he contaminated the murder weapon. He said he held it after it was tested.

THE COURT: Sustained.

Q. (By Mr. Potts) So what exact point of these proceedings did you believe that it became appropriate for you to handle the murder weapon without gloves?

A. When I knew that I wanted no more testing of this knife. I thought all the testing -- I didn't even know of any other tests that could be done. I didn't. And I assumed the lab did the most thorough job that they could. So I didn't ask for any, and I knew I wasn't going to ask for any tests. There were no fingerprints on there. There was nothing to link anybody to the

crime on that knife.

And I also knew before I touched that knife that Detective Creach gave his opinion to me. And why -- what formulated his opinion, what facts were there for him to conclude, not me, but for him to conclude that the person that entered the home wore gloves.

Second, Henry Cole testified at the trial that the defendant, Mr. Williams, told Henry Cole -- they were cellmates in the city jail. That's how Henry Cole got all the information. They were cellmates. He -- Henry Cole testified that the defendant told Henry Cole that the defendant wore gloves when he committed the crime so that he would not leave fingerprints in the house. Those were -- that's how Henry Cole testified at trial. And I knew he was going to testify that way in trial.

And the third reason I felt I could touch the knife was because there were no prints on it. There was nothing there. There was nothing to link anybody to the crime. It was worthless in my view at that time.

Q. And so I think that what you just said, though, is that it would have been within seven

days of this murder being committed that forensic evidence testing had been finished, right?

A. I mean, if you're going to hold me to seven, it could have been two, three days. It could have been ten days. If you give me that box that I looked at this morning, there's a date on it, I'm sure.

Q. Let's just say that roughly three- to ten-day window. Any time after that three- to ten-day window had elapsed that's when it became appropriate for you to handle the knife without gloves?

A. No. I didn't even get involved in the case until 15 months later. And I told you, it wasn't until I talked to Detective Creach and he told me his opinion, that based on his knowledge, his training, and what he saw that night that the person wore gloves. And that was real close to the trial. That was closer to the trial. Not closer to the murder. Closer to the trial.

Q. In this case the defense counsel was specifically requesting continuances of the trial date, right?

A. I know that they requested a continuance at some point. I don't know when they asked for

it. Maybe they asked for more than once. But I don't think the judge gave it to them, is my recollection.

Q. And they were asking for continuances because they wanted to conduct further forensic testing, right?

A. Wrong.

Q. Wrong?

A. Wrong.

Q. Okay. Why do you think that's wrong?

A. Because they never asked for any forensic testing. If they had asked me for forensic testing, I would have said, sure. And if I didn't say sure, the judge would have said yes, they may do it.

Q. Did you oppose the continuance in this case?

A. I don't remember. I probably did. I was ready to go.

Q. So you didn't -- when you told them that you wouldn't agree to the continuance, did you tell them that you had been handling the evidence without gloves?

A. I said I probably opposed it. I know the judge would have none of it. Judge O'Brien

would have none of it.

Q. And so you took that position to oppose the continuance after you had already contaminated -- I'm sorry. I want to strike that. I don't want an objection here. You took that position that you were going to oppose the continuance after you had already been handling the knife without gloves?

A. Well, you tell me when I opposed the continuance. It should be in the Court record.

Q. Does around early May sound right?

A. May of what year?

Q. Well, it was right before trial, wasn't it? You said --

A. The trial was in June. I think it started on June 4th of 2001. So May. That sounds -- that could -- if you say I opposed it, it very well could have been in May.

Q. Yeah. And, in fact, they filed a supplemental request for continuance on May 25th, right?

A. I don't know. If it's in the record, then it was.

Q. Yeah. And when they filed that supplement, you still opposed the continuance?

A. If the record says that, then I did.

Q. In seeking the continuance, defense counsel was also trying to get copies of Mr. Williams' incarceration records from the Department of Corrections, right?

A. I have no idea what the reasons were for their continuance.

Q. Well, was that one of the -- Okay. You had those records, didn't you?

A. Incarceration records?

Q. Yes.

A. I wanted to prove that he was in jail, the same cell as the informant. I wanted to show that they were together in jail so that the information could have been transferred as the informant said it was.

Q. I appreciate that. That's not quite the question. I'm saying, you had possession of those records, didn't you?

A. Was that an exhibit that I used in the case? If it was, I had possession of them. I don't know when I got possession of them. I might have got -- I don't know when I got possession of those records. They're probably dated by the person that made those records at the jail.

They're official records. They're dated.

Q. Now, this case involved a stolen laptop, right?

A. That was one of the things stolen, yes.

Q. Yeah. And Dr. Picus had to also look at the laptop that was recovered, correct?

A. That's correct.

Q. And Dr. Picus had to wear gloves when he was handling the laptop, right?

A. I don't recall that one way or the other. The laptop was never forensically tested like the knife was. I don't believe the laptop was ever -- any testing was done on it. I don't recall any being done. I don't see any reason to have used gloves on that if it wasn't going to be tested. And I don't know whether gloves were used. I just don't remember.

Q. Now, did you allow the jurors to handle the knife at trial?

A. Absolutely not.

Q. Why not?

A. The judge wouldn't have allowed that.

Q. Okay. But I mean, would you have had a problem with the jurors handling the knife at trial?

A. That calls for speculation on my part, and I guess I don't really know. I do not want the jurors touching any piece of evidence other than maybe a photograph or something that they would need to touch. So I don't think in any case a juror should touch a knife or a gun. After all, they might stab each other. Who knows.

Q. You said that doctor -- I mean, Detective Wunderlich was wearing gloves when he handled the knife at trial?

A. I handed him gloves, yes. I said, Put these on. Those were my exact words.

Q. But you didn't hand them to him when he was handling the purple shirt. You handed them to him when he was handling the knife. Correct?

A. I handed him those gloves before he touched any exhibit. It was right at the beginning of his testimony. I thought, why not start him with gloves. Why interrupt his testimony with putting on gloves right in the beginning. And the beginning was the knife. That's when I started talking about the knife. And then from the knife I went into the bloody purple shirt he seized at the autopsy. He seized the knife and the purple shirt. And those were

the items that I was going to talk to him about when he testified. That's when I gave him the gloves, and that's why I put them on too.

Q. And that's because evidence with blood on it should be handled wearing gloves, right?

A. That's a matter of personal opinion. I just thought, you know, I don't know if I discussed it with him in advance, but the purple shirt was just loaded, drenched in blood. You could imagine. It was dried blood. And I didn't really care to touch it, and I knew or figured he didn't either.

Q. Let's talk about jury selection.

A. All right.

Q. There were over 100 potential jurors who responded to their summonses and showed up for this case, right?

A. Probably so. In fact, I think you're right. Had to have been a hundred. It was a death penalty case.

Q. Exactly. I'll tell you, does 131 sound right for a death penalty case?

A. Yeah.

Q. Okay. Of more than a hundred potential jurors, only a handful of them were black?

A. I don't know how many were black.
Q. You don't?
A. You tell me.
Q. Through alternates who went through selection of seven black members of the veneer. Did that sound right?
A. I know how many I struck. I had nine peremptory strikes. I struck three. Three of nine blacks -- not three of nine blacks. Three of nine people were black. Six of nine people were white. I struck six whites, three blacks. Leaving one black on the jury is the way it came out.
Q. We'll get to that, but I think you have those numbers reversed.
A. No. I think you have them reversed, actually.
Q. Okay. All right.
A. I know for a fact -- I read the Supreme Court opinion. I struck Juror Number 64, 65, and 72. Those were my peremptory strikes. And you know what a peremptory is?
Q. Yes.
A. Okay. I have nine strikes I can use. Okay? I got to strike nine. And I struck three

African Americans, and I struck six whites, leaving one African American on the jury.

And the Supreme Court has outlined my strikes. And they said that my strikes were lawful, the Missouri Supreme Court.

Q. So would it bother you if the numbers were reversed and you struck six black instead of --

A. Peremptory?

Q. Yeah.

A. I read the Supreme Court case. I think I have it with me right here.

Q. Okay.

A. And it's three. It's Number 64, 65, and 72. Now, were other blacks struck along the way because they couldn't consider -- for example, if you couldn't consider the death penalty as one of the options in the case, then you were automatically struck by -- whether you're black or white because you couldn't follow the law. The law was you had to be able to consider both penalties.

If someone said, I would only vote for death, they were struck by the court. If someone said, I can only consider life without parole,

then they were struck by the court.

Then after that's all done, if they couldn't follow the law for any reason, then they're struck by the court.

I don't know how many of them -- people, black or white, were struck on that basis. But once we got everyone that was qualified, there were apparently there were four left. I struck three of the four. And I gave my reasons to the Supreme Court, or the Attorney General represented those reasons -- well, the record showed what the reasons were, the three that I struck. And the Supreme Court affirmed the case and said there was no constitutional error. I struck properly.

In other words, I had race neutral reasons to strike the African Americans, which is required by the Kentucky v. Batson 19 -- I believe -- 84 case.

Q. Now, that was a very long answer, but I want to circle back to what my actual question was. And that was, would it be a problem if you had used six of the nine strikes on black jurors instead of white jurors?

A. You didn't say peremptory, did you?

Q. Would it have been a problem if you had

used six of your nine peremptory strikes on black jurors instead of white jurors?

A. Would it have been a problem? Well, if I did it, which I didn't, but if I did and the Supreme Court says it was lawful, then no, that's not a problem.

Q. Okay. Does that sound like a high number to you?

A. I struck three. Number 64, 65, and 72, and I have the case right here.

Q. Let's talk about those potential black jurors that you struck. You struck one of those jurors because she was an unwed mother, right?

A. Wait a minute. I struck -- why I struck them? Okay. Why I struck, I don't know. Look at the Supreme Court case. It outlines my -- it quotes me, I believe.

Q. Yeah.

A. Read it.

Q. Did you read the Supreme Court case?

A. Let me look at it now.

Q. No, no. I don't want you to read it right now. We'll do the questions. Did you read the Supreme Court case before you came in today?

A. Not today I didn't read it.

Q. Well, I mean as you prepared for today did you reread the case?

A. I read it last week. And that's how I remember that 64, 65, and 72, those numbers. You know, there's a 133. You said a 131. Each juror has a number, one, two, three, four, five. Well, we were already up to, you know, we used a lot of those jurors.

Q. All right. So one of the ones you remember was Juror Number 64?

A. I don't remember why I struck Juror Number 64. Nor do I remember why I struck 65. Nor do I remember why I struck 72. It's right there in the opinion, and it's in the record. It's in the record of the trial.

Q. Do you remember telling the Court that you struck Juror Number 64 because he looked very similar --

MR. SPILLANE: I'm going to object.

Q. (By Mr. Potts) -- to the defendant?

MR. SPILLANE: Objection.

Q. (By Mr. Potts) He reminded you of the defendant?

THE COURT: Let him finish his question. Then you can object.

MR. POTTS: I will say it again so we can get it on the record.

THE COURT: Thank you.

Q. (By Mr. Potts) Do you remember that you struck Juror Number 64 because he looked very similar to the defendant and reminded you of the defendant?

MR. SPILLANE: Are you done with your question?

MR. POTTS: Yes.

MR. SPILLANE: I'm going to object. The reasons are in the trial transcript. They're in the Missouri Supreme Court opinion. They're in the 8th Circuit opinion, and the witness has already said he doesn't remember.

THE COURT: Maybe he's using it to refresh his recollection.

A. If you show me the case, it will refresh my recollection. Show me that Supreme Court case, and I'll read it. It will tell you exactly why I did. Whatever I did, the Supreme Court said it was lawful. Not a violation of the defendant's constitutional rights. On all three jurors. And you know what? If one of them was messed up, if I made a mistake on one of those three, this case

would have been reversed in 2003.

THE COURT: Mr. Larner, wait for a question, please.

MR. POTTS: May I approach the witness, Your Honor?

THE COURT: You may.

Q. (By Mr. Potts) So I'm going to hand you -- this is just an excerpt from the trial transcript which is already in the record. This is Page 1586. I'm going to direct you to Lines 12 through 20. And you can read that quietly.

A. Are you talking about Juror Number 64?

Q. I am indeed.

A. Well, it starts on the previous page, actually. So I'm not going to read part of what I said.

Q. Well, you're more than welcome to read all of it. I was just directing you to the part where --

A. No. I'm going to read it all.

THE COURT: Let's not have a conversation. Let's have a question and an answer.

MR. POTTS: No problem, Your Honor.

Q. (By Mr. Potts) You're more than welcome

to read all of that.

A. Can I read it out loud?

Q. No.

A. I give many reasons, many reasons for striking that juror.

Q. Yes. And so one of those reasons, though, that you gave was that Juror Number 64 looked very similar to the defendant. Right?

A. Wrong. I want to read what I said on that one reason. You stated like part of it, you know, just like half of it or not even half of it. I know what it says. I see it right here. So you're wrong.

I said -- that's part of what I said. I said, He also to my view looked very similar to the defendant. He reminded me of the defendant, in fact. He had the very similar type glasses as the defendant. He had the same piercing eyes as the defendant. And I went on and on with additional reasons. That was one reason. But I gave many other reasons why I didn't like that juror and why I struck that juror. And the Supreme Court said, No problem.

Q. So when you said that he looked very similar to the defendant, these were two younger

black guys who looked alike. Right?

MR. SPILLANE: I'm going to object to mischaracterization of the testimony. He said that he had the same glasses and he had basically the same demeanor. Not that they were black guys that looked alike. He's mischaracterizing the testimony.

THE COURT: Thank you. Overruled. The transcript is the best evidence of what was said at trial. So I would prefer, Mr. Potts, if you could identify the page number and the line numbers of that transcript so the record is clear.

MR. POTTS: All right. Thank you, Your Honor. So right now I am talking about Page 1586 Lines 12 and 13.

Do you see where you say, He also in my view looked very similar to the defendant? Do you see that.

A. Read the rest of Line 13. You said you were going to read 12 and 13. You haven't done that.

Q. I promise we'll get there. I'm just going one sentence at a time.

A. Okay. One sentence at a time?

Q. Yeah.

A. To my view, he also to my view looked very similar to the defendant. That is a sentence I said.

Q. Okay. And so these were both young black men, right?

MR. SPILLANE: I'm going to object again. He said he was going to get there. He didn't get there. He started talking about both young black men.

MR. POTTS: How can I not explore what he meant by that statement, Your Honor?

THE COURT: We can't have a stipulation that they were both young black men at the time of the trial?

MR. SPILLANE: Yeah, I think that's fine.

THE COURT: I mean, I don't know how it's relevant but --

MR. SPILLANE: Yeah.

THE COURT: Okay. So why are we objecting? You may answer.

MR. SPILLANE: He's saying that's the reason why he struck him, and he's never said that.

A. So he did look very similar to the

defendant, yes.

Q. (By Mr. Potts) And by that, they were both young black men; right?

A. They were both young black men.

Q. Okay.

A. But that's not necessarily the full reason that I thought they were so similar. Not because he was black and the defendant was black. I mean, if the juror, potential juror was black and the defendant was black and I struck him, that would have been kicked out by the Supreme Court in a second. That would have come back for a complete retrial.

Q. They both wore glasses?

A. Similar type glasses. Not just glasses. They looked to me like they were identical. They were similar type glasses, yes. That was the second reason.

Q. So they liked the same brand of glasses potentially. Is that right?

A. I don't know what they liked. All I know is the glasses were very similar. And I said something more about their similarities, several things.

Q. And they both had goatees, is that

right?

A. I don't know what page you're referring to on that. I said he reminded me of the defendant. Had similar type glasses. He had the same piercing eyes as the defendant. I said that juror had piercing eyes, and so did the defendant. I thought they looked like they were brothers.

Q. They looked like brothers?

A. Familial brothers.

Q. Okay.

A. I don't mean black people. I mean, like, you know, you got the same mother, you got the same father. You know, you're brothers, you're both men, you're brothers.

Q. So you struck them because they were both young black men with glasses?

A. Wrong. That's part of the reason. And not just glasses. I said the same type glasses. And I said they had the same piercing eyes.

Q. So part of the reason was that they had piercing eyes, right?

A. The same piercing eyes.

Q. Same piercing eyes. Part of the reason was they had the same piercing eyes? Right?

A. Yes, part of the reason.

Q. Part of the reason was that they both had the same type of glasses, right?

A. That's part of the reason.

Q. Part of the reason is that they were both young. Right?

A. I didn't say about the age. I said in my view he looked very similar to the defendant. I didn't talk about age. But I think they were about the same age, they looked to me. They looked like they were brothers.

Q. And part of the reason is that they were both black?

A. No. Absolutely not. Absolutely not. If I strike someone because they're black, under the Supreme Court of the United States Batson and other cases, then the case gets sent back for a new trial. It gets reversed if I do that.

Q. Now I want to direct you to the same page, 1586. Do you see Lines 8 through 11? And I'll let you read those.

A. Yes.

Q. So that juror was wearing a shirt with an orange dragon and Chinese or Arabic letters on it. Right?

A. That's right.

Q. All right. Was the defendant also wearing that type of shirt at trial?

A. No.

Q. No. Okay. Now, I want to now direct you to Page 1586. Let's look at Lines 9 through 11. I'm going to let you read those.

A. To myself or out loud?

Q. You can read it to yourself.

A. All right. I see it.

Q. Okay. The juror was wearing a large gold cross outside of his shirt. Right?

A. That's part of the sentence. But you got to read it all. You're taking it out of context.

Q. No. No.

A. He had a large gold cross very prominent outside his shirt, which I thought was ostentatious looking.

Q. Yeah.

A. That was my reason. That was another reason why I didn't like him.

Q. Was Mr. Williams wearing a large gold cross outside of his shirt?

A. No.

Q. Okay. Now, let's also look at Lines 18

through 20. The juror was wearing gray shiny pants, right?

A. With that wild shirt, yes.

Q. Yeah, with the wild shirt. Was the defendant wearing gray shiny pants at trial?

A. No. But the juror was similar in the other ways that I said.

Q. Okay.

A. Not every single way. Didn't have the same shoes on. It's not every single way were they the same.

Q. And let's actually go back to Page 1585, and let's look at Lines 22 through 25. Juror Number 64 also had two earrings in his ear. Right?

A. In his left ear.

Q. Yeah?

A. Which I went on to describe why I don't like that.

Q. Did Mr. Williams have two -- let's see. I want to make sure -- two earrings in his left ear?

A. I don't think so. I don't have any reason to believe that. If he did, I would have said they both had two earrings.

Q. Okay. So to summarize, this was a young black man --

A. I'm sorry, but you didn't finish the sentence about the earrings. You cut it off right in the middle.

Q. You can have the State ask you some more questions.

MR. SPILLANE: I ask he be allowed to finish his answer, Your Honor.

THE COURT: He answered the question. Overruled.

MR. POTTS: To summarize, Juror Number 64 was a young black man who was wearing a shirt with an orange dragon and either Chinese or Arabic letters with a large gold cross on his chest, gray shiny pants, glasses and had a goatee, and he reminded you of the defendant.

A. There was more than that. You haven't hit all the reasons. I told you about the piercing eyes the same as the defendant. I said the glasses were similar-type glasses as the defendant. I said that the cross, the large gold cross, very prominent, which I thought was ostentatious. And I also said that -- I gave a lot more reasons, actually. A lot more.

Q. Now, during voir dire in this case did you take notes?

A. Very few notes. Very few, but yes, I took a few. I was busy talking to people. It's hard to write and talk, but I took a few.

Q. You did? Okay. I mean, at the same time, you have a 131 people potentially whose answers you have to be managing to these questions. Right?

A. As best you can, yeah.

Q. Best you can. What did you do with those notes?

A. Saved them. You probably have them.

Q. Would you be surprised if the prosecuting attorney's office could not find those notes in their box?

A. I haven't been with the prosecutor's office in ten years. Since then you've done DNA. I wasn't involved in any of that DNA in 2015. I have no idea what happened to that file since May 1st, 2014. I have been gone, retired. That's over ten years. I have no idea what happened to that. I would like to see it, though. I'm curious myself about those notes. Actually, the prosecutor's office is the one trying to overthrow

the conviction. You guys should have the notes.

Q. Have you ever been found to have violated Batson v. Kentucky in another case?

A. Now let me say this perfectly clear. Never.

Q. Never?

A. Never.

Q. So no judge has ever found that you have failed to provide a race neutral reason for using a peremptory strike on a black juror?

A. I thought you said have I ever been reversed.

Q. I said, Has any judge ever found you have violated Batson in another case?

A. Oh, okay. Okay.

Q. So different answer?

A. Yeah.

Q. Okay. So you have been found to have violated Batson?

A. Yes and no. It depends what -- can you be more specific?

Q. Well, you were the trial prosecutor in McFadden case, right?

A. Yes.

Q. Judge Ross was the trial judge in that

case, right?

A. That's right.

Q. And Judge Ross found that you had failed to provide race neutral reasons for exercising peremptory strikes on black jurors, correct?

A. On three black jurors, that's right. I disagreed with him, but he's the judge. And we put those jurors back on the jury. And they were on that case, and they voted death. They were put back on that jury. But yes, I was wrong on that. But it was not by a -- I've never been reversed on Batson. And that's what I thought you were asking. I tried all those cases. Most of them I won, almost all. And they were all appealed on Batson. If any black was struck, they appealed on Batson.

In all those cases, and I'd say there's probably 25 to 50 that were appealed on Batson, none of those by any court, appellate court, reversed me on Batson.

On that one case Judge Ross, he thought I didn't have sufficient reasons. He actually, he told me that, he says, before I even struck them he said, if you strike them, I'm going to put them back on. And I struck them anyway because I

thought I was right. And you know what? He put them back on, and they stayed on, and they voted for death.

Q. You struck them anyway?

A. Yeah, because I thought he was wrong. But he's the judge, and he ruled that I was wrong. And I don't have a problem with his ruling at all. I mean, I did at the moment, but it is what it is.

Q. So as we have been sitting here talking, you know, is it still your memory that you only used six of your nine peremptory strikes on black jurors in the Williams case?

A. No, no. Three.

Q. Sorry. I actually did not mean to do that. It's still your memory that you only used it on three black jurors in this case, right?

A. That's what the Supreme Court opinion says.

Q. Okay. So I want to talk about how you selected the jury in this case. Okay. So we already went through this a little bit, but the reason the potential jury pool is so large in this case is because it's a death penalty case. Right?

A. Correct.

Q. And it's more difficult than other

felony cases to get a proper jury pool in a death penalty case, right?

A. That's correct.

Q. Because some people have pretty strong feelings about capital murder, right?

A. One way or the other.

Q. One way or the other. There's a name for the type of jury that's eligible to get seated, right?

A. To get what, sir?

Q. That's eligible to get seated in a capital murder case, right?

A. There's a name for it?

Q. A death-qualified jury, right?

A. I would say that's -- I've used that term.

Q. Okay. So typically jury selection in a death penalty case goes through a couple different phases, right?

A. Tell me what you mean.

Q. Yeah. So starting out first you need to eliminate jurors who have potential conflicts, you know, for example, work or family conflicts that are going to prevent them from being able to serve on the jury; right?

A. That's right. It was a sequestered jury.

Q. Okay. And then next you move on to death qualification with the remaining jurors, right?

A. If that was the second thing the judge did, it could very well be.

Q. Fair enough. That's what they did here, they moved on to death qualification for the remaining jurors.

A. Okay.

Q. And then finally after that, after any more strikes for cause you moved on to a more general voir dire with the remaining jurors; right?

A. That's right.

Q. Okay. So what does it mean to have a death-qualified jury?

A. That meant that the jurors could consider death or life without parole. Both. If they could only consider death, if that's the only one -- some people say an eye for an eye and if you kill someone you're going to get death. You know what I say to that? You're not on the jury. I don't say it to them, but I tell the judge, get

rid of them. And so does the defense attorney. They don't want a juror like that either. That's against the law.

Q. That means all jurors, including black jurors, have to be death qualified. Right?

A. All jurors must be able to consider both punishments. That's the law.

Q. And you're kind of getting into this, but there's a sequence of questions that you typically ask jurors to figure out whether they're fit to serve on a death penalty jury. Right?

A. I mean, there's a ton of questions that you ask them.

Q. Yeah.

A. And you ask every juror the same question.

MR. POTTS: And if you'll give me one moment, Your Honor. I'm thinking this will help. Don't worry, it's just a standup chart. Can you see that, Your Honor?

THE COURT: I can.

MR. POTTS: You might have to go in the jury box, Mr. Spillane. I'm sorry. I'm not trying to do that to you.

Q. (By Mr. Potts) All right. So let's go

through how you pick jurors for a death penalty case. Okay? I'm going to put a title up here jury selection. Okay?

So first of all, to serve on a jury in a death penalty case a juror can't be categorically opposed to the death penalty; right?

A. Right. They have to be able to consider both punishments.

Q. Okay. I put death right there. Next, a juror alternatively can't believe that the death penalty should be imposed in every capital murder case, right?

A. Correct.

Q. Meaning they have to be able to consider life without parole?

A. They have to be able to consider both punishments. If they're only going to vote death, even though I might like that juror as a prosecutor, that's illegal, and I know that. I ask them if they can consider both punishments. I always ask every juror, can you consider this one and can you consider that one. Both of them. I don't just pick one.

Q. Okay. So in other words, a death-qualified juror must be willing to consider

both types of potential punishment?

A. Two punishments that are allowed under the law for murder first degree.

Q. Now, also the juror needs to be willing to weigh aggravating and mitigating factors to determine whether the death penalty is appropriate, right?

A. That's right.

Q. Okay. There's some other problems that can happen with jurors. Jurors must be willing to -- must agree to follow the Court's instructions at trial. Right?

A. Every juror in every case, that's correct.

Q. Yep. And jurors must be willing to hold the prosecution to its burden of proof, right?

A. Beyond a reasonable doubt is the burden of proof, and you are right.

Q. Okay. Okay. Also jurors need to wait to hear all the evidence before they make up their minds?

A. Yes.

Q. Right?

A. Yes.

Q. Now, as a prosecutor do you generally

want more or fewer death-qualified jurors?

A. Well, depends what you mean by death qualified. What I mean by death qualified is they can consider both punishments and they'll keep their mind open on both punishments until the absolute very end. They can't make up their mind before that which way they're going to go.

Q. Yeah. So maybe another way to put that is you don't want it to be automatic one way or the other?

A. Correct.

Q. Right?

A. That would be illegal.

Q. That would be illegal. Now, throughout jury selection there are certain ways to protect the jurors that you potentially want, right?

A. You'll have to give me an example.

Q. Well, for example, you can ask those jurors leading questions instead of open-ended questions. Right?

A. I think both sides can do that.

Q. Yeah. No, I'm saying both sides can do it.

A. Yeah.

Q. Okay. And also you can rehabilitate --

A. I don't know what you mean by leading. Are you, like, putting words in their mouth? Is that what you mean by leading? You don't put words in the juror's mouth. You want to hear their honest opinion whether they can do it or not.

Q. You can ask them a direct yes or no question, right?

A. Yes.

Q. Like the one I just asked you?

A. Yes.

Q. Okay. Now also you can rehabilitate those jurors afterwards if they potentially give an answer that's not favorable to you when they're being asked questions by defense counsel, right?

A. I question the jurors first, and I'm done. Then the defense attorney questions the jurors, and they're done. I don't get another shot at the jurors. I don't get another chance.

Q. You're absolutely right. I misspoke. You can rehabilitate jurors after they give you a question that maybe wasn't the perfect answer but you still think they might be a good juror for you, right?

A. I don't know what you mean. You have to

give me example.

Q. Okay. No. That's totally fine. So let's start by looking at your questioning of Juror Number 8.

MR. POTTS: Your Honor, this is just an excerpt from the trial transcript Pages 205 and 206.

Q. (By Mr. Potts) Are you able to see up on that screen?

A. No.

Q. Okay. I do have a courtesy copy for you right here. There you go.

A. Thank you.

Q. So I have blacked out the names of the jurors for the ones I'm putting up on the screen.

A. Okay.

Q. But you should have the un-redacted copy in front of you. Now, let's go ahead and walk through these questions. So one of the things that you're doing here is with Juror Number 8 you're asking can you legitimately consider imposing the death penalty. Right?

A. In the proper case.

Q. Yeah, in the proper case?

A. Yes.

Q. Yes?
A. Yes.
Q. So that's the very first question up here on the chart, right? I'm talking about the chart that's right here. Whether they're willing to sentence someone to death?
A. Okay. Your question is what, please? I'm sorry.
Q. All right. And so --
A. Oh, yeah. Okay.
Q. Yeah, that's Line 7 through 9. Sorry. And then later in Line 17 through 22 you're asking whether the juror can also consider life without the possibility of parole. Right?
A. Yeah.
Q. Okay. You clarify on -- at the bottom of the Page 24 and 25, you consider both punishments. Right? Then you ask the juror whether she could stand up in open court and announce the verdict if that was the death penalty. And that's Lines 2 through 4. Do you see that?
A. Yes.
Q. Then in Lines 6 through 11 you're clarifying that the burden of proof is always with

the State. That's one of these questions right here. Right?

A. That's right.

Q. Burden of proof?

A. I clarified that.

Q. Okay. Now, did you ask -- you didn't ask any specific questions about following the judge's instructions that you can see, did you?

A. I don't know. I'd have to read all the testimony from that witness -- that jury, I mean.

Q. I thought you said that once you're done with the juror, you're done; right?

A. I ask questions until I decide I have gotten answers from the jury, juror, that are -- that we know what they meant.

Q. Okay.

A. Sometimes they equivocate. You have to dig a little deeper.

Q. Did you ask the juror whether she'd be able to weigh aggravating against mitigating factors?

A. If there's more aggravating than mitigating, could you still consider life without parole. Yes, I asked her that.

Q. You asked whether she could weigh.

A. Do I use the word weigh?
Q. No, you don't. Right?
A. No. I use -- I compare them. If there's more aggravating -- even if there's zero mitigating. Only aggravating could you still vote for life without parole. And she says, Yes.
Q. Okay. And did you ask the juror whether she would wait to hear all the evidence before making up her mind?
A. What line?
Q. I'm asking you. You can review that. Did you ask her?
A. About weighing?
Q. No. About whether she would wait to hear all the evidence before making up her mind.
A. The judge instructs her of that. I don't have to instruct her. But I don't know that I said it to that juror. The judge instructs the entire panel. There's an instruction of law on that, and the judge gives it to the jury.
Q. And I'm just asking whether you asked her the question?
A. I don't see that I did with that --
Q. Okay.
A. -- particular case. I did say, If

there's only bad stuff and that is only aggravating circumstances and zero mitigating, you still have to be able to consider life even if there's nothing on the defense side, even if they got nothing, you still got to consider life without parole, and she said, Yes.

Q. Did you ask her whether she would automatically decide one way or the other?

A. I asked her if she could consider both punishments, and she said, Yes. So that to me means she wasn't automatic either way.

Q. I can give you a checkmark on that one. So after looking at that do you know whether Juror Number 8 was a black or a white juror?

A. No clue.

Q. Do you remember whether Juror Number 8 made the jury?

A. No. I don't know.

Q. Well, I'll actually go ahead and represent to you Juror Number 8 was a black juror.

A. Okay.

Q. All right. And we can agree that you do know how to ask some of the right questions to black jurors. Right?

A. No. I know all the right questions to

ask for every juror or I wouldn't have been trying this magnitude of a case, in my opinion.

Q. Let's go ahead and look at some of the other jurors. Now, as part of your presentation to the jury in this case you gave them an analogy about three doorways. Is that an analogy that you've used in other cases?

MR. SPILLANE: I'm going to break in now that his question is finished and object to this whole line of questioning. It has nothing to do with Batson. The Batson questions were asked and answered. The Missouri Supreme Court found he did nothing wrong. There's nothing that can be done about that. Asking about death qualification is just irrelevant.

MR. POTTS: Under Flowers v. Mississippi and Foster v. Chapman I'm allowed to ask him about his method of questioning jurors to determine whether there's a discriminatory purpose.

THE COURT: Thank you. The Court has reviewed 1,936 pages of voir dire. The Court has reviewed all the opinions in this case. This is not helping this Court with your motion. Objection is sustained.

Q. (By Mr. Potts) When you were

questioning black jurors, did you ask them more frequently than white jurors whether they would be willing to stand up and announce their verdict in open court?

A. No. The reason I would ask that is because if someone can stand up in open court and say that they're voting for death, then they would be a good juror for the State. Because some people say, oh, I could never do that. But, you know, if you're the foreman, you have to do that. So if they can't do that, then they can't follow the law. So I don't want someone that can't stand up and announce in open court in front of everybody that they could vote for death.

THE COURT: Your answer no stands. The rest of it I didn't need.

A. Okay. Sorry.

Q. (By Mr. Potts) Out of 100 plus non-black jurors do you know how many you asked whether they would be willing to stand up in open court and announce the verdict of death?

A. No, I don't.

Q. Would five sound right to you?

A. I have no clue.

Q. Juror Number 2, Juror Number 13, Juror

Number 31, Juror Number 44, and Juror Number 53.

MR. SPILLANE: I'm going to object to counsel testifying. He says he has no clue. So counsel gives him the answer. That's leading as well as counsel testifying.

THE COURT: I know he's trying to refresh his recollection. I'm giving him a little leeway. I'm sure his answer is going to be the same as he did just a minute ago.

A. I don't know who those jurors were. It doesn't say whether they're black or white or another race.

Q. By contrast, when you were questioning white jurors did you reassure them more frequently than black jurors that there would be 12 people who needed to agree on the verdict?

A. I have no idea how many times or to whom I asked that particular question.

Q. Do you know the specific number of white jurors that you reassured about needing 12 people to agree on the verdict?

A. I told every juror in voir dire that all 12 had to vote the same way to have a verdict. It's call unanimity of the jury. There's an instruction of law that they got that specifically

says that. When they went back to the jury room they had that instruction in their hand.

Q. Did you tell that specifically to Juror Number 11, Juror Number 18, Juror Number 21, Juror Number 22, Juror Number 26, Juror Number 27, Juror Number 29, Juror Number 30, Juror Number 32, Juror Number 34, Juror Number 35, Juror Number 41, Juror Number 43, Juror Number 50, Juror Number 63, Juror Number 67, Juror Number 70, Juror Number 71, Juror Number 106, and Juror Number 126?

MR. SPILLANE: Now that the question is finished, I'm going to object. He already said he doesn't remember. Reading a list of numbers isn't going to change that.

MR. POTTS: I asked him whether he knew the specific number, Your Honor.

A. I do not.

THE COURT: Answer stands. Objection overruled.

Q. (By Mr. Potts) How many black jurors did you reassure that there would be 12 people who had to vote that way?

A. I have no idea. I don't know who the blacks and the whites were.

Q. Well, you were asking them questions;

right?

A. But I didn't know if they were black or white. I mean, I didn't care. I could care less if they're black or white.

Q. Would it surprise you if you didn't tell a single black juror that there would be 12 people who had to agree on the verdict when you were questioning them individually?

A. If the record reflects that, then I would agree. If not, I don't agree.

Q. Okay. So the record would reflect that the message to the non-black jurors was that there was safety in numbers. Right?

A. Wrong. All 12 had to agree for a verdict whether it's death, whether it's life, or whether it's not guilty. All 12 have to agree. The jurors were all told that at one point or another during voir dire by me, every one of them.

Q. And the message to the black jurors was that they were all on their own?

A. No. Are you kidding? What are you talking about? I don't have any idea. So the answer is no.

MR. POTTS: I'll pass the witness.

THE COURT: Cross-examination.

MR. SPILLANE: Yes, sir.

CROSS-EXAMINATION BY MR. SPILLANE:

Q. Thank you for coming in, sir. I was going to ask you about Laura Asaro. Could you tell me about your interaction with her in relation to the reward? Tell me what happened when she asked for it, if she ever asked for it, that sort of thing.

A. I don't recall talking about the reward with her. I don't know when, at some point it came up. I think she got $5,000 afterwards, but that wasn't the focus of my conversations with her. I don't recall whether I mentioned it or not. She didn't know about the reward when I first talked to her, as I recall.

Q. I'll ask you a better question. Do you recall her ever asking you for a reward?

A. Never.

Q. Do you recall how Dr. Picus ended up giving her a reward?

A. Yeah. I think he gave her $5,000. It was after the trial.

Q. Right. But I mean, did you or Mr. Magee say, hey, give her a reward because she earned it by showing us the things?

A. I thought she earned it. I thought the other fellow earned it as well. So they got five. That was my opinion. But ultimately it was up to Dr. Picus. It was his money.

Q. Right. But you didn't feel that it was a motivating factor for Ms. Asaro, if I understand you correctly, because she came forward before the reward was ever discussed?

A. That's correct.

Q. Let me ask you something that he never got back to that he said he was going to. Why did you think Mr. Cole and Ms. Asaro were such good witnesses?

A. They knew things that the killer told them that no one else knew. For example, Henry Cole said that the defendant told him that he jammed the knife in her neck and he twisted it and left it in her neck. And that's exactly how they found the body. And the knife was bent. And no one knew that. That was not on the news. That was not in the newspapers. The only people that knew that were the police. And Cole had written it on a piece of paper while he was in the jail. He wrote down a list of facts that the defendant said. And every one of those facts, as I recall,

and there were a dozen of them approximately, were true.

I couldn't catch Cole in anything that wasn't true. I couldn't catch him. I was trying to catch him if I could, because they were going to catch him. I couldn't find anything that Cole said, nothing, that was false. I'll continue with what Cole said.

Q. And why was Ms. Asaro such a good witness?

A. She was amazing. She said -- first of all, she was with the defendant when he sold the computer to Glenn Roberts. She was there in the car. He walked up to Glenn Roberts' house and he sold him the computer. She took the police to the house where the computer was. She said, The guy that lives in that house has the computer. And the police knock on the door. Glenn Roberts comes to the door and says, What can I do for you? Officers say, Do you have a computer? He says, Yes, I do. The police said, Bring it to me. He brought it to them, and it was the computer. They said, Who gave it to you. And he said, Roberts said Marcellus Williams.

Marcellus was staying about three houses

down living out of his car. Inside his car was Mrs. Gayle's calculator and Post Dispatch ruler in his car 15 months later. The computer, these are the things taken at the crime. The computer was found at Glenn Roberts' house about three doors down from his grandfather's house where he was staying in a car, a Buick, on the front yard or the side yard.

Q. In 2001 had you ever heard of touch DNA?

A. No.

Q. When was the first time you heard of it?

A. In this case. Probably about 2015 maybe when they asked for additional DNA. They asked for DNA testing on the handle. And I thought, what DNA? And someone said, well, there's possibly something called touch DNA. If you touch something, you might leave DNA. Used to not be that way.

Q. Let me ask you this: What was your procedure in the prosecuting attorney's office for dealing with evidence, particularly weapons, that had already been fully tested in your view? Did you wear gloves?

A. No. No reason to.

Q. How many cases besides this one did you

do where you handled the murder weapon or some other evidence that you didn't wear gloves because testing was done?

A. Probably all of them.

Q. And how many would all of them be?

A. Well, I don't know how many cases had guns and knives, but the majority of my -- most of my cases, I would say, were homicides. So they could have very well involved a knife or a gun. And if it had been tested -- sometimes there's no issue that you can touch it. There's no reason not to touch it. Who knows that someone is going to come in 17 years later or 15 years later and ask for a DNA test when they knew the killer wore gloves?

Q. Let me ask you this. Even if you hadn't known that he wore gloves, the standard procedure wouldn't have been to wear gloves after everything was fully tested. Am I understanding you correctly?

A. You are absolutely correct.

Q. Let me ask you about the packaging. You looked at it earlier today in the evidence. I guess, I say the evidence room, but it was basically the jury room. And did that refresh

your recollection of what the evidence looked like when you saw it?

A. Yes, it did.

Q. Tell me how?

A. Well, if you read the transcript on Page 2261, Detective Wunderlich talks about how it was packaged in front of the jury. He said that when the knife was pulled out of victim's neck, it was handed to Detective Wunderlich. Wunderlich put it in an evidence envelope, sealed it, and took it over to the fingerprint Krull.

Krull then opened up the package and tested the handle for fingerprints and found none on that knife handle anywhere.

He then sent it over to the lab, St. Louis County Lab, and they then tested it for blood, which they found.

Then the lab put the knife in a new package, a box. So when it was -- first you had Detective Wunderlich putting it in an evidence envelope, and then you had the lab transferring that knife after they had tested it into a box. I saw that box today. That refreshed my recollection. I remember the box. The box was longer than the knife. The whole knife was

inserted into the box and sealed. Also in the box was the evidence envelope that was brought by -- it was put -- initially used by Detective Wunderlich. It was all there. The box is what I saw today. And that refreshed my memory about the box. I forgot about the box until I read it in the transcript. And I said to the witness at the trial, I said to Detective Wunderlich, What's this box? And he said, That's the box that the lab repackaged the knife in after they tested it. And that's how I got it from U City Police.

Q. Am I understanding your testimony correctly that the knife was inside a sealed package inside a sealed box when you got it? Is that accurate?

A. The package, the evidence envelope was folded. It wasn't inside the evidence envelope. The evidence envelope was in the box, and the knife was in the box.

Q. And the box was sealed?

A. The box was sealed.

Q. And the knife was completely inside the sealed box?

A. Completely. Completely concealed.

MR. SPILLANE: Would it be any use to you if I showed you the box and the package or everything or not? Would that be any use to the Court?

THE COURT: No.

MR. SPILLANE: All right.

THE COURT: I saw it this morning.

MR. SPILLANE: That's what I wanted to know.

Q. (By Mr. Spillane) As far as preservation of evidence at trial, did you make an effort to preserve every piece of evidence that you thought could possibly be used in the future?

A. No. Everybody touched that laptop, for example.

Q. Okay. Well, let me see about things that could be tested. Did you make an effort to preserve the fingernail clippings?

A. They were put in a package by the medical examiner that cut the fingernail clippings off the victim and put them in some kind of a package. And the defense asked for half of those to test them for DNA. And we gave them half. And the DNA came back being the victim's DNA only. It was her nails. It was her DNA. There was nothing

else on those nails.

My half of the nails I didn't do anything with them. I didn't test them. I figured they tested them. Why do I need to retest them?

Q. Well, my recollection of the testimony, and you tell me if I'm wrong, is that when you were looking at your fingernail clippings, you said, I'm not going to open those because I'm not wearing gloves and I don't want to contaminate them?

A. That's true. I did say that.

Q. And so you were making an effort to preserve evidence that you thought might be useful in the future?

A. If they would have let me open those nails without gloves, I would have done so. But the defense attorney said, Don't do it. Don't open those nails. And then he asked the judge about that. And I said, Well, I'll ask the witness, the expert witness on the DNA what her opinion is. And she said, You really shouldn't open those nails unless you've got gloves on. And I said, Fine.

Q. Let me ask you this: Your testimony is

you were walking around that trial holding the knife. I think at one point you said, The knife is in my left hand. You handed it to Detective -- well, to Detective Krull. Did defense counsel at any point jump up and say, no, bad, why aren't you wearing gloves?

A. On Page 2313 Line 17 and 18, I walk up to Detective Krull and I ask him, I say, Let me hand you State's Exhibit 90, comma, a wood-handled knife. I handed it to him. I said, Let me hand you. He didn't have gloves on, and neither did I, on that witness.

Q. And nobody said anything?

A. No one said anything.

Q. And they could see your hands that you weren't wearing gloves?

A. That's correct. And they didn't ask for any tests as well.

Q. And it was always your practice -- I hate to beat ground that's already been plowed here -- that you never wore gloves on a weapon after it was tested in all of your trials because there was no point in it?

A. That's correct.

MR. SPILLANE: Does the Court have any

questions in case I missed something?

THE COURT: No.

MR. SPILLANE: Oh, maybe I did miss something. Oh, okay. I am told that I did miss something.

Q. (By Mr. Spillane) You talked earlier on direct about a mistake in the affidavit. And I think they were going to come back to that, and I'm not sure they did. Could you tell me about the mistake in the affidavit and what the actual truth is?

A. I referenced that in my testimony. I said I made a mistake. When I did the affidavit I said that when I received the knife it was -- the handle, the knife handle was exposed, not completely concealed but exposed so that anyone could pick it up. You know, the knife handle was just there. I confused that with another death penalty case I had where a guy used a knife in the kitchen to stab a woman, and he's been executed.

Q. Roberts?

A. Roberts. Michael Roberts. About five or ten years before this murder Michael Roberts took a knife from the kitchen, a butcher knife, just similar to this knife, and he killed a woman

who lived in the house, similar to this case. And that knife was exposed. When I got that -- but it wasn't a question of who did it. That was not a who did it. That was a psychiatric case. Not a whodunit case. That knife was never tested, period. But it was sticking out of the container that it was in. It was an evidence envelope, and the handle was sticking out. I thought that was very odd.

I confused that case with this case. In my affidavit I said that the knife was exposed, the handle. I'm wrong, and I admit I'm wrong. I saw what it was exposed in today. The box. I read the testimony from Detective Wunderlich, and it was the box.

Q. And the triangular box that's in that bag on the table is what it was in when it came to you and it was sealed?

A. That very box.

Q. You recognize the same box?

A. Absolutely do. I can look at the writing on the box too.

Q. It's not necessary. I don't want to take it out and be accused of --

A. Same box.

Q. That sounds good. Let me ask you about Purkett v. Elem, your St. Louis US Supreme Court case. Tell me about that.

A. Well, that was a Batson issue. It was -- in fact, it happened in this courthouse in Division 6 back in around 1990 or so. It was a -- I struck two African Americans, and the defense attorney objected to that. It went all the way up to the United States Supreme Court on two witnesses that were black.

The United States Supreme Court affirmed me, affirmed the case and said those strikes are proper. The US Supreme Court, on a robbery second degree case. With Batson it's that important that it had to be -- it went all the way to the Supreme Court. I won that one.

Q. Do you remember what reasons you struck them for?

A. Well, the one African American had long hair, unkempt long hair, shoulder length or longer and he had a goatee. And I said that that hair looks suspicious to me.

Back in the day people didn't wear -- men didn't wear their hair shoulder length. And the other juror, as I recall, he had a goatee as

well and his hair, I don't remember what I said about his hair, but I said that it looks --

Q. I think it was unkempt.

A. Unkempt.

Q. I'm not sure.

A. I didn't like the hair. There was no one else in the courtroom on that case that had facial hair. I picked the two people that had the beard, the goatee. I didn't like the way that looked. And it looked suspicious to me. And the long, unkempt hair looked suspicious to me. And Supreme Court said, That's fine.

Q. Because it's race neutral?

A. It's race neutral. It had nothing to do with race.

Q. Earrings, glasses, I'm jumping around, don't have to do with race. Unkempt hair doesn't have to do with race. That's race neutral.

A. And the Supreme Court said that.

MR. SPILLANE: I think I'm done if I haven't missed anything else.

THE COURT: Mr. Jacober, do you have anything else?

CROSS-EXAMINATION BY MR. JACOBER:

Q. Hi, Mr. Larner. Matthew Jacober on

behalf of the prosecuting attorney's office.

You testified earlier that you didn't have a clear recollection of the reasons behind the motions for continuance that were filed by the defense in the month prior to trial. Is that correct?

A. Yes.

Q. I would like to read from the motion for you. Specifically this is Paragraph 4(B). On May 1st, 2001, the State advised defense counsel -- I'm sorry. This is the verified motion for continuance filed on May 7th, 2001. I'm actually looking at 4(C), not 4(B). I apologize.

Defense counsel has made numerous requests to the Missouri Department of Corrections for a complete copy of defendant's incarceration records. These incarceration records contain both psychiatric and medical records needed for the preparation of the penalty phase by defendant. These records are particularly important for mitigation and experts retained by defense counsel for consultation and preparation for the penalty phase.

I know you don't have it in front of you, but do you have any reason to doubt that I

read that accurately?

A. I'll trust you on that.

Q. Okay. This was argued at the hearing on the motion for continuance. Do you recall that?

A. If you say so. I don't dispute what you're saying. I mean, it could have happened that way.

Q. Do you recall telling the defendant's counsel at that time, Well, I have those records. You can just come get a copy from me?

A. No, I don't remember that. I probably had them, if that's what the record says.

Q. And you just didn't volunteer that you could produce them to the defendant at that time?

A. If they knew I had them, all they had to do was ask for them. They came to my office and looked at every single exhibit that I had. I had 350 or more exhibits. And the defense attorneys, Green and McGraugh, two gentlemen who are now judges, came to my office and they looked through all my exhibits that they wanted to. They had permission. That's under the law. I have to do that. Supreme Court Rule 25.03, the rules of discovery, I have to let them come and examine or look at my exhibits.

I also gave an exhibit list which listed every single exhibit. Number 90 happens to be the knife. I had 1 through 350. I gave a copy to him, defense attorneys. I gave a copy to the judge.

So they looked at all my exhibits. They would have seen my -- if I had a serial record, they would have seen it.

Q. And if you could answer my question. My question is: Did you say, I have those records. You can have them? Not whether they could come and get them. I'm asking if you volunteered them?

A. If that's what the record says. I don't recall if I said what you just quoted. If you say so, okay.

Q. That motion was denied by the court on May 9th, 2001. Then a supplemental verified motion was filed on May 25th, 2001. And in that supplemental motion on Paragraph 4 -- I'm sorry. Paragraph 5 at the time of the drafting of this motion Department of Correction records on defendant still remain lost. Volume 2 of defendant's Department of Correction records cannot be found by the custodian of the Missouri Department of Corrections. The last entry for the

whereabouts of the records are that they were last checked out to St. Louis County Justice Center. The absence of these records has prejudiced the defendant in that they would contain information not only to defendant's behavior and conduct while in the custody of the Department of Corrections but would also contain mental and psychological evaluations of the defendant.

I'm not going to read the rest of it. Well, I will. This information is not only relevant to rebut the aggravating circumstance of the State whereby it alleges the defendant does not adjust well to incarceration and future dangerousness but would be relevant as proof of mitigation the defendant does, in fact, adjust well to a structured environment as necessary for defense expert Dr. Cunningham to evaluate and offer opinions as to the character and mental makeup of the defendant.

That motion was heard and denied on --

MR. SPILLANE: Is there -- I'm going to object, Your Honor. Is there a question here someplace? He's just reading.

THE COURT: Oh, I think he's trying to aid the witness. I mean, he doesn't have the

motion in front of him so I think he's just trying to circumvent handing it to him and having him read it.

MR. JACOBER: That's correct, Your Honor.

THE COURT: Overruled.

Q. (By Mr. Jacober) That was heard and denied on May 25th. Do you recall at that time telling the defendant, defendant's counsel, I have those records, you can just come and get them from me?

A. No. You'll have to show me that.

MR. SPILLANE: I'm going to object now that the question is over. This is completely irrelevant. The Court struck the continuance claim from the pleading. This has nothing to do with anything except the claim about the continuance.

MR. JACOBER: Judge, this still weighs into the ineffective assistance of counsel claim which remains before the Court. It was pled in the original motion. And under the statute every claim that is still before the Court is one that the Court can rule on in this matter.

MR. SPILLANE: If I could respond, Your

Honor.

THE COURT: You may.

MR. SPILLANE: The ineffective assistance of counsel claim is two things. Not better impeaching Ms. Asaro and Mr. Cole with their family members and friends and not putting on different mitigating evidence. It has nothing to do with this.

MR. JACOBER: This goes directly to mitigating evidence, Judge. They reference mitigation a number of times in this motion.

THE COURT: As I have indicated before, I'm not happy with the verbiage in this statute, especially when there's no definition of what information means. So I'm going to go ahead and allow it. But you're close on running out of your time.

MR. JACOBER: I understand, Your Honor, and I'm being conscious of that.

Q. (By Mr. Jacober) Do you recall if at that point in time you told them, I have those records, you can come get them whenever you want?

A. No. I never had those records. I don't know what you're talking about. The records I had I thought you were talking about were serial

records which are records of his incarceration. It says what crimes he committed, when he was received by the Department of Corrections, and when he got paroled. Those are serial records. I had those, because I wanted to know what his prior convictions were.

Q. You didn't use the records of his incarceration and alleged escape attempt and alleged assault while he was in prison as part of your penalty phase?

A. That's a different question. You asked me a different question. You wanted to know about records of his mental health and all of that. I never saw any of that. I would have liked to have seen that.

Q. No --

A. I never saw that.

Q. It also contained the mental and psychological evaluations?

A. I really don't know.

Q. The Missouri Department of Corrections records.

A. If I had it, the defense had it. I will swear to that. Everything I had, the defense had it. And if I didn't have it, they would have made

a big stink, and they would have made a big record and would have appealed on that basis. They had everything that I had. I didn't have one thing that they didn't have.

Q. Well, they made a record here that they didn't have it?

A. Well, if I had it, they had it. I didn't have it then. I did introduce evidence that he tried to break out of the city jail. I absolutely introduced that at trial. That's evidence of guilt. I could go into that. That was very devastating evidence against him.

Q. And the defense didn't have those records before --

A. I don't know what records you're talking about. I had witnesses come in and testify that the defendant hit him over the head with a barbell and almost killed him. And then he took the barbell and tried to bash out the window of the city jail to break out, but it only scratched the window because it's unbreakable glass. And he did that right after he got sentenced to 20 years for the armed robbery of the donut shop in the City. That night he tried to break out of the jail, the way I just described it. That was the evidence at

trial. That was no surprise to the defense that that evidence was coming in.

Q. Again, what I'm asking is, did you let the defense know that you had those records when they were telling the Court weeks before the trial that you had those records?

A. When you say "those records", I don't know what you're talking about. You talked about mental health records. I didn't have any mental health records of the defendant.

Q. Sir, I'm not talking about mental health records. I'm talking about Department of Correction records.

A. Well, he didn't try and break out of the Department of Corrections. He tried to break out of the city jail. So there were records from the city jail about that breakout, about that escape attempt. The defense attorneys had that. I had that. They had that. That's the only records I'm talking -- I know about. I don't know any Department of Corrections records. That's not where he tried to break out.

Q. One additional reason the defense noted that they needed a continuance is counsel is also still waiting for the forensic test results from

its own experts with regard to forensic evidence seized by the State.

Did that flag for you at all that maybe it was important to keep pristine evidence in the case so further testing could be done?

A. They never had possession of the knife. So I don't know what forensic testing you're talking about. They never asked for testing of the knife.

The only forensic testing they did was on the nails, the fingernail clippings. They wanted to know if there was anything other than the victim's under his nails -- under her nails in case she during the altercation, if you want to call it, she somehow got his DNA under the nails, the killer's DNA. So it was tested for that, and there was no other DNA under their nails except hers. And that was all testified to. Those were your witnesses.

MR. JACOBER: No further questions, Your Honor.

THE COURT: Thank you. I'm not sure who gets to go now.

MR. POTTS: Nothing further.

THE COURT: Thank you. Mr. Spillane.

MR. SPILLANE: I just wanted to thank you for your service to St. Louis, sir. Thank you.

MR. LARNER: Thank you very much.

THE COURT: I have one question, and I apologize. I know this was several years ago.

Did the trial court give you a reason as to why you couldn't consent to the continuance requested by defense counsel?

A. We had a policy in our office that we didn't agree to continuances. I couldn't agree to that without permission of Bob McCulloch, and he was not going to give that permission.

Our witnesses were ready to go. A month later I don't know where our witnesses -- one came in from New York on a bus, and the other was a prostitute who was living all over town. Anywhere.

So we were not in any mood, and there was no additional evidence that anyone was going to produce by a continuance is my recollection.

THE COURT: Thank you. Any questions based upon my question?

MR. POTTS: No, Your Honor.

THE COURT: Thank you. Can this witness

stand down?

MR. POTTS: Yes, Your Honor.

MR. JACOBER: Yes, Your Honor.

THE COURT: I think we need to take a little bit of recess, if you don't mind. We will be in temporary recess until quarter to 4:00.

(At 3:32 a recess was taken. The Court reconvened at 3:45 and the further following proceedings were had:)

THE COURT: We are back on the record in Cause Number 24SL-CC00422. We finished our afternoon recess. It is now approximately 3:45 p.m. Mr. Jacober?

MR. JACOBER: Yes. Thank you, Your Honor. We have one final witness. Patrick Henson.

PATRICK HENSON,

Having been sworn, testified:

DIRECT EXAMINATION

BY MR. JACOBER:

Q. Good afternoon, Mr. Henson.

A. Good afternoon.

Q. For the record, where are you currently employed?

A. At the St. Louis County Prosecuting

Attorney's Office.

Q. And what is your position there?

A. I am an investigator in the Conviction & Incident Review Unit.

Q. How long have you been employed in that position?

A. Three years and ten months.

Q. So sometime in the year 2020?

A. Yes, sir.

Q. Are part of your duties to maintain and supervise the maintenance of various files in the prosecuting attorney's office?

A. Yes, sir, with the caveat of those under the auspices of the Conviction & Incident Review Unit.

Q. So you don't -- if it's a case that's being presently tried by an assistant prosecutor, you don't have any supervision over those files?

A. That's correct.

Q. Only the files in the CIU?

A. That is correct.

Q. Are one of those files the file in the Marcellus Williams matter?

A. Yes, sir.

Q. Can you tell us briefly about when the

Marcellus Williams file came back into the St. Louis County Prosecuting Attorney's Office?

A. Certainly I have to refresh my memory, but I believe we received those files sometimes perhaps in February of 2024.

Q. And since February of 2024 have those -- has that file been under your care, custody, and control?

A. Yes, sir.

Q. Where has it been stored in the St. Louis County Prosecuting Attorney's Office?

A. We have an evidence room that's locked, that's locked, and that's where it's stored.

Q. Who has access to that evidence room?

A. Certainly myself, the chief investigators -- or chief investigator and other investigators because they also store their evidence there as well.

Q. Anyone else besides investigators?

A. No, sir, not to my knowledge.

Q. And did I ask you to review that file?

A. Yes.

Q. Have you done so?

A. Yes, sir.

Q. Did I specifically ask you to review

that file to see if you could find any notes relating to voir dire in the underlying criminal trial which happened in 2001?

A. You did.

Q. And did you do that?

A. I did.

Q. Did you find any notes relating to voir dire?

A. I did not.

MR. JACOBER: No further questions, Your Honor.

THE COURT: Thank you. Mr. Clarke?

MR. CLARKE: Yes, Your Honor.

CROSS-EXAMINATION BY MR. CLARKE:

Q. Mr. Henson, you said you received the Marcellus Williams file in February of 2024. Is that correct?

A. I believe that's right, sir. Yes, I said that.

Q. Okay. So you didn't have the file when the motion to vacate was filed?

A. I'd have to go back and look. I'm not sure.

Q. Okay. But you said February 2024, is that correct?

Reporter's Certificate

I, Susan M. Lucht, a Certified Court Reporter, hereby certify that I was the official court reporter for Division 13 of the Circuit Court of the County of St. Louis, State of Missouri; that on August 28, 2024, I was present and reported the proceedings had in the case of In Re: Prosecuting Attorney, 21st Judicial Circuit, ex rel Marcellus Williams v. State of Missouri, Cause Number 24SL-CC00422; and I further certify that the foregoing pages contain a true and accurate reproduction of the proceedings had on that date.

Susan M. Lucht, CCR #302
Official Court Reporter
Twenty-First Judicial Circuit
(314) 615-2685

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

MARCELLUS WILLIAMS,	)	
	)	
Petitioner,	)	
	)	
v.	)	4:05-CV-1474-RWS
	)	**Capital Case**
DONALD ROPER,	)	**Execution Scheduled for:**
	)	**September 24, 2024**
Respondent.	)	

SUGGESTIONS IN OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT UNDER FED. R. CIV. P. 60(b)(6)

Applications for writs of habeas corpus filed by prisoners in state custody are governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). 28 U.S.C. § 2254; *Singleton v. Norris,* 319 F.3d 1018, 1023 (8th Cir. 2003). AEDPA limits the authority of federal courts to entertain habeas applications. In addition, 28 U.S.C. § 2244(b) governs successive habeas applications. This statutory provision requires the dismissal of claims previously raised in a federal habeas action. 28 U.S.C. § 2244(b)(1). Petitioner's motion is a second or successive application for habeas relief.

In the context of Rule 60(b) motions, courts should briefly inquire as to whether these motions raise claims similar to those in previously-filed habeas petitions. *Boyd v. United States*, 304 F.3d 813, 814 (8th Cir. 2002) (*per curiam*) ("[W]e encourage district courts, in dealing with purported Rule 60(b) motions following the dismissal of habeas petitions, to employ a procedure whereby the

district court files the purported Rule 60(b) motion and then conducts a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack under either 28 U.S.C. § 2255 or § 2254."). If a Rule 60(b) motion does raise a second or successive claim, it should be dismissed for failure to obtain authorization from the Eighth Circuit, or the matter should be transferred to the Eighth Circuit. *Id.*

In *Gonzalez v. Cosby*, the United States Supreme Court held that a petitioner does not raise a habeas claim where he is only challenging "a previous ruling which precluded a merits determination. . . for example, a denial for such reasons as failure to exhaust, procedural default or statute of limitations bar." 545 U.S. 524, 532 n.4 (2005). The *Gonzalez* Court further concluded that a claim raised in a Rule 60(b) motion may only be deemed as second or successive where the motion itself or the judgment entered on the movant's prior habeas petition addressed substantive grounds for setting aside his underlying conviction. *Id.* at 532 ("If neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant's state conviction, allowing the motion to proceed as denominated creates no inconsistency with the habeas statute or rules.").

This Court, in its 2010 order, addressed and denied the *Batson*[1] claims raised in Petitioner's original habeas petition. Doc. 58 at 20–25. Petitioner now appears to allege that this Court's earlier denial of his *Batson* claims was not a decision on the merits because this Court gave AEDPA deference to the Supreme Court of Missouri. Doc. 121 at 35–36. But this Court's prior denial of Petitioner's petition was clearly a merits-based denial. *See Ward v. Norris*, 577 F.3d 925, 933 (8th Cir. 2009) ("'On the merits' refers 'to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §2254(a) and (d)'"). And, at present, Petitioner is making a claim challenging his conviction and sentence in lieu of alleging that untimeliness, lack of exhaustion, or some other procedural bar prevented this Court from addressing his *Batson* claims. Therefore, his motion is a second or successive application for habeas relief.

Petitioner attempts to use the United States Supreme Court's decision in *Buck v. Davis* to support his assertion that Rule 60(b) "provides this Court the procedural mechanism to consider the newly disclosed evidence and to grant appropriate relief." Pet. Rule 60(b) Mot. at 2. But the findings of the *Buck* Court are not helpful to Petitioner. The issue in *Buck* was whether it was an abuse of discretion not to grant a certificate of appealability. 580 U.S. 100 (2017).

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

The *Buck* Court's findings had nothing to do with second or successive applications for habeas relief like the one at issue here. *See id.*

In addition, the United States Supreme Court's decision in *Flowers v. Mississippi* is not helpful to Petitioner. 588 U.S. 264 (2019). *Flowers* stands only for the unremarkable proposition that relevant facts and circumstances may be considered in evaluating a *Batson* claim. *See id.* In *Flowers*, the United States Supreme Court neither excused the bar on second or successive petitions, nor did it permit the filing of a Rule 60(b)(6) motion presenting second or successive claims based upon alleged extraordinary grounds, as Petitioner attempts to do here. *See id.*

In support of the theory that he has extraordinary grounds permitting his filing of the Rule 60(b)(6) motion, Petitioner asserts that the prosecutor ("Larner") now admits that race was part of the reason he struck a juror. Doc. 121 at 40. This fact would not make his motion something other than a second or successive application for habeas relief. In any event, Petitioner's assertion is a mischaracterization of the record. Petitioner does not include the § 547.031[2] motion court's findings of fact; rather, he makes this assertion based upon an inaccurate characterization of Larner's testimony that he did not have any race-based reasons for his strikes. Petitioner attempts to construe Larner's testimony

[2] All citations to this statutory provision refer to § 547.031 RSMo 2024.

as an admission that he did have race-based reasons for these strikes. But the record does not support that.

The findings of fact and conclusions of law entered following the hearing in the § 547.031 motion court provide that "Larner denied systematically striking Black jurors or asking Black jurors more isolating questions than White jurors." Resp. Sugg. in Opp. Ex. 1 at 16. The transcript from this hearing also refutes the idea that Larner had partially non-race-neutral reasons for any of his peremptory strikes. *See* Tr. Vol. 2 at 203–237. Larner explicitly *denied* striking potential juror number 64 in part because he was black, stating that he struck this potential juror because he thought Petitioner and said potential juror looked similar, but not because he was black. *Id.* at 211. Larner further stated that if he had struck this potential juror because he was black, which he did not, that such a strike would have been thrown out and caused a retrial. *Id.* When asked specifically if *part of the reason* he struck this potential juror was because he and Petitioner were both black, the prosecutor "*No, absolutely not. Absolutely not*." *Id.* at 213 (emphasis added). Larner clearly understood that he would have been reversed under *Batson* had he done that. *Id.* To characterize Larner's testimony as being an admission that he struck a potential juror in part because he was black is plainly incorrect.

At bottom, Petitioner is seeking to use a meritless second or successive application for habeas relief as a delay tactic, just days before his scheduled

execution. Nothing new is raised in Petitioner's Rule 60(b)(6) motion. Petitioner has had the trial transcript and record for decades. Petitioner simply attempts to repackage a *Batson* claim that has previously been denied by this Court, using testimony from his § 547.031 motion hearing that fails to establish the elements of such a violation and contradicts the transcript of Petitioner's original criminal trial, which he has had for decades. Even if this motion were not second or successive, which it is, the evidence Petitioner presents would not support the granting of a Rule 60(b)(6) motion under these circumstances. *See Bucklew v. Precythe*, 587 U.S. 119, 149–151 (2019) (noting that last minute challenges to executions "should be the extreme exception, not the norm," and courts "can and should" protect state court judgments from such "dilatory" attacks).

This Court should dismiss Petitioner's Rule 60(b)(6) motion as second or successive.

Respectfully submitted,

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