THIS IS A CAPITAL CASE
Execution Scheduled for September 24, 2024, 6:00 central

No. 24-5606 (Connected Case: 24A286)

IN THE
SUPREME COURT OF THE UNITED STATES

MARCELLUS WILLLIAMS, Petitioner,

v.

DAVID VANDERGRIFF,

Warden, Potosi Correctional Center, Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

At a recent proceeding initiated by the county prosecutor who originally sought the death sentence, evidence established that the trial prosecutor did indeed consider race in the exercise of his peremptory challenges. Further evidence that could have supported the allegations of wrongdoing in the form of the voir dire notes could not be presented – they are mysteriously missing from the trial file, even though the trial prosecutor's notes from other parts of the trial are there in the file. As conceded by Respondent below, the recent testimony "contradicts" the trial transcript and now confirms racial animus. No wonder the county prosecutor has conceded that its former agent violated *Batson*. The following questions are presented:

1. Whether the *Buck v. Davis*, 580 U.S. 100 (2017) extraordinary circumstances test is satisfied when the County Prosecutor conceded error and recent testimony constitutes admissions from the trial prosecutor that race did play a factor in his exercise of its peremptory challenges?
2. Whether a trial prosecutor may rely on race to strike a juror and misrepresent his true reasons during the trial colloquy?

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A horrible tragedy occurred. But at the end of the day, the only evidence the State possessed were witnesses who were incentivized and only came forward after receiving monetary and other consideration. Those witnesses offered testimony that conflicted with each other and the physical evidence. Post-trial evidence fares no better for strengthening the State's case – Mr. Williams's DNA is not on the knife.

Mr. Williams has never failed to appreciate the enormity of the offense for which he has been charged. And certainly, no one knows better than Ms. Gayle's family – who, in seeking finality, have expressed their opposition to the death penalty here – only to be thwarted by Respondent. Respondent utterly fails to acknowledge the victim's family's position because they seemingly do not matter — unless they agree with Respondent.

Respondent attempts to distract from the obvious misconduct that has occurred here. Respondent focuses on finality at the cost of the rights of Missouri's Black citizens. A right Mr. Williams seeks to enforce and a wrong the St. Louis County Prosecutor seeks to redress by conceding error for a *Batson v. Kentucky,* 476 U.S. 79 (1986), violation committed by one of their agents.

A. Respondent's Concession Below.

In the procedural history, Respondent omits his previous concession that the recent testimony of the trial prosecutor "contradicts the transcript of Petitioner's original criminal trial." (App. 154a). He was correct—it does rebut the self-serving statements from the time of trial. The trial prosecutor said enough at trial to

survive a *Batson* challenge but did not reveal every reason for his strike. He finally revealed his race-based reasons at the August 28, 2024 hearing, and despite Respondent's claims of mischaracterization, the trial prosecutor's testimony speaks for itself.

B. A Court always has jurisdiction to determine jurisdiction.

Neither the district court nor the Eighth Circuit committed error in considering Mr. Williams's request. A court always has the jurisdiction to consider whether jurisdiction exists. This Court possesses the authority to exercise its jurisdiction to determine its jurisdiction. This is because "federal courts have 'jurisdiction to determine jurisdiction;' that is, 'power to interpret the language of the jurisdictional instrument and its application to an issue by the court.'" *Kansas City S. Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822,825 (8th Cir. 1980) (quoting *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938)).

While Respondent cannot seem to grasp it, this is something the Eighth Circuit clearly understood because it provided a briefing schedule for the filing of a motion for rehearing *en banc* after denying a certificate of appealability. (App. 2a). This inherently acknowledges the possibility that reasonable jurists could disagree.

C. Respondent has no response to this Court's admonitions regarding *Batson*.

But for a simple cite to *Batson*, an individual reading Respondent's BIO would have no idea that a *Batson* claim had been raised. This is odd and perhaps an overcompensation for Respondent's earlier concession that the sworn testimony contradicted the self-serving colloquy.

Respondent minimizes the challenges raised by minorities to serve on juries by even referring to Petitioner's *Batson* claim as a "garden variety" claim. There is nothing garden variety about racial discrimination – that characterization is wildly offensive and diminishes the justice system for a State's Attorney General to even argue such.

There are some critical points that bear repeating and remain unaddressed by Respondent:

1. The St. Louis County Prosecutor's Office has conceded the *Batson* error based on the testimony of their agent.
2. The victim's family wanted this settled a month ago – and Respondent refuses to acknowledge their wishes.
3. Respondent fails to address the significance of the missing voir dire notes.
4. The trial counsel's admission that race was "part of the reason," though not the "full reason" in his utilization of the peremptory strikes.
5. The trial prosecutor attempted to minimize his actual use of peremptory strikes against Blacks.
6. The trial prosecutor had no explanation for his disparate treatment and questioning of Black jurors versus white jurors.
7. The trial prosecutor's inaccurate testimony regarding his personal history of *Batson* violations and the history of the St. Louis County Prosecutor's Office's *Batson* violations.

8. The sheer number of Black prospective jurors stricken by the prosecution via peremptory strikes—six of seven, or 86%—speaks for itself. *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members…. Happenstance is unlikely to produce this disparity.").

"In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *Flowers v. Mississippi*, 588 U.S. 284, 298 (2019). This process requires an examination of the totality of the circumstances. The Court "must examine the whole picture." *Id.* at 314. "[A] court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93. The evidentiary record recently developed demonstrates that the alleged resemblance between Petitioner and Juror No. 64 can no longer be treated as a "race-*neutral* basis" for the strike. *v. Chatman*, 578 U.S. 488, 499-500 (2016) (emphasis added).

Respondent's argument boils down to this: the person accused of acting in an inappropriate manner denied he did so, and that should end the inquiry. Mr. Williams is not aware of many people who will admit to their flaws, especially one as big as acting in a racially discriminatory manner. It is akin to asking the profoundly mentally ill whether they are incompetent – they will say "no, I am not, what are you, crazy?"

The truth can be discerned from the details of the testimony and the trial prosecutor's ever-shifting responses. As this Court noted in *Foster*, 578 U.S. at:

"There are also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file." As a result, the Court lifted the procedural bar imposed by the State and granted relief. Mr. Williams' case is even more troubling—worse than in *Foster*, where the Court found that voir dire notes revealed after the conclusion of trial with race-based notes evinced a *Batson* violation, the prosecutor's voir dire notes in this case are mysteriously missing from the file altogether—the absence of the notes is particularly conspicuous because the prosecutor's other trial notes *are* in the file. Further, the trial prosecutor waffled on his answers. Telling the truth generally does not lead to waffling or shifting responses.

D. Mr. Williams exceeds *Buck v. Davis*, 580 U.S. 100 (2017).

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of criminal justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). This Court has emphasized that when it comes to jurors, racial bias must be especially guarded against. "Racial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado,* 580 U.S. 206, 224 (2017) (internal quotation marks omitted). "Permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State." *Id.*

Respondent seeks to minimize the impact of *Buck* on this case in an inappropriate manner, downplaying the constitutional violation here. Respondent

ignores the fact that the St. Louis County Prosecutor has conceded error for this very violation. Notably, in *Buck*, the State refused to concede error in Mr. Buck's case, despite doing so in other cases that it acknowledged involved the same expert testifying as to racist matters and the same underlying issue. *Buck*, 580 U.S. at 100-01. Even without the State's concession of error in *Buck*, this Court still found 60(b)(6) relief appropriate.

Here, in Mr. Williams' case, the circumstances amount to at least the same level of extraordinariness as those present in *Buck*. Like the defendant in *Buck*, Mr. Williams' trial was tainted by racism. While in *Buck*, racism came into play regarding evidence of the defendant's "future dangerousness," in Mr. Williams' case, racism came into play when the trial prosecutor struck Black venirepersons from the jury because they were the same race as Mr. Williams and, two decades later, admitted his unconstitutional conduct. Furthermore, in addition to this overt racism, Mr. Williams' case includes even more factors that amount to extraordinary circumstances: the St. Louis County Prosecuting Attorney expressly admits it committed constitutional error; the Missouri Attorney General agrees that the new testimony presents a different evidentiary picture than the prosecutor's trial colloquy, *see* App. 154a; and most importantly, the family of the victim adamantly opposes Mr. Williams' execution.

In the end, this Court is left with a similar scenario as the one it faced in *Buck*. There can be no question that the new testimony by the trial prosecutor undermines and contradicts the self-serving *Batson* colloquy from trial and

establishes a cover-up through the destruction of the voir dire notes. Respondent fails to address either of these factors, shying away from the facts, which clearly establish race-based strikes, so as to avoid revealing their defense of racism.

E. Mr. Williams has not delayed.

The trial prosecutor admitted race played a role in the use of peremptory strikes on August 28, 2024. Mr. Williams pursued federal relief even before the exhaustion of state remedies. The State appeal was just denied yet remained pending while Mr. Williams pursued federal relief. He cannot be late when he was early.

Respondent attempts to manufacture delay. At best for Respondent, Judge Kelly's concurring opinion demonstrates that there is no delay:

> "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."

(App. 4a).

Respondent still has never explained why they avoided a July hearing – only to have the alleged attorney unavailable for the July hearing be a no-show in August. That is because there is no credible response. Nor has Respondent explained why they failed to file their promised opposition to the prosecutor's Motion to Vacate until after Mr. Williams's execution date was already scheduled.

Admittedly, Mr. Williams has sought review in many places and venues. But none of that review has been based on the testimony of the trial prosecutor, which was given less than a month ago. It bears remembering that this already strong *Batson* claim did not even receive a COA on Mr. Williams's cross-appeal. Thus, the

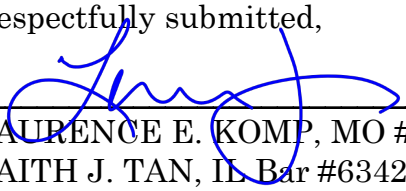
only federal review has been circumscribed by the review of the Missouri Supreme Court's deference to a self-serving trial colloquy, which is now contradicted by the sworn testimony of the trial prosecutor. This is the first opportunity for any court to consider Mr. Williams's *Batson* claim in light of the prosecutor's sworn testimony.

Conclusion

This Court has unequivocally and repeatedly decried the use of race as a factor in striking prospective jurors, and permitting this admitted constitutional violation to go unchecked undermines confidence in the judicial system. *See, e.g., Pena-Rodriguez*, 580 U.S. at 224; *Buck*, 580 U.S. at 124; *Davis v. Ayala*, 576 U.S. 257, 285 (2015); *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). As the *Buck* Court explained, "Such concerns are precisely among those we have identified as supporting relief under Rule 60(b)(6)." *Buck*, 580 U.S. at 124. In these circumstances and crediting the reasonableness of the Justices of this Court in *Buck*, there exists here more than enough for reasonable jurists to permit an appeal.

For the foregoing reasons, the petition for writ of certiorari should be granted and a stay should issue. Alternatively, this Court should convert this request to an Original action and fully consider the *Batson* claim because it seems no one else will.

Respectfully submitted,



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