In the Supreme Court of the United States

Case No. 24-5612

(CONNECTED CASE 24A290)

PROSECUTING ATTORNEY, 21ST JUDICIAL CIRCUIT,
EX REL. MARCELLUS WILLIAMS,

Petitioners,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

REPLY IN SUPPORT OF A PETITION FOR CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

LATHROP GPM LLP
Matthew A. Jacober, Bar
Alana M. McMullin
Teresa E. Hurla

ASSISTANT PROSECUTING ATTORNEY
Jessica Hathaway

Counsel for Wesley Bell
St. Louis County Prosecuting Attorney

MIDWEST INNOCENCE PROJECT
Tricia J. Rojo Bushnell
Counsel of Record

INNOCENCE PROJECT
Adnan Sultan

BRYAN CAVE LEIGHTON PAISNER, LLP
Jonathan B. Potts
Charles A. Weiss

Counsel for Marcellus Williams, Relator

Counsel for Petitioners

Execution Scheduled for September 24, 2024, 6:00 p.m. Central

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INTRODUCTION

The evidence in this case reflects an overt Batson violation. The opinion below and the Missouri Attorney General's response both avoid wrangling with the uncomfortable admissions of the trial prosecutor that demonstrate an unconstitutional jury selection process. The point of the underlying statute, Mo. Rev. Stat. §547.031, is to provide an avenue for local prosecutors to correct unconstitutional convictions. The Supreme Court of Missouri's decision disregards the evidence cited by the St. Louis County Prosecuting Attorney and the importance of his confessions of error. The Court should stay the execution to provide time to consider these issues fully.

I. There Is Not and Independent and Adequate State Law Ground of Waiver.

The Attorney General argues that, with only 12 days to prosecute an appeal to the Supreme Court of Missouri and this Court, this Court cannot rectify a Batson violation based on a failure to file a post-trial motion asking the trial judge to fix the "form" and "language" of his judgment. This is not the type of rule that provides an "independent" and "adequate" state law ground to bar the Court's review. "There are . . . exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citing *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and

reasonably made, is not to be defeated under the name of local practice."). The normal timeline for the initiating of an appeal in Missouri is 40 days: 30 days for the trial court judgment to become final for purposes of appeal, and then 10 days to file a notice of appeal. Under those circumstances, the rule makes sense. Here, however, the Prosecuting Attorney and Williams received the trial court ruling 12 days before Williams' execution.

This case "falls within the small category of cases in which asserted state grounds are inadequate to block adjudication of a federal claim." *Id.* at 381; *see also Foster v. Chatman*, 578 U.S. 488 (2016) (addressing Batson claim on the merits despite alleged state law ground). The Attorney General and Supreme Court of Missouri seek to assign blame to the Prosecuting Attorney and Williams for a deficiency in the trial court's ruling. This is incorrect on the facts and the law and works as a manifest injustice. Even without that unnecessary round of trial court briefing, argument, and reissuance of the judgment (which may or may not have happened), the Supreme Court of Missouri was only able to decide this case with approximately 24 hours before Williams' execution.

On August 21, the Supreme Court of Missouri "COMMAND[ED]" the trial judge to hold the evidentiary hearing and "make findings of fact and conclusions of law as required by Section 547.031 in a timely manner, but no later than September 13, 2024." *State of Missouri ex rel. Andrew Bailey v. Hon. Bruce F. Hilton*, No. SC100707, Preliminary Writ of Prohibition. Following a hearing on August 28, the trial court issued its ruling on September 12. If the Prosecuting Attorney or Williams

had file a motion to amend the judgment on September 13, the local trial court rules require 7 days' notice before a hearing may be held. *See* St. Louis County Local Rule 33.2, *available at* https://stlcountycourts.com/services/21st-judicial-circuit-the-rules-of-court/.

As reflected by the progression below (and assuming that the State courts would conduct business on Saturdays and Sundays), even if the trial court held a timely hearing to fix the "form" and "language" of its judgment (September 20) and issued an amended ruling *that day* and the Prosecuting Attorney filed an immediate notice of appeal *that day*, it would have still taken one day for the clerk to docket the appeal in the Supreme Court of Missouri (Saturday, September 21), another day for the court to issue its show cause order (Sunday, September 22), one day for the Prosecuting Attorney to respond to that show cause order (Monday, September 23) and for the Court to accept jurisdiction later that day. Under the current schedule, the Prosecuting Attorney and Williams did not even have an opportunity to file a reply brief, as normally permitted by the Supreme Court's rules. Thus, under that best case scenario, the opening brief would be filed *today*, with no time to fully brief, argue, and decide the case before filing an application and petition for a writ of certiorari to this Court. The court's website crashed yesterday at the time of the opinion release, so that counsel could not even access the opinion until approximately 5:45 p.m. Central, and did not receive the e-filing notification regarding the opinion until 8:20 p.m. Central. Needless to say, it would have been too late.

Here, a final trial court decision was necessary to pursue and exhaust available appeals before the execution. Moreover, it is the trial court's "form" and "language" error, not the Prosecuting Attorney's or Williams', that led to the current circumstances. It is also unknown whether the trial court would have even modified the ruling. As the decision below reflects, the "form" and "language" of the instant ruling did not prevent the Supreme Court of Missouri from ruling on the merits. Williams' *Batson* claim "should not depend on a formal 'ritual . . . [that] would further no perceivable state interest.'" *Lee*, 534 U.S. at 366–67 (quoting *Osborne v. Ohio*, 495 U.S. 103, 124 (1990)). This error is a reason to reverse the decision, not execute Williams.

II. The Batson Claim Is Meritorious.

It is not "race-neutral" to strike a young Black juror in the capital murder trial of a young Black defendant because the white trial prosecutor thinks they look like "brothers." (App. 179) The trial prosecutor has admitted under oath that "part of the reason" he struck a juror was because he was a young Black man with glasses, and the fact that both men were young and Black is "not necessarily the full reason"—but part of the reason—he thought they looked similar and therefore chose to strike the Black juror. (App. 179–80). This is unconstitutional discrimination.

The young, Black juror with glasses was in favor of the death penalty and should have been an ideal juror. The trial court gave no weight to this fact; nor did the Supreme Court of Missouri. The Prosecuting Attorney pointed it out as part of

the evidence behind his confession of error, and pointed out this Court's precedent. It was ignored.

The young, Black juror with glasses who supposedly looked so similar was wearing a shirt with an orange dragon, "Chinese or Arabic letters," a large gold cross, two earrings in his left ear, and shiny great pants. The trial court gave no weight to this fact; nor did the Supreme Court of Missouri. The Prosecuting Attorney pointed it out as part of the evidence behind his confession of error, and pointed out this Court's precedent. It was ignored.

Instead, the Supreme Court of Missouri concluded that the trial prosecutor found because the trial prosecutor "denied systematically striking potential Black jurors" we should "presume the circuit court found the trial prosecutor's testimony to be credible." (Pet. App. 250). But the trial court made no such credibility finding. And the prosecutor's own admission that he struck a juror because of his race stands on its face. His subsequent testimony denying that he struck jurors for discriminatory reasons reveals why that testimony is itself not credible – this prosecutor knew what he did was unconstitutional and wanted to cover it up. (*See* Pet. App. 213) ("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."). There was no credibility finding.

The Court also cannot lose sight of the larger context on top of these sworn admissions. The trial prosecutor struck six of seven potential Black jurors. The trial

court gave no weight to this fact and made no finding, one way or the other, about the impact of striking 86% of potential Black jurors on a finding of discriminatory purpose. The Supreme Court of Missouri likewise paid it no heed. The Prosecuting Attorney pointed it out as part of the evidence behind his confession of error, and pointed out this Court's precedent to both courts. *See Flowers v. Mississippi*, 588 U.S. 284, 288 (2019); *Miller-El v. Dretke*, 545 U.S. 231, 241, 266 (2005). It was ignored.

A review of the trial prosecutor's questioning of potential jurors reveals different styles of questioning for Black and non-Black jurors, including closed-ended, leading questions for Black jurors. The trial court merely acknowledged the fact that the trial prosecutor "denied systematically striking potential Black jurors or asking Black jurors more isolating questions than White jurors." This denial falls far short of a credibility finding or even a review of the trial transcript. The Prosecuting Attorney pointed it out as part of the evidence behind his confession of error, emphasized that all is necessary is a discriminatory strike of one juror, and pointed out this Court's precedent. *See Miller-El*, 545 U.S. at 255–56 (pattern of questioning). It was ignored.

After Williams' trial, the trial prosecutor was found to have committed a Batson violation in another case. The trial court ignored this fact and made no finding, one way or the other, about the impact of this history discriminatory purpose. The Supreme Court of Missouri likewise ignored this evidence. Again, the Prosecuting Attorney pointed out this uncomfortable fact—committed by a prosecutor

in his own office—as part of the evidence behind his confession of error, and pointed out this Court's precedent. It was ignored.

Further, the Supreme Court of Missouri's assertion that the "Prosecutor did not present any new evidence on this claim" ignores all of this critical context and further unsupported by the wealth of new information—indeed, over 100 pages-worth of new information—gleaned at the August 2024 evidentiary hearing. The full scope of the new evidence is set forth in the petition for writ of certiorari, but the simplest is the most damning: the prosecutor admission that he struck Venireman 64 because he was a "young black man with glasses" is new evidence. The prosecutor's clarification of why he believed the venireperson reminded him of Mr. Williams because they looked like "brothers" who shared the same mother and same father (meaning, as a biologically fundamental matter, that both the venireperson and Mr. Williams were Black), is new evidence.

Finally, the Supreme Court of Missouri's analysis of the circuit court's analysis is circular. The court reminds us that it "already rejected this argument with nearly identical testimony from the original prosecutor on direct appeal." But this testimony was not the same. And the finding from the trial court relied on this false assertion. As the trial court noted, in July 2024, the Supreme Court of Missouri, without having any of the new evidence in front of it, issued an order in Mr. Williams' execution warrant case pointedly directing the trial court what it wanted it find. It wrote: "This Court is aware the circuit court scheduled Prosecutor's motion for an August 21 evidentiary hearing. 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 postconviction relief, and his unsuccessful petitions for a writ of habeas corpus." Op. Overruling Mt'n to Withdraw Warrant of Execution, *State v. Williams*, No. SC83934 (Jul. 12, 2024), *available at* https://www.courts.mo.gov/file.jsp?id=209675. In other words, without reviewing or even knowing any of the new evidence yet to be revealed at the August 28,2024 evidentiary hearing, the Missouri Supreme Court made clear what it wanted the circuit court to do—deny the *Batson* claim in the Motion to Vacate. And that is exactly what that court obligingly did, making no findings on the claim itself, but noting in its the Findings of Fact and Conclusions of Law the previous decisions of the Missouri Supreme Court and denied the *Batson* claim. This was error.

This case exposes uncomfortable truths that reveal an unconstitutional trial. This is precisely why Mo. Rev. Stat. §547.031 exists—to allow the local prosecutor to fix unconstitutional actions by his own office.

CONCLUSION

Accordingly, the Court should also grant Marcellus Williams a stay of execution pending disposition of the petition for a writ of certiorari and, if granted, pending a disposition on the merits.

Dated: September 24, 2024

Respectfully submitted,

CHARLES A. WEISS
JONATHAN B. POTTS
BRYAN CAVE LEIGHTON PAISNER LLP
211 N. Broadway
Suite 3600
St. Louis, MO 63102
(314) 259-2000
caweiss@bryancave.com
jonathan.potts@bclplaw.com

TRICIA J. ROJO BUSHNELL*
MIDWEST INNOCENCE PROJECT
300 East 39th Street
Kansas City, MO 64111
(816) 931-4929
trojobushnell@themip.org

ADNAN SULTAN
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, NY 10013
(212) 364-5340
asultan@innocenceproject.org

Counsel for Marcellus Williams

MATTHEW A. JACOBER
LATHROP GPM LLP
The Plaza at Clayton
190 Carondelet Plaza, Suite 1400
Clayton, MO 63105
(314) 613-2800
matthew.jacober@lathropgpm.com

ALANA M. MCMULLIN
TERESA E. HURLA
LATHROP GPM LLP
2345 Grand Blvd., Suite 2200
Kansas City, MO 64108
(816)292-2000
alana.mcmullin@lathropgpm.com
teresa.hurla@lathropgpm.com

JESSICA HATHAWAY
ASSISTANT PROSECUTING ATTORNEY
OFFICE OF THE ST. LOUIS COUNTY PROSECUTING ATTORNEY
100 South Central Avenue 2nd Floor
Clayton, MO 63105
(314) 615-2600
Jhathaway@stlouiscountymo.gov

Counsel for the St. Louis County Prosecuting Attorney

Counsel for Petitioners

***** Counsel of Record, Member of the Bar of the Supreme Court