THIS IS A CAPITAL CASE

Execution Scheduled for September 24, 2024, 6:00 central

No. 24-_____

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

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. 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?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Marcellus Williams is the petitioner in this case and was represented in the Court below by Kent Gipson, and the Federal Defender for the Western District of Missouri.

David Vandergriff, Warden of Potosi Correctional Center, is the Respondent. His predecessor in that position, Donald Roper, was represented in the court below by multiple Missouri Assistant Attorneys General.

Pursuant to Rule 29.6, no parties are corporations.

RELATED PROCEEDINGS

United States Supreme Court:

- Marcellus Williams v. Missouri ex rel. Michael L. Parson, et al., No. 24-5561 (Board of Inquiry dissolution) (pending)
- Marcellus Williams v. Steve Larkins, No. 17-5641 (60(b)) (Oct. 2, 2017)
- Marcellus Williams v. Cindy Griffith, No. 17-5642 (Rule 91) (Oct. 2, 2017)
- Marcellus Williams v. Troy Steele, No. 16-8963 (Rule 91) (June 26, 2017)
- Marcellus Williams v. Troy Steele, No. 12-10141 (habeas appeal) (Oct. 7, 2013)
- Marcellus Williams v. Don Roper, No. 11-5005 (habeas cross-appeal) (Nov. 7, 2011)
- State of Missouri v. Marcellus Williams, No. 02-9792 (direct appeal) (Jun. 23, 2003)

United States Court of Appeals for the Eighth Circuit:

- Marcellus Williams v. David Vandergriff, No. 24-2907 (Sep. 21, 2024)
- Marcellus Williams v. Donald Roper, No. 17-2801 (60(b) appeal) (Aug. 18, 2017)
- Marcellus Williams v. Donald Roper, No. 10-2579 (State's appeal) (Sep. 18, 2012)
- Marcellus Williams v. Donald Roper, No. 10-2682 (Cross-appeal) (Feb. 23, 2011)

United States District Court for the Eastern District of Missouri:

- Marcellus Williams v. David Vandergriff, No. 4:05-CV-1474-RWS (Sep. 20, 2024)
- Williams v. McCulloch, No. 4:15-CV-00070 (Jan. 14, 2015)

Supreme Court of Missouri:

- Marcellus Williams v. Missouri ex rel. Michael L. Parson, et al., No. SC100352 (Board of Inquiry dissolution) (Jul. 12, 2024)
- Marcellus Williams v. Steve Larkin, No. SC96625 (Rule 91) (Aug. 15, 2017)
- Marcellus Williams v. Troy Steele, No. SC94720 (Rule 91) (Jan. 31, 2017)
- Marcellus Williams v. State of Missouri, No. SC86095 (post-conviction appeal) (June 21, 2005)
- State of Missouri v. Marcellus Williams, No. SC83934 (direct appeal) (Jan. 14, 2003)

Circuit Court of St. Louis County, Missouri:

- Prosecuting Attorney ex rel. Marcellus Williams v. State of Missouri, No. 24SL-CC00422 (Motion to Vacate) (Sep. 12, 2024)
- State of Missouri v. Marcellus Williams, No. 01CR-164629 (trial) (Oct. 1, 2001)

Marcellus Williams v. State of Missouri, No. 03CC-2254 (post-conviction) (May 14, 2004)

Circuit Court of Cole County, Missouri:

Marcellus Williams v. Michael L. Parson, et al., No. 23AC-CC05323 (dissolution of Board of Inquiry) (Nov. 7, 2023)

Circuit Court of Boone County, Missouri:

Marcellus Williams v. Troy Steele, No. 15BA-CV01828 (Special Master) (Date)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Marcellus Williams prays that a writ of certiorari be granted to review the judgment of the Eighth Circuit Court of Appeals entered on September 21, 2024.

OPINIONS BELOW

The September 21, 2024 order of the Eighth Circuit Court of Appeals summarily denying a Certificate of Appealability (COA) and dismissing Mr. Williams's appeal is unpublished and appears in the Appendix (hereinafter "App.") at 1a-5a. The memorandum and order of the district court denying Petitioner's Fed. R. Civ. P. 60(b)(6) is unpublished and appears at App. 6a-11a.

JURISDICTION

On September 21, 2024, the Eighth Circuit Court of Appeals summarily denied a COA and dismissed Mr. Williams's appeal, with a concurring opinion. App. 1a-5a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution which states, in pertinent part: "no state shall. . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

This case also involves Fed. R. Civ. P. 60(b)(6) which states, in pertinent part:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:…

(6) any other reason that justifies relief.

STATEMENT OF THE CASE

An unspeakable tragedy occurred when Ms. Gayle was viciously stabbed by an unknown assailant. The case went cold, only to be "solved" by two incentivized witnesses who claimed Marcellus Williams confessed his involvement in the crime a year later. No scientific evidence implicated Mr. Williams (and none does now, after improvements in forensic science).

The lack of evidence supporting the conviction was so troubling that the St. Louis County Prosecutor's Office lodged a petition to vacate the conviction and sentence pursuant to a new civil procedure established under RSMo. § 547.031. During the course of those proceedings, the St. Louis County Prosecutor's Office conceded error and attempted to settle the case, with the approval of Ms. Gayle's family.

As the trial court recently described in open court without any objection:

> 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.

8/21/24 Tr. p. 23 (App. 37a). The Consent Order and Judgment from the August 21, 2024 proceedings reflected respect for Dr. Picus, the victim's husband, noting: "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

. . . 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." (App. 13a). The St. Louis County Prosecutor's Office also relied on the family's opposition to Mr. Williams's execution in seeking the consent judgment: "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." (App. 22a-23a).

The Missouri Attorney General did not like that and, spurning the family's wishes, successfully moved to vacate the agreement. As a result, a hearing on the petition filed by the St. Louis County Prosecutor's Office was rescheduled to August 28, 2024. During that hearing, the trial prosecutor testified regarding his exercise of peremptory strikes against Black prospective jurors. As noted by Respondent below, the trial prosecutor's recent hearing testimony "contradicts the transcript of Petitioner's original criminal trial." App. 154a. In addition to revealing the trial-era *Batson* colloquy was self-serving as opposed to accurate as to his intent in striking Black jurors, the recent testimony disclosed critical relevant and previously undisclosed details regarding the exercise of peremptory strikes.

The venireperson at issue, Venireperson 64, stated that he could impose the death penalty, favored the death penalty in some cases, and he could also sign a death verdict. (Tr. 762-63). The State nevertheless struck Venireperson 64, claiming that he was "weak" on the death penalty. (Tr. 1586). The State also reasoned that

Venireperson 64 also "looked very similar to the defendant" and "reminded [the State] of the defendant." (*Id.*). In the original trial transcript, the trial prosecutor does not specifically call out Venireperson 64's race as the basis of that similarity. The trial prosecutor's recent testimony revealed that Venireperson 64's race was indeed part of the reason for the strike.

A. Admission that race was a factor in utilization of the peremptory strikes.

The trial prosecutor recently testified that "part of the reason" he struck Juror No. 64 was because he was a young Black man with glasses. (App. 93a-94a); *see also id.* (App. 92a) ("Q. 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."). He admitted that "part of the reason," though not the "full reason," he exercised a peremptory challenge was that the juror was a Black man with glasses.

The trial prosecutor further testified that he exercised a peremptory strike because he thought the prospective juror and Mr. Williams looked like they were "brothers." (93a). Then, in a very troubling manner, the trial prosecutor foundered after using the term "brother" to describe both men and offered an unsolicited plaintive race neutral explanation for his comments at the hearing. *See* (App. 93a). He quickly tried to backpedal from the implication of his statement they looked like brothers, blustering, "I don't mean like black people. I mean like, you got the same mother, you got the same father You know, you're brothers . . . ." and so on. *Id.* He admitted that part of the reason he struck Venireperson 64, a Black juror, was

because he looked very similar to the defendant, a Black man, that he reminded him of the defendant, and had the same "piercing eyes" as Petitioner. (App. 89a).

Since Mr. Williams is Black, the only way he and the venireperson could look like brothers who share a mother and father, as the trial prosecutor testified he meant, is with an acknowledgement that both men were Black. The testimony on August 28, 2024 showed that the juror who supposedly resembled Petitioner was, unlike Petitioner, wearing a shirt with an orange dragon and "Chinese or Arabic letters," a large gold cross, two gold earrings in his left ear, and shiny gray pants. (App. 94a-96a). Beyond their race and youth, the only similarities were the type of glasses, and, according to the trial prosecutor, "piercing eyes." (Apparently, of the approximately 130 venirepersons, only one had piercing eyes—and he just happened to be a Black man). It follows, then, that if the reason the trial prosecutor struck the venireperson was because he looked like Mr. Williams's brother, the prosecutor struck him because he was Black. This obvious conclusion is supported by the prosecutor's other statements related to race during his testimony. The trial prosecutor's exclusion of venirepersons was not race-neutral. Black venirepersons were excluded from the jury because they were Black, as the trial prosecutor's recent testimony makes clear.

B. Attempt to minimize actual use of peremptory strikes against Blacks.

During jury selection in Petitioner's trial, the State utilized six of its nine peremptory strikes (67% of the available strikes) against six of the seven (86%) Black venirepersons. (Tr. 1568-69). Petitioner's jury was comprised of eleven white

jurors and only one Black juror. Although this is clear from the trial record, the trial prosecutor claimed it was not true. The trial prosecutor sought to minimize his use of the peremptory against the qualified Black jurors ("No. I think you have them reversed, actually" (App. 82a). He inaccurately insisted that he used only three of his nine peremptory strikes to strike Black jurors and six strikes to exclude white jurors. (App. 82a-83a). In reality, he used six of his nine peremptory strikes to strike qualified Black jurors and three strikes to strike white jurors.

C. Disparate treatment and questioning of Black jurors.

Venireperson William Singleton, another qualified Black man, was also struck because the State claimed he was "weak" on the death penalty, even though he stated he could vote for a death sentence, keep an open mind throughout the trial and deliberation process, make a decision based on the evidence and the law, and could abide by the State's burden of proof beyond-a-reasonable-doubt. (Tr. 762-63, 768, 775-76, 778). Singleton elaborated that he did not believe a sentence of life imprisonment to be more lenient than the death penalty, because "[e]ither way, [the defendant]'s gone for the rest of his life." (Tr. 766). Three white jurors who gave similar answers regarding their belief that a life sentence was of equivalent magnitude to the death penalty were not struck. (Tr. 564-65, 663-64, 666-67, 789, 1611). The State also argued for Singleton to be struck because he had been court martialed in 1988. (Tr. 1420-21). But Singleton had been honorably discharged and in 2001, at the time of voir dire, was still serving in the reserves. White venirepersons who had been convicted of various other crimes, including receiving

stolen property and indecent exposure, were not struck. (Tr. 1413-14, 1425, 1427, 1611).

In a disparate line of questioning as compared to white jurors, the trial prosecutor did not reassure a single Black juror that all 12 people had to agree on the verdict when he questioned them individually, but did reassure white jurors 11, 18, 21, 22, 26, 27, 29, 30, 32, 34, 35, 41, 43, 50, 63, 67, 70, 71, 106, and 126, that 12 jurors needed to agree on a conviction and a sentence. The trial prosecutor had no response when confronted with this disparate treatment at the August 28, 2024, hearing. This failure to respond when faced with disparate and a lack of comparative treatment of jurors based on their race is further proof that race affected the voir dire proceedings at Mr. Williams's trial.

The record demonstrates several ways in which the prosecution engaged in disparate questioning for Black and non-Black jurors. First, the prosecution tended to ask Black jurors open-ended questions that could have led to Black jurors providing answers that disqualified themselves, while asking non-Black jurors closed-ended, leading questions. For example, the prosecution questioned a non-Black prospective juror (who was later seated on the jury) as follows:

> MR. LARNER: All right Juror Number 30. In a proper case, under the evidence and the law, can you legitimately and seriously consider imposing the death sentence?
>
> VENIREMAN STORMS: Yes.
>
> MR. LARNER: You can?
>
> VENIREMAN STORMS: Yes.

MR. LARNER: Are you sure?

VENIREMAN STORMS: Yes.

MR. LARNER: You would not automatically -- can you also consider life without parole, without the possibility of probation and parole?

VENIREMAN STORMS: Yes.

…[Brief questioning of another juror]…

MR. LARNER: I didn't mean to forget to do that with you. I like to do that with everyone. And I assume that I have on the first row. Okay. Now, the judge has already asked you if you could consider both. I'm going into it a little deeper. Now, Number 30, you understand that the burden of proof is on the State?

VENIREMAN STORMS: Yes.

MR. LARNER: And you won't automatically go from guilt to the death penalty, will you?

VENIREMAN STORMS: No.

MR. LARNER: You'll wait to hear the aggravating circumstances, or circumstance, and see if it exists, right?

VENIREMAN STORMS: Yes.

MR. LARNER: I have to prove it exists?

VENIREMAN STORMS: Right.

MR. LARNER: Beyond a reasonable doubt?

VENIREMAN STORMS: Absolutely.

MR. LARNER: And if it exists, all twelve have to agree it exists. Okay?

VENIREMAN STORMS: Right.

MR. LARNER: To get through that second door. Okay?

VENIREMAN STORMS: Yes.

MR. LARNER: Any question about any of this?

VENIREMAN STORMS: Absolutely not.

MR. LARNER: Okay. And then when you start weighing it, it's a matter of quality, not quantity. Okay? Otherwise, it would just be getting out your calculator. And then, even then, you still don't have to do the death penalty. You don't have to. Do you have a problem with that, or question about that?
VENIREMAN STORMS: No.

MR. LARNER: Now, but you will be able to legitimately consider it, and if it's appropriate, vote for it. Is that right?

VENIREMAN STORMS: Yes.

(Tr. 401-03)

In stark contrast is the prosecution's questioning of Juror No. 65 (a Black juror who was not seated):

MR. LARNER: Juror Number 65, in the proper case under the evidence and the law, could you seriously and legitimately vote for the death penalty?

VENIREMAN SINGLETON: I think I could.

MR. LARNER: Could you *see yourself in that position actually voting*, if the evidence and the law was there, for the death penalty?

VENIREMAN SINGLETON: Yes.

MR. LARNER: You've *considered this in the past*, this issue?

VENIREMAN SINGLETON: I've never really thought about it.

MR. LARNER: Do you think that some crimes are *deserving* of that and others are not?

MR. GREEN: Judge, I'm going to object to the relevance of whether other crimes are deserving of that or not.

MR. LARNER: Well, I'll rephrase that. Do you think that you could also consider life in prison without the possibility of probation or parole?

VENIREMAN SINGLETON: Yes, I could.

MR. LARNER: Would that be *easier* for you?

VENIREMAN SINGLETON: I can't say. Both, either way, you know, when you think about it, life in prison without parole, or death. You know, you put a person away for the rest of their life. So I can't see any differences in it. Therefore, I can't see any difference in how you judge or weigh those. In other C.W.s, what I'm saying is, I could, you know, -- if I could vote for death, I could vote for life in prison without parole.

MR. LARNER: Do you think that *one is more harsh than the other*?

MR. GREEN: Judge, I'm going to object. You're implying that they lean one way or the other, to one punishment over the other.

THE COURT: The objection is sustained. Please rephrase your question.

MR. LARNER: Do you think that *one punishment is a worse punishment* than the other? I'm not asking you which one you favor, whether you lean towards this one or lean towards that one. I just would like to know, since you said that both of them are -- you didn't see any difference, I think you said. You didn't see any –

VENIREMAN SINGLETON: What I –

MR. GREEN: Judge, I have to object to it, that there's no question before the juror.

THE COURT: Well, the question was, you didn't see any difference. Is that correct?

MR. LARNER: Yes.

MR. GREEN: Okay.

VENIREMAN SINGLETON: I don't think one is any more lenient than the other.

MR. LARNER: Okay. Do you think they are equal?

MR. GREEN: Judge, I would object. That implies a leniency of one over the other.

THE COURT: The objection will be sustained.

MR. LARNER: What do you mean by, *you don't think one is any more lenient than the other*?

MR. GREEN: Judge, that's another form of the same question.

THE COURT: The objection is overruled.

MR. LARNER: Okay.

THE COURT: It's a followup to what the venireperson stated.

MR. LARNER: Yes.

VENIREMAN SINGLETON: Well, basically once the person is convicted, then they are put away for the rest of their life. If there's life without parole, or probation, that means until the day he dies. The death penalty means he's put away until the State puts him to death. Either way, he's gone for the rest of his life.

MR. LARNER: Okay. But do you see that -- well, what you've said is not, I'm not arguing with what you said at all. I'm just trying to see if you *feel* that one punishment is as bad as the other, or is as harsh is the other.

(Tr. 763-66) (emphasis added).

By comparison, the prosecution used a different script for non-black jurors, as shown below:

> MR. LARNER: All right Juror Number 67, in the proper case, could you seriously and legitimately, under the law and the evidence, consider the death penalty?
>
> VENIREPERSON NO. 67: Yes.
>
> MR. LARNER: All right. Can you also seriously and legitimately consider life without parole?
>
> VENIREPERSON NO. 67: Yes.
>
> MR. LARNER: You would make the State prove that special aggravating circumstance?
>
> VENIREPERSON NO. 67: Yes.
>
> MR. LARNER: You wouldn't go from door one, which is the guilt, right, to door three, would you?
>
> VENIREPERSON NO. 67: No.
>
> MR. LARNER: You would make us prove that special, that aggravating circumstance?
>
> VENIREPERSON NO. 67: Yes.
>
> MR. LARNER: Beyond a reasonable doubt? To the twelve people?
>
> VENIREPERSON NO. 67: Yes.
>
> MR. LARNER: And then you would weigh the one or more aggravating circumstances against the one or more mitigating?
>
> VENIREPERSON NO. 67: Yes.
>
> MR. LARNER: And then at that point, you could still consider both punishments?

> VENIREPERSON NO. 67: Yes.
>
> MR. LARNER: And if, in this hypothetical case, if there was no mitigation evidence in favor of the defendant in this hypothetical case, there was only aggravating circumstances and no mitigating, so that, of course, the aggravating would outweigh the mitigating, if there wasn't any mitigation, you could still consider both, seriously consider both punishments at that point?
>
> VENIREPERSON NO. 67: Yes.
>
> MR. LARNER: If that's what the law says?
>
> VENIREPERSON NO. 67: Yes.

(Tr. 769-71) (emphasis added).

The prosecutor in this case also engaged in disparate types of questioning regarding the verdict process for Black and non-Black jurors, systematically isolating Black jurors. (Tr. 206) ("MR. LARNER: And you could stand up in open court and announce your verdict, if it was the death penalty? VENIREMAN LINDA JONES: Yes."); *id.* at 762 ("MR. LARNER: If you were the foreman of the jury, could you sign the verdict of death? VENIREMAN GOODEN: Yes, I could."); *id.* at 878-79 ("MR. LARNER: I noticed you were sort of like Number 76, in that you had your hand up at first and then when I said about signing the verdict as the foreperson and announcing that in court, that kind of hit home a little bit? VENIREMAN RANDLE: That would be difficult."). The prosecution, by contrast, sought to reassure non-Black jurors that twelve votes were required, so they would not have to be alone:

- Tr. 249 ("And all twelve jurors would have to agree on that aggravating circumstance beyond a reasonable doubt before the

second door is opened. Does that help? VENIREMAN HEIDBRINK: I think so.");

- Tr. 342 ("MR. LARNER: Okay. If you were the foreman of the jury, could you sign the death verdict? VENIREMAN TERRILL: If I felt that was the correct decision. MR. LARNER: Okay. If all twelve agreed? VENIREMAN TERRILL: Yeah. MR. LARNER: And you would be one of those twelve? VENIREMAN TERRILL: Yeah.");

- Tr. 344 ("MR. LARNER: And all twelve have to agree that I proved an aggravating circumstance beyond a reasonable doubt. Okay? VENIREMAN RABACK: Yes. MR. LARNER: Are you with me?");

- Tr. 355 ("MR. LARNER: And if all twelve don't agree to that aggravating circumstance, all twelve, then you have to go with life without parole? VENIREMAN KAMMER: Yes. MR. LARNER: It's only if all twelve agree that that aggravating circumstance exists, that you then weigh the mitigating. And if all twelve agree that the aggravating is heavier than the mitigating, you're at door three. Okay? VENIREMAN KAMMER: Yes.");

- Tr. 393 ("MR. LARNER: And just because you find aggravating circumstances, or the twelve people find an aggravating circumstance beyond a reasonable doubt, you wouldn't then automatically vote for the death penalty, would you? If the instructions tell you there's more to be done? 7 VENIREMAN CASBY: No, I wouldn't.");

- Tr. 397 ("MR. LARNER: Aggravating circumstances, all twelve have to agree. If there's nothing in mitigation, you'll still consider life without parole? VENIREMAN BALDES: (Nods).");

- Tr. 399-400 ("MR. LARNER: And if the defense -- if there's more aggravating than mitigating, you understand all twelve have to agree that there's more aggravating than mitigating?

VENIREMAN VORST: Yes. MR. LARNER: And all twelve, even before that, have to agree that we have aggravating circumstances, okay? VENIREMAN VORST: Correct.");

- Tr. 402-03 ("MR. LARNER: And if it exists, all twelve have to agree it exists. Okay? VENIREMAN STORMS: Right.");

- Tr. 404-05 ("MR. LARNER: And if I don't prove that aggravating circumstance to your satisfaction beyond a reasonable doubt, to the twelve jurors, what's the punishment? If I don't prove that aggravating circumstance, what's the punishment? VENIREMAN VINYARD: Life imprisonment." … MR. LARNER: That's the law. And if I do, then you start -- then the twelve, if they agree, then you start looking at mitigating. And if that mitigating outweighs that aggravating, if twelve people don't think that that aggravating -- twelve people have to agree the aggravating is heavier. If they don't, you stop there. You don't get -- you're not quite at that third door. You are not at that third door until aggravating is heavier than mitigating, and all twelve agree to that. Okay? Any question about that, Juror Number 32? VENIREMAN VINYARD: No, sir."[1]

The prosecution did not engage in this type of reassurance with a single Black prospective juror. *Cf. Miller-El v. Dretke*, 545 U.S. 231, 255 (2005) ("If the graphic script is given to a higher proportion of blacks than whites, this is evidence that prosecutors more often wanted blacks off the jury, absent some neutral and extenuating explanation."); *id.* at 256 ("Only 6% of the white venire panelists, but 53% of those who were black, heard a different description of the death penalty before being asked their feelings about it.").

[1] Similar questioning was also provided for prospective jurors 34, 35, 41, 43, 50, 63, 67, 70, 71, 106, and 126. (Tr. 533, 535, 538, 542-43, 653, 761, 770, 779, 781, 1239-40, and 1245-246).

In fact, the only time the topic of twelve jurors came up with a Black prospective juror, the prosecution returned to the theme of placing pressure on the juror of having to stand up and announce the verdict in open court. (Tr. 879-80) ("VENIREMAN RANDLE: I would do it under the law and the evidence. But it would really be difficult for me to be a foreperson, and to sign, and stand up and say it. MR. LARNER: Well, I think all twelve jurors will probably have to stand up and say that that's their verdict. Not just the foreperson. The foreperson would sign the verdict. But all twelve would have to get up and announce their verdict in open court. So there's no getting around that, in that type of case."). "A court confronting that kind of pattern cannot ignore it." *Flowers v. Mississippi*, 588 U.S. 284, 310 (2019). The prosecution engaged in disparate questioning of jurors based on their race.

D. Disappearance of the prosecutor's voir dire notes from the file.

In addition to admitting race was a factor in striking jurors, the trial prosecutor admitted at the August 28, 2024 hearing that he took notes during voir dire and that he saved them in the file. App. 98a. Incredibly (and suspiciously), those notes are now missing from the State's file. App. 146a-147a. The destruction of the prosecutor's voir dire notes—evidence that would underpin a Batson claim—raises a negative inference that such notes would support Petitioner's claim. The State maintained sole possession of their case file including the prosecutor's trial notes and they failed to disclose them to the defense or to any court before they

were apparently destroyed, precluding full and fair consideration of Mr. Williams's *Batson* claim now and at prior stages of his case.

E. History of striking Black jurors.

St. Louis County's practice of striking Black venirepersons based on their race continued after Petitioner's trial. In 2006 and 2007, the Missouri Supreme Court reversed two death sentences imposed in St. Louis County for *Batson* violations. *State v. McFadden*, 216 S.W.3d 673, 674-77 (Mo. banc 2007); *State v. McFadden*, 191 S.W.3d 648, 656, 657 (Mo. banc 2006). The Missouri Supreme Court and other state appellate courts have also reversed a number of convictions on *Batson* grounds. *See State v. Hampton*, 163 S.W.3d 903, 904-05 (Mo. banc 2005); *State v. Hopkins*, 140 S.W.3d 143, 157 (Mo. Ct. App. 2004).

At the August 28, 2024 hearing in this case, the trial prosecutor initially sought to minimize that history. When asked, "Have you ever been found to have violated *Batson v. Kentucky* in another case?" he retorted, "Now let me say this perfectly clear. Never." (App. 99a). However, when asked, "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?" he backpedaled, claiming, "I thought you said have I ever been reversed." *Id.* He then conceded that in the "McFadden case," the trial judge found him to have failed to provide race neutral reasons for excluding three Black jurors. (App. 99a-100a). The trial prosecutor insisted:

> 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.

(App. 100a-101a). The trial prosecutor again sought to minimize his previous misconduct; he failed to mention that regarding the one juror in *McFadden* where a *Batson* challenge was overruled, the trial court found the prosecutor's first provided reason for the strike to be pretextual for race.

REASONS FOR GRANTING THE WRIT

I. Exercising a peremptory strike on the basis of race violates the Fourteenth Amendment.

"Racial discrimination in jury selection compromises the defendant's right to a trial by an impartial jury." *McFadden*, 191 S.W.3d at 651 n.2. "The right to sit before a jury of one's peers, chosen not because of race, but because of their standing as citizens doing their civic duty, is essential to a fair trial." *Id.* at 657 (*quoting Miller-El v. Dretke*, 545 U.S. 231 (2005)).

Furthermore, "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Batson v. Kentucky,* 476 U.S. 79, 87 (1986). "The very idea of a jury is a body … composed of the peers or equals of the person whose rights it is selected or

summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Id.* at 86 (*quoting Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)). "In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law [is] strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Id.* at 99.

As a result, "[t]he State's privilege to strike individual jurors through peremptory challenges[] is subject to the commands of the Equal Protection Clause." *Id.* at 89. "In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *Flowers v. Mississippi*, 588 U.S. 284, 298 (2019).

Batson provides a three-step process for determining when a strike is discriminatory:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Foster v. Chatman, 578 U.S. 488, 499-500 (2016) (*quoting Snyder v. Louisiana*, 552 U.S. 572, 476-77 (2008)).

"The ultimate inquiry is whether the State was 'motivated in substantial part by discriminatory intent.'" *Flowers*, 588 U.S. at 303 (*quoting Foster*, 578 U.S. at 303). Once purposeful discrimination is shown, the prosecution cannot rely on other non-discriminatory reasons to justify the strike. *See McFadden*, 191 S.W.3d at 657

("To excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike would erode what little protection Batson provides against discrimination in jury selection.").

This process requires an examination of the totality of the circumstances. The Court "must examine the whole picture." *Flowers*, 588 U.S. 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 (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 266 (1977)).

In this case, while the Missouri Supreme Court addressed a *Batson* claim on direct appeal in 2003 in favor of the State, neither that court nor any subsequent court reviewing that claim had available the express admission of racial animus on the part of the trial prosecutor. No testimonial evidence was before the Supreme Court of Missouri in 2003, only a self-serving colloquy with the trial court, which is clearly and convincingly rebutted by the sworn testimony from 2024.

As Respondent admits, the trial prosecutor's recent testimony "contradicts the transcript of Petitioner's original criminal trial." (App. 154a). The new testimony reveals that there was in fact an "overt" race-based reason for the strikes. During the trial prosecutor's testimony on August 28, 2024, he volunteered that race was a consideration in exercising a peremptory strike of Juror No. 64, and that he struck that juror in part because he was Black. (App. 93a). ("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."). Further, the trial prosecutor admitted that "[t]hey were both young black men…[a]nd that's not necessarily the full reason that I thought they were so similar." (App. 92a).

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. *Foster*, 578 U.S. at 499-500 (emphasis added); *see State v. Williams*, 97 S.W.3d 462, 471 (Mo. Banc 2003) ("The state's reasons for strike need only be facially race-neutral unless discriminatory intent is inherent within the explanation."). The trial prosecutor's testimony shows that race ***was*** a factor, which is impermissible. "A person's race simply 'is unrelated to his fitness as a juror.'" *Batson*, 476 U.S. at 87 (*quoting Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). The trial prosecutor now admits race was "part of" but not the "full" reason for the strike.

"'[T]he prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose.'" *Flowers*, 588 U.S. at 308 (*quoting Batson*, 476 U.S. at 97). In this respect, Juror No. 64 only gave favorable answers to the prosecution's questions:

> Juror Number 64. In the proper case, under the law and the evidence, could you seriously and legitimately consider imposing the death penalty?
>
> VENIREMAN GOODEN: I believe I could.

> MR. LARNER: Okay. Could you also give serious legitimate consideration to the punishment of life without the possibility of probation or parole?
>
> VENIREMAN GOODEN: Yes.
>
> MR. LARNER: If you were the foreman of the jury, could you sign the verdict of death?
>
> VENIREMAN GOODEN: Yes, I could.
>
> MR. LARNER: You could? Okay. Have you thought about this issue before?
>
> VENIREMAN GOODEN: No, not really.
>
> MR. LARNER: Okay. Have you been in favor of the death penalty in the past, in certain cases?
>
> VENIREMAN GOODEN: In certain cases.
>
> MR. LARNER: Do you think in some cases it might be appropriate, in others, it might not?
>
> VENIREMAN GOODEN: Yes.
>
> MR. LARNER: Okay.

(Tr. 762-763).

The above represents the full extent of the prosecution's questioning of Juror No. 64 about his willingness to impose the death penalty. Juror No. 64 "should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, and the prosecutor's explanation for the strike cannot reasonably be accepted." *Miller-El,* 545 U.S. at 247.

Despite his pro-death-penalty answers, to survive the *Batson* challenge, the prosecutor stated that he was potentially "liberal" based on his earrings. But any

"liberal" leaning is something the prosecution should have explored during voir dire, not assumed based on earrings. (Tr. 1585). "[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *McFadden*, 191 S.W.3d at 653-54 (quoting *Miller-El,* 545 U.S. at 245). This is further evidence of discriminatory intent.

A Court also looks at the sheer number of peremptory challenges used against the few black members of the venire. *See Flowers*, 588 U.S. at 288 (it was a "critical fact" that "the State exercised peremptory strikes against five of the six black prospective jurors"); *see also McFadden*, 191 S.W.3d at 650 ("At trial, the State exercised five of its nine peremptory challenge to remove African-American venirepersons, leaving only one African-American to serve on the jury."). "Simple math shows … the number of peremptory strikes available to the prosecutor exceeded the number of black prospective jurors." *Flowers*, 588 U.S. at 296. Here, the prosecution had nine peremptory strikes, which it exercised on six of seven black prospective jurors. (Tr. 1568, 1569-70). Even the trial prosecutor had trouble believing that he had exercised peremptory strikes on this many black jurors, minimizing the reality and insisting that he only struck three instead of six. (App. 82a-83a).

The sheer number of Black prospective jurors stricken by the prosecution via peremptory strikes—six of seven, or 86%—speaks for itself. *See Miller-El*, 545 U.S. at 241 ("The prosecutors used their peremptory strikes to exclude 91% of the eligible

African-American venire members…. Happenstance is unlikely to produce this disparity."); *McFadden*, 191 S.W.3d at 657 n.27 ("Happenstance also fails the prosecutor in this instance, where 83% of the eligible African-American venire members were stricken using pretextual reasons."). There were 30 eligible members of the venire at that point, consisting of seven Black members and 23 non-black members. This means that the prosecution eliminated 86% (6/7) of Black prospective jurors with peremptory strikes, and only 13% (3/23) of non-Black prospective jurors with peremptory strikes. *Cf. Miller-El*, 545 U.S. at 266 ("By the time a jury was chosen, the State had peremptorily challenged 12% of the qualified nonblack panel members, but eliminated 91% of the black ones."). It is insufficient to point to the fact that one Black member of the venire was seated on the jury. This Court "skeptically view[s] the State's decision to accept one black juror," because "a prosecutor might do so in an attempt 'to obscure the otherwise consistent pattern of opposition to' seating black jurors." *Flowers*, 588 U.S. at 307 (quoting *Miller-El*, 545 U.S. at 250).

Furthermore, "[t]he lopsidedness of the prosecutor's questioning and inquiry can itself be evidence of the prosecutor's objective as much as it is of the actual qualifications of the black and white prospective jurors who are struck or seated." *Flowers*, 588 U.S. at 310. Specifically, "disparate questioning can be probative of discriminatory intent." *Id.* at 308. As this Court has explained:

> [T]his Court's cases explain that disparate questioning and investigation of prospective jurors on the basis of race can arm a prosecutor with seemingly race-neutral reasons to strike the prospective jurors of a particular race. In other

> words, by asking a lot of questions of the black prospective jurors or conducting additional inquiry into their backgrounds, a prosecutor can try to find some pretextual reason—any reason—that the prosecutor can later articulate to justify what is in reality a racially motivated strike. And by not doing the same for white prospective jurors, by not asking white prospective jurors those same questions, the prosecutor can try to distort the record so as to thereby avoid being accused of treating black and white jurors differently…. Prosecutors can decline to seek what they do not want to find about white prospective jurors.

Id. at 310 (internal citation omitted).

The Eighth Circuit disregarded this Court's *Batson* precedent. This Court should grant certiorari on the basis of this Court's *Batson* line of precedent. Sup. Ct. R. 10 (a) and (c).

II. The court of appeals wrongly denied a COA on Mr. Williams's *Batson* claim when Mr. Williams satisfied the extraordinary circumstances test of *Buck*.

"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.*

Fed. R. Civ. P. 60(b) provided the district court the procedural mechanism to consider the newly disclosed evidence and to grant appropriate relief to Mr. Williams in a manner similar to that this Court approved in *Buck v. Davis*, 580 U.S. 100 (2017). This Court granted Texas death row inmate Duane Buck penalty phase relief under Rule 60(b)(6).

The facts surrounding Mr. Buck's Rule 60(b)(6) litigation are similar to the circumstances of Petitioner's case. As in *Buck*, there were intervening legal developments that undermined the correctness of the prior judgment in the habeas proceeding. The Court in *Buck* also stressed that Mr. Buck's underlying claim, involving the injection of racial discrimination into the case, was an extraordinary circumstance that warranted relief, as was the Attorney General's earlier concession of error. *See id.* at 113-14. The Court in *Buck* noted that claims of racial discrimination are particularly "pernicious in the administration of justice" and "poison[] public confidence in the judicial process." *Id.* at 124. Rule 60(b)(6) is properly invoked in extraordinary circumstances much like those in this case. "Clause (6) is a residual clause used to cover unforeseen contingencies; that is, it is a means for accomplishing justice in exceptional circumstances, [not covered by the other five provisions of Rule 60]." *Stipelcovich v. Sand Dollar Marine, Inc.,* 805 F.2d 599, 604–05 (5th Cir.1986) (citing 7 J. Lucas & J. Moore, Moore's Federal Practice ¶ 60.27[2] at 274 (2d ed.1985)).

A motion under subsection (b)(6) must be brought "within a reasonable time," Fed. R. Civ. P. 60(c)(1), and requires a showing of "extraordinary circumstances" to

justify the reopening of a final judgment. A consideration of extraordinary circumstances under Rule 60(b)(6) relies on a variety of factors, all of which this case meets. Applying *Buck*, there can be no question that there are extraordinary circumstances here.

Without the St. Louis County Prosecuting Attorney's 2024 filing, the evidence and expression of racial animus in voir dire would never have come to light. Racism is anathema to justice. It has reared its ugly head here. Mr. Williams's case reflects the same perniciousness the Supreme Court considered in *Buck*, 580 U.S. at 123. In addition to the evidence that came to light at the August 28, 2024 hearing, the prosecutor's confession of error supports reopening Petitioner's claim.

If finality is to be considered, Petitioner respectfully points this Court to the manner in which Ms. Gayle's family defines finality, as described by the Circuit Court: In initially granting the consent judgment, the court considered "the family's desire that the death penalty not be carried out in this case, as well as the family's desire for finality." (App. 37a).

A prosecutor is entrusted to seek justice, not what he perceives to be "wins," making it all the more problematic that Respondents seek to ignore and minimize the evidence that race played a role in voir dire, in violation of *Batson*. It bears the imprimatur of the State justifying the marginalization of Black community members. For this reason, Mr. Williams's case involves at least the same level of racial animus as Mr. Buck's and even more extraordinary circumstances, but assuredly, both deserve relief.

Respondent also seeks to minimize the impact of *Buck* in an inappropriate manner. For instance, Respondent downplays 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. The St. Louis County Prosecutor's concession here is a **step above** *Buck* in terms of extraordinary circumstances. Further, Respondent marginalizes Ms. Gayle's family by ignoring their acceptance of a life plea agreement (this too far exceeds *Buck*'s extraordinary circumstances).

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.

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*, 443 U.S. at 556. 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 Supreme Court justices in *Buck*, there exists here more than enough for reasonable justices to grant a COA.

The federal courts here did not adequately address the extraordinary circumstances when clear and convincing evidence now existed rebutting the state court *Batson* finding. As noted by Justice Jackson in "But deference is not a rubber stamp; it 'does not imply abandonment or abdication of judicial review.' *Miller-El v. Cockrell*, 537 U. S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). 'A federal court can disagree with a state court's [factual findings] and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.' *Ibid.*" *King v. Emmons*, 144 S.Ct. 2501 (2024) (Jackson, J., dissent from cert denial)

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. Under this Court's jurisprudence, these extraordinary circumstances warrant 60(b) relief.

As this Court has warned, "Racial bias [is] a familiar and recurring evil that, **if left unaddressed**, would risk systemic injury to the administration of justice." *Pena-Rodriguez,* 580 U.S. at 224 (emphasis added). "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.* Furthermore, the infiltration of racial animus into a criminal trial "poisons public confidence" in the judicial process. *Davis* v. *Ayala*, 576 U. S. at 285. That is precisely what happened in Mr. Williams' trial.

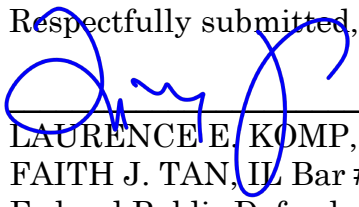
The extraordinary circumstances here relate to § 2254(e)(1) and recently developed clear and convincing evidence that rebuts the state court's reliance on the *Batson* colloquy. In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), this Court addressed the matter through § 2254(d). The Court did not have the occasion to consider the circumstances of a clear satisfaction of § 2254(e)(1), completely undermining the previous § 2254(d) inquiry. It should now.

For all the above reasons, the extraordinary circumstances of *Buck* demonstrate that this Court should grant certiorari. *See* Sup Ct. R. 10(a) and 10(c).

CONCLUSION

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

Respectfully submitted,



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