No. 24-_____
CAPITAL CASE

In the Supreme Court of the United States

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

PETITION FOR WRIT OF CERTIORARI

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******Execution Scheduled for September 24, 2024******

CAPITAL CASE
QUESTIONS PRESENTED

The St. Louis County Prosecuting Attorney, Wesley Bell, moved to vacate the conviction of capital defendant Marcellus Williams on the basis of actual innocence and constitutional error at trial. At the hearing, the Prosecuting Attorney and Williams presented evidence that 1) racial discrimination had occurred during jury selection, and 2) that the State had destroyed potentially useful evidence in bad faith. The Prosecuting Attorney conceded constitutional error in both the jury selection and the handling of evidence based on evidence presented at the hearing, including testimony from the trial prosecutor admitting "part of the reason" he struck a Black juror was because of his race and that he handled the murder weapon without gloves multiple times before trial, contaminating any DNA on the weapon. The state courts denied the Prosecuting Attorney's motion and appeal of the denial without giving any deference to the concession of constitutional error at trial.

This petition presents the following questions:

1. Whether due process of law requires reversal where a capital conviction is so infected with errors that the prosecutor who prosecuted the case no longer seeks to defend it.

2. Whether, in this capital case, the Missouri courts erred in failing to recognize that a prosecutor's testimony that he struck a juror "in part" because of his race requires reversal under *Batson v. Kentucky*.

PARTIES TO THE PROCEEDING

Petitioners are the Prosecuting Attorney for the 21st Judicial Circuit of the State of Missouri, Wesley Bell, and Marcellus Williams. The Prosecuting Attorney filed a Motion to Vacate the Conviction or Set Aside the Judgment of Marcellus Williams in the underlying matter.

Marcellus Williams is a wrongfully convicted defendant and the real party in interest in the trial court proceedings. Wiliams is scheduled for execution on September 24, 2024, despite the prosecutor's concession of error.

Respondent is the State of Missouri.

STATEMENT OF RELATED PROCEEDINGS

Prosecuting Attorney, 21st Judicial Circuit, ex rel Marcellus Williams, No. 2422-CC000422 (St. Louis Cnty. Cir. Ct., Mo.) (Order issued on September 12, 2024).

Prosecuting Attorney, 21st Judicial Circuit, ex rel Marcellus Williams, No. SC10083 (Mo.) (Opinion and judgement issued on September 23, 2024).

State v. Williams, No. SC83934 (Mo.) (death warrant issued on June 4, 2024; opinion overruling motion to withdraw warrant of execution issued on July 12, 2024).

State v. Williams, 97 S.W.3d 462 (Mo. banc 2003). Judgment entered January 14, 2003.

Williams v. State, 168 S.W.3d 433 (Mo. banc 2005). Judgment entered June 1, 2005.

Williams v. Roper, 695 F.3d 825 (8th Cir. 2012). Judgment entered September 18, 2012.

Williams v. Steele, 571 U.S. 839 (Oct. 7, 2013) (mem.).

Williams v. Steele, 582 U.S. 937 (Jun. 26, 2017) (mem.).

Williams v. Larkins, 583 U.S. 902 (Oct. 2, 2017) (mem.).

State ex rel. Parson v. Walker, No. SC100352 (Mo.) Opinion and judgment issued on June 4, 2024. Rehearing denied July 12, 2024.

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Petitioners, the Prosecuting Attorney for the 21st Judicial Circuit of Missouri and Marcellus Williams, respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Missouri in this case.

INTRODUCTION

Marcellus Williams is scheduled to be executed tomorrow, September 24. If the execution proceeds, it will occur over the objection of the prosecutor's office that convicted him. Earlier this year, the local prosecutor filed a motion to overturn Williams' conviction and, following an evidentiary hearing, conceded that constitutional errors committed by his office had infected the fairness of Williams' criminal trial.

These facts—wherein a duly elected prosecutor, after reviewing the facts and evidence, confesses constitutional error—present this Court with the same issue granted certiorari by this Court in *Glossip v. Oklahoma*, No. 22-7466:[1] whether the Due Process Clause of the Fourteenth Amendment requires reversal where a capital conviction is so infected with errors that the prosecutor who prosecuted the case no longer seeks to defend it. This case presents even more compelling facts regarding the weight accorded to a prosecutor's confession of error. These confessions were made in proceeding under Mo. Rev. Stat. § 547.031, a statute that empowers local prosecutors to satisfy their ethical and constitutional obligations to overturn wrongful convictions and ensure "justice shall be done." *United States v. Bagley*, 473 U.S. 667, 675 n. 6 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

[1] Oral arguments are scheduled for October 9, 2024

The evidence supporting these concessions is compelling. During an evidentiary hearing, the Prosecuting Attorney subpoenaed the trial prosecutor to take the stand and subjected him to an adversarial process. The trial prosecutor thereupon admitted that "part of the reason" he struck a Black juror was because of his race. He also admitted that he contaminated critical evidence (the murder weapon) prior to trial, despite the defense's request for additional testing. The revelations at the hearing confirmed that Williams' trial was corrupted with constitutional error.

For these reasons, this petition and the pending application for stay of execution are necessary for the same reasons they were in *Glossip*: because the lower courts fail to accept what the duly elected minister of justice has accepted—that Williams' conviction was marred by constitutional error. To execute him would be an unthinkable, irreversible travesty.

OPINION BELOW

The opinion of the Supreme Court of Missouri (App. 236) is not yet reported. The order of the Circuit Court of St. Louis County, Missouri denying the Prosecuting Attorney's Motion to Vacate the Conviction or Set Aside the Judgement is unreported. (App. 2)

JURISDICTION

The Supreme Court of Missouri entered judgment on September 23, 2024. (App. 236). This Court has jurisdiction under 28 U.S.C. §1257(a) and § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

The Missouri Statute providing for a prosecutor to file a Motion to Vacate is set forth in the Appendix. (App. 102); RSMo. § 547.031 (2021).

STATEMENT OF THE CASE

On August 11, 1998, Dr. Daniel Picus found his wife, Felicia Gayle, lying on the floor of the foyer of their house, in University City, Missouri, stabbed 43 times with their kitchen knife that was left lodged in her neck. (TT.[2]1712, 2163).

Police processed the house and collected numerous pieces of forensic evidence left by the perpetrator including: bloody shoeprint in the foyer and joining hallway, fingerprints on the second floor of the house, (TT. 2310), and hairs near Ms. Gayle's body. (TT. 2977-78).

Police could not initially identify any suspects, so they advised Dr. Picus and Ms. Gayle's family to offer a monetary reward to help generate information. As a result, the family offered a $10,000 reward. (TT. 1783, 1814).

A. Police turn to two incentivized witnesses.

On June 4, 1999, ten months after Ms. Gayle's murder, and after the family offered the reward money, Henry Cole, a convicted felon, approached police,

[2] "TT." refers to citations from the trial transcript.

immediately after being released from the city jail, claiming to have information about the murder. (TT. 2380-81). Cole had a criminal history spanning two decades and pending charges against him at the time he came forward to police. (TT. 2281-82). Cole claimed that Williams, with whom he was incarcerated with in the city jail, admitted to him that he murdered Ms. Gayle. (TT. 2392-2401). From the beginning, he told police that he came forward to collect the reward money. (TT. 2455). He later threatened not to participate in a pretrial deposition unless he was paid a portion of the reward money. (TT. 2459). As a result, prosecutors advised Dr. Picus to pay Cole $5,000 before trial, which he did. (TT. 1817-18, 2555).

Police did not arrest Williams based on Cole's account and instead, used Cole for months as an informant to extract information from Laura Asaro, Williams's former girlfriend and a known prostitute. (TT. 1818). Asaro did not provide Cole with any information about the murder. (TT. 2439-44). Months later, in November 1999, police approached Asaro at her home. (TT. 1910). Asaro believed they were there because of an outstanding warrant for her arrest. (TT. 1923). Police told her that she was guilty of withholding evidence if she did not cooperate and give them information about who killed Ms. Gayle. (TT. 1910). It was only then that Asaro claimed that Williams had also confessed to her that he murdered Ms. Gayle and she had supposedly seen proceeds of the robbery, including, Ms. Gayle's purse, identification card, and a laptop computer stolen from Ms. Gayle's home. (TT. 1846, 2001-02).

After Asaro's statement, police searched Williams's non-operational car which was parked in front of his grandfather's home. Williams had not had access to the car

for 15 months prior because he had been incarcerated in the city jail for an unrelated charge. They found a calculator and *St. Louis Post-Dispatch* ruler in the glove compartment. (State's Trial Exs. 97, 98). They also found a medical dictionary in the trunk, but Dr. Picus later confirmed that the dictionary did not belong to him. (TT. 1776). At least one witness at trial testified that Asaro had access to Williams' car during that time when Williams did not. (TT. 2792).

Asaro directed police to Glenn Roberts, Williams's grandfather's neighbor, who possessed Dr. Picus's laptop that had been stolen during the murder. Roberts testified at trial that he received the laptop from Williams in exchange for $150 or $250. (TT. 2001-02). Roberts would have also testified that at the time he received the laptop, Williams told him the computer belonged to Asaro (State's MTV Ex. 10, Aff. Glenn Roberts, Sept. 9, 2020), but the trial court sustained the State's hearsay objection and prevented the jury from ever hearing this information. Instead, the jury simply heard that Williams was in possession of the computer stolen from Dr. Picus and Ms. Gayle's house.

B. Williams excluded as the source of crime scene forensic evidence.

Police compared Williams to the multitude of forensic evidence collected from the house. The bloody shoeprints found in the house did not match Williams's shoe size nor any of the first responders' shoe sizes. (TT. 2882, 2940). They eliminated Williams, Dr. Picus, and the victim as the source of hairs found near her body. (TT. 2876-77). Williams' fingerprint did not match the print lifted from the medical dictionary found in the trunk of the Buick. (TT. 2319). Fingerprints lifted from the

second floor of the house, however, were destroyed, without documentation or photographic reproduction; the State later said this was because they believed they were not suitable for comparison. (TT. 1695, 2310, 2332, 2342). However, this destruction was not disclosed to Williams's attorneys until after the State had already destroyed the fingerprints.

C. Prosecution's case rested on Cole's and Asaro's credibility.

At Williams's trial, the State's case rested on Cole's and Asaro's testimony. At the conclusion, the jury convicted Williams of first-degree murder, first-degree burglary, armed criminal action, and robbery. (TT. 3073-3074). Following the sentencing phase, the jury recommended Williams be sentenced to death, which the trial court imposed on August 27, 2001. (TT. 3517-18).

D. Marcellus Williams Appealed His Conviction and Sentence.

The Missouri Supreme Court affirmed Williams's conviction and sentence on direct appeal, *State v. Williams*, 97 S.W.3d 462 (Mo. banc 2003), and the U.S. Supreme Court denied the petition for a writ of certiorari, *Williams v. Missouri*, 539 U.S. 944 (2003). In 2004, the circuit court denied Williams's motion for post-conviction relief after conducting an evidentiary hearing limited to two issues, which the Supreme Court of Missouri affirmed. *Williams v. State*, 168 S.W.3d 433 (Mo. banc 2005). The United States District Court for the Eastern District of Missouri found Williams had received ineffective assistance of counsel and granted penalty phase relief on Williams's federal habeas corpus action, but in 2006, the Eighth Circuit

Court of Appeals reversed and reinstated Williams' death sentence. *Williams v. Roper*, 695 F.2d 825 (8th Cir. 2012).

In 2015, Williams filed a habeas petition with the Missouri Supreme Court to obtain DNA testing on the handle of the murder weapon, a knife left embedded in the victim's neck. The Court appointed a special master to supervise DNA testing. *Ex rel. Marcellus Williams vs. Steele*, Case. No. SC94720 (Mo. 2015). But once the testing was complete, without conducting a hearing or issuing findings, the special master sent the case to the Supreme Court of Missouri. *Id.* Without briefing or oral argument regarding the results of the DNA testing, the court summarily denied Williams's petition. The U.S. Supreme Court denied Williams's petition for certiorari. *Williams v. Steele*, 582 U.S. 937 (2017).

Upon review of the DNA test results, three DNA experts independently reviewed the results and came to the same result: Marcellus Williams was excluded as the source of the DNA on the knife. (PA's Ex.[3] 14, Aff. Dr. N. Rudin; Ex.15, Aff. Dr. G. Hampikian; Ex. 16, Aff. Dr. C. Word). After reviewing this evidence, on August 22, 2017, then-Governor of Missouri Eric Greitens stayed Williams's execution date and convened a Board of Inquiry to investigate Williams's claims of innocence, Exec. Order No. 17-20 (Aug. 22, 2017), but the Board was dissolved by Governor Mike Parson on June 29, 2023. Exec. Order No. 23-06 (June 29, 2023). It is believed the Board never reached a conclusion nor issued a report and recommendation. *See* Steve

[3]"PA" refers to the Prosecuting Attorney. All exhibit citations are to exhibits introduced at the hearing on the Prosecutor's Motion to Vacate.

Kraske & Halle Jackson, *Gov. Mike Parson says Missouri must 'be competitive' to keep Chiefs and Royals*, KCUR (Jun. 13, 2024) (In interview, Governor Parson states board of inquiry did not produce any results).

E. The Prosecuting Attorney files a motion to vacate Williams' conviction.

On January 26, 2024, after months of review and investigation, the St. Louis County Prosecuting Attorney Wesley Bell appointed a Special Prosecutor to file a Motion to Vacate Williams's conviction pursuant to Section 547.031, RSMo. Under the statute, the prosecutor is the only prosecuting authority that is a party to the proceedings. The statute states in relevant part:

> 1. A prosecuting or circuit attorney, in the jurisdiction in which charges were filed, 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. The circuit court in which charges were filed shall have jurisdiction and authority to consider, hear, and decide the motion.

§ 547.031 RSMo (2021).

The statute permits the Attorney General to *participate* in such proceedings, but his presence is not required and he is not a party. *See* § 547.031(2) ("The attorney general shall be given notice of hearing of such a motion by the circuit clerk and shall be permitted to appear, question witnesses, and make arguments in a hearing of such a motion."). Similarly, the statute limits the right to appeal to the prosecutor, stating "The prosecuting attorney or circuit attorney shall have the authority and right to file and maintain an appeal of the denial or disposal of such a motion." § 547.031(4).

Prosecuting Attorney Bell raised four counts in the Motion to Vacate: (1) new evidence suggests that Williams is actually innocent; (2) Williams' trial counsel was ineffective for failing to investigate and present evidence to impeach Cole and Asaro; (3) Williams's trial counsel was ineffective for failing to present mitigation evidence during the sentencing phase; and (4) the prosecution improperly removed qualified jurors for racial reasons during jury selection in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). (App. 26- 88)

On June 4, 2024, with the prosecutor's Motion to Vacate still pending, the Missouri Supreme Court set Williams's execution date for September 24, 2024. *State v. Williams*, No. SC83934 (Mo.). On June 5, 2024, the Attorney General filed a Motion to Dismiss the prosecutor's motion, arguing, among other things, that the hearing court did not have jurisdiction to hold a hearing because the Missouri Supreme Court had scheduled an execution date.[4] The hearing court denied the Attorney General's Motion to Dismiss and scheduled an evidentiary hearing on the Motion to Vacate for August 21, 2024. *See Prosecuting Attorney, 21st Judicial Circuit, ex rel Marcellus Williams*, No. 2422-CC000422 (St. Louis Cnty. Cir. Ct., Mo.)

F. The Prosecuting Attorney and Williams reach a disposition supported by Dr. Picus.

On August 20, 2024, the day before the scheduled hearing, the Prosecuting Attorney received new DNA results that indicated that the DNA on the knife handle,

[4] It bears noting that the Attorney General's Motion to Dismiss was filed **four months** after they filed a Notice of Intent to Oppose the Motion to Vacate, but just one day after the execution date was set. At 32 pages, the Motion to Dismiss was clearly prepared in advance, and the Attorney General sat on it until a time when it was most advantageous to them to file.

was consistent with the DNA profiles of Keith Larner, the assistant prosecuting attorney who tried Williams' case and Edward Magee, a former investigator for the St. Louis County Prosecuting Attorney's Office. Both men had submitted affidavits claiming that they had handled the knife without gloves before trial (AGO's Ex. T, Aff. K. Larner; Ex. S, Aff. E. Magee.); however, affidavits from the defense attorneys confirmed that they were required to wear gloves while handling evidence at the time (PA's Ex.41, Aff. Hon. C. McGraugh; Ex. 23, Aff. Hon. J. Green). These DNA results showed that trial prosecutor's and prosecution investigator's DNA profiles were consistent with the DNA found on the knife, indicating that the State had contaminated this critical piece of evidence.

Based on these contaminating DNA results, the Prosecuting Attorney and Williams reached a consent agreement to resolve the Section 547.031, RSMo proceeding. Williams agreed to enter a plea to murder in the first degree pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) ("Alford plea") with a sentence of life without the possibility of parole. (App. 110). The Prosecutor discussed this resolution with the victim's widow, Dr. Picus, who "indicated he does not support the application of the death penalty to Williams." (App.110-111, 125). Dr. Picus expressed these sentiments to the hearing court and all counsel. (App. 111). At this hearing, the Prosecuting Attorney also confessed that the "St. Louis County Prosecuting Attorney determined there were constitutional errors undermining our confidence in the judgement." (App. 110). The Attorney General objected to Williams' *Alford* plea and

pending resentencing,(App. 117-18), but not to the PA's concession of constitutional error.

Immediately following the August 21, 2024 proceedings, the Attorney General filed a Petition for Writ of Prohibition, or in the Alternative, Mandamus to the Missouri Supreme Court. The Supreme Court of Missouri granted a preliminary writ on August 21, 2024, Writ, *Ex rel Marcellus Williams*, No. SC10083 (Mo. Aug. 21, 2024), and on August 22, 2024, the hearing court vacated the consent judgment and set an evidentiary hearing for August 28, 2024. On August 25, 2024, the Prosecuting Attorney filed a motion for leave to amend the Motion to Vacate to advance additional claims. The court granted leave to amend the motion to advance a claim of bad-faith evidence destruction under *Arizona v. Youngblood,* 488 U.S. 51 (1998). (*See* App. 12-13, 89-93, 96-98).

G. August 28, 2024 evidentiary hearing.

On August 28, 2024, a hearing on the Motion to Vacate was held. The Prosecuting Attorney was limited to two hours of time to support its Motion to Vacate, while Marcellus Williams and the Attorney General were also given two hours. (HT.[5] 5).

At the hearing, the prosecution called six witnesses in support of its Motion to Vacate, including an expert in police forensic interviewing, an expert in DNA testing and the handling of forensic evidence to maintain biological material, Patrick Henson (an investigator for the prosecution's office), Williams' trial defense attorneys—the

[5] Citations to "HT." refer to the August 28, 2024 Hearing Transcript.

Honorable Joseph Green and the Honorable Chris McGraugh, and the trial prosecutor. (HT. 25-275).

Williams and the Attorney General did not call any witnesses.

Neither party could present Henry Cole or Laura Asaro at the hearing as they are both deceased.

H. Hearing Testimony.

At the hearing, the trial prosecutor testified that he handled the murder weapon without gloves at least five times during witness preparation sessions prior to trial. (App. 147-154). He was also "open" to witnesses handling the knife, except for the victim's husband. (App. 149, 155). The trial prosecutor justified his handling of the knife without gloves by claiming that, although he was not an eyewitness to the crime, he personally "knew" the murderer wore gloves. (App. 151). The trial prosecutor testified that because the knife was tested for fingerprints and blood in August 1998, he did not plan to request further testing. (App._140-141). He believed the investigation was done and he could begin handling the knife just 10 days (or perhaps even earlier) after the crime was committed. (App. 160-161). However, he also "always knew" that the other side might want to test the knife. (App._141-42).

The trial prosecutor handled the knife in this fashion at the same time the defense was requesting continuances, including to conduct further forensic testing. The trial prosecutor did wear gloves, and asked witnesses to wear gloves, at trial at least once. (App. 156). Despite this, he claimed that he probably handled all the murder weapons in cases he prosecuted without gloves. (App. 209).

Judge McGraugh, who represented Williams at trial, testified that that at the time of trial, he knew it was important to maintain the integrity of the evidence for future forensic testing, such as DNA testing. (HT. 161). He testified that he knew at the time of trial that touching the knife without gloves would contaminate it. (HT. 162). Judge McGraugh was required to wear gloves when he reviewed the physical evidence in Williams's case and he did wear gloves. (HT. 162-64). The prosecution did not inform defense trial counsel prior to trial that they had handled the murder weapon prior to trial without gloves or that their investigator handled the murder weapon without gloves. (HT. 164).

Judge Green also testified the prosecutor failed to disclose evidence in a timely manner including witness notes and witness mental health history, Williams's DOC records that were used by the State in the penalty phase, and fingerprints from the crime scene that were destroyed by the State without notice, preventing an independent examination by the defense. (HT. 68-88, 92-93). These issues were memorialized in a Verified Motion for Continuance and Supplemental Motion for a Continuance filed in Williams's case, which were denied by the trial court. (HT. 78-79).

The trial prosecutor also insisted he used three of his nine peremptory strikes to strike Black jurors and six strikes to strike white jurors. (App. 168-69). (The trial transcript demonstrates that, in fact, the trial prosecutor used six of his nine peremptory strikes to strike Black jurors and three strikes to strike white jurors.) It was only then, when required to answer questions from counsel about his actions,

that he admitted that "part of the reason" he struck Juror 64, a Black juror, was because he was a "young, Black man" like Williams. (App. 177-78). Although the fact they were both "young, Black men" was not "necessarily the full reason", (App.178), for his peremptory strike, he thought they looked like "brothers." (App. 179).

The trial prosecutor also testified that he took notes during voir dire but has no idea what happened to them. (App. 184). Although the trial prosecutor's notes from pre-trial and trial were maintained in the file, there are no notes from voir dire. He also acknowledged that a judge in another case he had tried found that he failed to provide race neutral reasons for exercising peremptory strikes on three black jurors. (App. 184-185).

I. The Prosecuting Attorney confesses constitutional error.

During closing arguments, the Prosecution stated: "St. Louis Prosecuting Attorney's office has conceded the constitutional error of mishandling the evidence in the Marcellus Williams trial." (HT. 280, 11-13). It further argued that "when all the evidence both in the file and as presented to the Court today, the motion to vacate is well taken. Clear and convincing evidence has been presented to the Court of *numerous constitutional errors* in the prosecution of Mr. Williams." (HT. 281, 10-15) (emphasis added).

At the conclusion of the hearing, the Prosecuting Attorney submitted proposed Findings and Facts and Conclusions of Law for the hearing court. In his proposed findings of facts and conclusions of law, the Prosecuting Attorney, again, confessed constitutional error warranting relief. (*See* Joint Proposed Findings of Fact and

Conclusions of Law, *Ex rel Marcellus Williams*, No. 2422-CC000422 (St. Louis Cnty. Cir. Ct., Mo.) at 38 ¶117) ("Finally, the Court notes that the St. Louis County Prosecuting Attorney's Office now concedes bad faith by the prosecutor.").

J. Hearing court denies Motion to Vacate.

On September 12, 2024, the hearing court issued a 24-page opinion denying the prosecutor's Motion to Vacate. (App.2-25). The hearing court did not mention the prosecutor's confession of error and gave it no deference or weight in its decision.

The Prosecuting Attorney filed a Notice of Appeal on September 16, 2024. The Missouri Supreme Court issued an order on September 18 ordering Appellant's brief to be filed by September 21 at noon, and the Respondent's brief on September 22 at noon. In their brief, the prosecution again conceded error. Oral arguments were held on September 23 at 9am. On September 23, 2024, the Supreme Court of Missouri issued an opinion denying relief on all grounds. (Pet. App. 263).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW SQUARELY IMPLICATES THE QUESTION GRANTED CERTIORARI BY THIS COURT IN *GLOSSIP V. OKLAHOMA*.

This case mirrors an issue raised before this Court, and which this Court granted certiorari on, in *Glossip v. Oklahoma*, 22-7466:[6] the amount of deference courts should give a prosecutor's considered judgment that a conviction should be vacated in light of state misconduct. In *Glossip*, also a capital case, the Oklahoma

[6] This Court will hear oral argument in *Glossip* on October 9, 2024—15 days after Williams is scheduled to be executed.

Attorney General conceded error before the Oklahoma Court of Criminal Appeals (OCCA) and asked that Glossip's conviction be reversed because the State had unconstitutionally suppressed exculpatory information and failed to correct false testimony. The Attorney General reached these conclusions after conducting an independent investigation that uncovered the suppressed exculpatory information and false testimony. Despite the Attorney General's confessed constitutional errors, the OCCA denied the request. This Court granted certiorari to consider, among other issues, "whether due process of law requires reversal, where a capital conviction is so infected with errors that the State no longer seeks to defend it." *Id.; see also Escobar v. Texas*, 143 S.Ct. 557 (2023) (mem.) (remanding for further consideration in light of the confession of error by the State.). This case compels the same review.

As this Court has long understood, "[t]he considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight." *Young v. United States*, 315 U.S. 257, 258 (1942); *see also Sibron v. New York*, 392 U.S. 40, 58 (1968). The circumstances here are equal to, if not exceeding those from *Glossip*. In Williams' case, the duly-elected St. Louis County Prosecutor—whose office sought, and secured, Williams' death sentence—undertook its own independent investigation, just like Oklahoma Attorney General. And like the Oklahoma Attorney General, based upon that investigation, the prosecutor conceded that his office had committed constitutional error in securing the defendant's conviction and death sentence. In Williams' case, that the prosecutor's office violated

Williams' rights when it infected the jury selection with racial discrimination and when the trial prosecutor improperly contaminated and destroyed DNA evidence prior to trial. These concessions, made by the office responsible for ensuring "justice shall be done" in the County of St. Louis, are extensively supported by the evidentiary record after a hearing under Mo. Rev. Stat. §547.031. The Supreme Court of Missouri paid lip service to the notion of "great deference," but ultimately did not apply any deference at all and instead substituted the judgment of the court. (App. 236-259).

A. The Prosecution's Concession that the Trial Prosecutor Violated *Batson v. Kentucky* is Supported by Extensive Evidence.

The prosecutor's concession of a *Batson* violation is well substantiated. In reaching his conclusion, the prosecutor considered: testimony from the trial prosecutor at the evidentiary hearing wherein he admitted that "part of the reason" he struck at least one juror was because he was Black; the pattern of questioning used by the prosecutor with Black and non-Black jurors; the percentage of strikes used against Black jurors and the number of Black jurors who remained on the jury; the trial prosecutor's history of racial discrimination in another case; and the prosecution's destruction of voir dire notes.

1. Admission of a racially motivated strike

During the hearing before the trial court on August 28, 2024, the trial prosecutor made critical admissions that demonstrated that at least one juror was struck for racially discriminatory reasons in violation of *Batson v. Kentucky*. Specifically, the trial prosecutor admitted under oath that "part of the reason" he struck Juror No. 64 was that he was a young Black man with glasses. (App. 179).

> 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.

(*Id.*) (emphasis added). This admission occurred immediately after the following exchange:

> A. . . . 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.

(*Id.*) The trial prosecutor fixated on the men's supposed similarity based on their age and race and further conceded "[t]hey were both young black men . . . [a]nd that's not necessarily the ***full reason*** that I thought they were so similar." (App. 178). (emphasis added). Indeed, testimony from the hearing further established that the juror who "resembled" Williams, in fact, did not. The trial prosecutor testified that the juror was wearing a shirt with an orange dragon and "Chinese or Arabic letters," a large gold cross, two earrings in his left ear, and shiny gray pants—none of which were similar to what Williams, who was incarcerated pre-trial, wore. (App. 180-82). The only things at all similar were their race, age, glasses, and "piercing eyes."

The trial prosecutor's testimony also made clear that he was aware of the risk of reversal if he had openly told the trial court that race was a reason, which explains

why he did not previously volunteer this information during his original self-serving colloquy with the trial court. (App. 178 ("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."); App. 186 ("If any black was struck, they appealed on *Batson*.")).

2. Pattern of questioning.

This awareness was also clear in the trial prosecutor's methodology for juror selection. 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.

(TT. 401-03).

In stark contrast, here 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.

(TT. 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.

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

The prosecution in this case also engaged in differential types of questioning regarding the verdict process for Black and non-Black jurors, systematically isolating Black jurors. (TT. 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 for a verdict, so they would not have to be alone:

- TT. 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.");

- TT. 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.");

- TT. 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?");

- TT. 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.");

- TT. 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.");

- TT. 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).");

- TT. 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.");

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

- TT. 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.")[7]

The prosecution did not engage in this type of reassurance with a single Black prospective juror, supporting the Prosecutor's concession of constitutional error. *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.").

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. (TT. 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."). Considering all of this

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

information, the Prosecuting Attorney, like "[a] court confronting that kind of pattern cannot ignore it." *Flowers v. Mississippi*, 588 U.S. 284, 310 (2019).

3. Percentage of strikes and total number of Black jurors.

The Prosecutor's concession of error is further supported by 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" was that "the State exercised peremptory strikes against five of the six black prospective jurors"). "Simple math shows … the number of peremptory strikes available to the prosecutor exceeded the number of black prospective jurors." *Id.* at 296. Here, the prosecution had nine peremptory strikes, which it exercised on six of seven black prospective jurors. (TT. 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. 168-69).

Indeed, the 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."). 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. id.* 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.").

"'[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).

4. Historical evidence of discriminatory peremptory strikes.

In reaching his conclusion, the prosecutor also "consider[ed] [the] historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction." *Flowers*, 588 U.S. at 304. The trial prosecutor admitted that, in a prior case, the trial judge had found that he had exercised peremptory strikes on Black jurors in violation of *Batson*. (App. 185-187).

5. Destruction of voir dire notes.

Finally, the Prosecuting Attorney's concession is also supported by the destruction of voir dire notes, while all other notes remain in the file. At the evidentiary hearing, the trial prosecutor admitted that he took notes during voir dire but stated has no idea what happened to them. (App. 217). Yet, while trial files are kept under lock and key, only the trial prosecutor's notes from pre-trial and trial were maintained in the file—there are no notes from voir dire. (HT. 265-266).

There is no analysis of the vast majority these issues and evidence in the trial court's or Supreme Court of Missouri's opinions, despite being detailed at length by the Prosecuting Attorney in his filings. In fact, the circuit court's findings of facts were limited to two paragraphs summarizing the trial prosecutor's testimony with no

explicit credibility findings. Those courts both failed to apply any deference whatsoever. The trial court did not acknowledge any deference at all, and the Supreme Court of Missouri only paid lip service to that concept.

B. The Prosecution's Concession that the State Violated *Arizona v. Youngblood* is Supported by the Record.

After reviewing all the evidence, the Prosecuting Attorney similarly concedes error related to the bad faith destruction of evidence in violation of *Arizona v. Youngblood*. 488 U.S. 51, 58 (1988). The Prosecuting Attorney has conceded the constitutional error of mishandling the evidence in the Marcellus Williams trial," (HT. 280), noting that "when all the evidence both in the file and as presented to the Court today, the motion to vacate is well taken. Clear and convincing evidence has been presented to the Court of numerous constitutional errors in the prosecution of Mr. Williams." (*Id*. at 281).

The Prosecuting Attorney reached this determination based on the trial prosecutor's testimony that he mishandled the murder weapon without gloves during pre-trial witness preparation sessions and knew fingerprints were destroyed, prior to the defense being given access to them. These actions contaminated the knife and removed any potential biological evidence left by the perpetrator, including their DNA. The Prosecuting Attorney reiterated these confessions of errors in its Proposed Findings of Fact and Conclusions of Law. (See *See* Joint Proposed Findings, *Ex rel Marcellus Williams*, No. 2422-CC000422 at 8, 23) ("Finally, the Court notes that the St. Louis County Prosecuting Attorney's Office now concedes bad faith by the prosecutor…") Where, like here, the State was aware that evidence will likely play a

significant role in a defendant's defense, due process required it preserve the evidence. *See California v. Trombetta*, 467 U.S. 479, 488 (1984).

The Prosecuting Attorney also confessed error on August 21, 2024 when the trial court agreed to a Consent Order. The Prosecuting Attorney stated, "St. Louis County Prosecuting Attorney determined there were constitutional errors undermining our confidence in the judgement." (App. 110). The trial court later withdrew the Consent Order pursuant to the Missouri Supreme Court's preliminary writ. Yet, despite the State's confession of constitutional error, Missouri courts gave them no consideration or deference.

The Prosecuting Attorney concedes that it destroyed any DNA on the murder weapon that killed Ms. Gayle when the trial prosecutor and his investigator handled the knife without gloves prior to trial. (*See* Joint Proposed Findings, *supra*, at 10). This concession was initially made after DNA reports from Bode Technology—received the day before the originally scheduled August 21, 2024 hearing—indicated that the DNA profiles of the trial prosecutor and his lead investigator were consistent with the DNA profiles found on the murder weapon. (Res.'s Ex. FF, DNA Reports; HT. 159-160). The trial prosecutor and investigator willingly admit to touching the murder weapon in this capital death penalty case prior to trial without gloves or other "evidence saving techniques." (AGO's Ex. S, Ex. T; HT. 180-82). Accordingly, it was undisputed at the August 28, 2024 hearing that employees of the St. Louis County Prosecuting Attorney's Office left their DNA on the blood-stained kitchen knife used to kill the victim by touching it prior to trial without gloves. *Id.*

A DNA expert provided unrebutted testimony that because the prosecutor and investigator touched the knife prior to trial without using known and generally accepted evidence preservation techniques, DNA from the real perpetrator "certainly" could have been destroyed. (HT. 115, 126-27, 152-153).

"Bad faith can be shown by proof of an official animus or a conscious effort to suppress exculpatory evidence." *Jimerson v. Payne*, 957 F.3d 916, 926 (8th Cir. 2019) (citing *United States v. Bell*, 819 F.3d 310, 318 (7th Cir. 2016)) (internal citations omitted); *see also United States v. Elliott*, 83 F. Supp. 2d 637 (E.D. Va. 1999) ("[W]here the [State] acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected [ ] or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the Trombetta/Youngblood test."). This includes situations in which "evidence was not made available before trial and was suppressed by the prosecution." *Jimerson*, 957 F.3d at 926. To satisfy "bad faith," "the person destroying … evidence must, at a minimum, have some knowledge that evidence is important to a pending criminal prosecution." *Driskill v. State*, 626 S.W.3d 212, 226 (Mo. banc 2021).

1. <u>The Prosecution Knew that the Evidence was Important.</u>

The prosecution understood the importance of potential DNA evidence on the murder weapon— it was collected from the crime scene and kept preserved under general evidence handling conditions in contemplation of further testing. In fact, the trial prosecutor testified, he "always knew that the other side … may want to test

[the knife]. 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." (App. 141-42). Thus, the potential utility of the DNA on the knife was clear not just to the defense, but also the State.

2. The Trial Prosecutor Destroyed the Evidence in Bad Faith.

The prosecution's concession of bad faith is supported by the record. The trial prosecutor independently decided only his theory of the case mattered, determining that he could handle the evidence without gloves "[w]hen [he] knew that [he] wanted no more testing of this knife…." (App. 159). He came to this conclusion after a detective and a jailhouse snitch opined that the perpetrator had worn gloves. (App. 160). The fact "in [the trial prosecutor's] opinion," the "killer wore gloves" and the knife was "irrelevant" bears no weight. (App. 150). This is especially true here, where there were fingerprints found at the crime scene, which were also destroyed by the prosecution, and where one of only two key witnesses testified that the killer did not wear gloves. The defense had every right to test the knife handle prior to and after trial without contamination from the prosecution.

The trial prosecutor knew that handling the evidence without gloves could contaminate the evidence and took care not to do so with the fingernail clippings. (App. 213) ("I'm not going to open those because I'm not wearing gloves and I don't want to contaminate them."). It also knew that the defense was requesting additional forensic testing, including DNA testing, as of May 2001.[8] (*See* AGO's Ex.

[8] At the evidentiary hearing, the trial prosecutor testified that he waited "until [he] knew that they were not going to ask for any further testing, that they were satisfied with the

C-1, Direct Appeal Legal File at 432 (Verified Motion for Continuance, May 7, 2001); *Id.* at 495 (Supplemental Verified Motion for Continuance, May 25, 2001)). And the defense had every reason to believe such testing would be possible to be performed—the prosecution was still requesting additional fingerprint examination as late as April 2001, contrary to the trial prosecutor's assertion that all testing was complete within 3-10 days of the crime.[9] (App. 140-41; HT. 81).

When considering all of this, the prosecutor's concession of error is supported.

***

As the Court has recognized in granting Glossip's writ of certiorari, a confession of error by the prosecution in a criminal case is an extraordinary event that warrants significant deference from the courts. Despite the strength of the evidence supporting the prosecutor's concession of constitutional error, the state courts gave it no deference or consideration, even in considering the Prosecuting Attorney's own motion filed under a statute enacted specifically to give him the power to overturn a wrongful conviction. For these reasons, this Court should grant the stay of execution and certiorari.

II. *BATSON V. KENTUCKY* REQUIRES REVERSAL BECAUSE THE TRIAL PROSECUTOR NOW ADMITS HE STRUCK A JUROR IN PART BECAUSE OF HIS RACE.

tests that were done…. before [he] touched the knife." (App. 141-42). The record does not support this assertion.

[9] The trial prosecutor further testified that as of that time period immediately after the crime, both the prosecution and defense "were all satisfied with the testing. Neither side asked for any additional testing at any time prior to that trial." (App. 140-141). However, that is not possible as Williams was not charged until November 19, 1999, over a year after the crime occurred, and thus there was no defendant or defense team until that time.

Concerns about racial discrimination in jury selection have plagued Williams' trial since the start. After 23 years, the evidence of that discrimination now includes the most powerful evidence of all: a confession of the trial prosecutor that he struck a juror based in part because of his race, and the concession of the current, duly-elected prosecutor that racial discrimination marred Williams' trial in violation of his constitutional rights. While that evidence, discussed in Section I *supra*, was not available at the time of Williams' previous state and federal appeals, this evidence now comes to this Court unencumbered—with no procedural bars—and demands reversal.

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 strike 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.

Below, the Supreme Court of Missouri addressed the *Batson* claim on the merits and consciously paraphrased the trial prosecutor's testimony to surgically

remove his damaging admissions. As the transcript reflects, the trial prosecutor stated:

> 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.

(App. 179). About this exchange, the Supreme Court of Missouri wrote:

> Prosecutor claims the original prosecutor testified at the evidentiary hearing that "part of the reason" the original prosecutor struck that potential juror was because of race. But that argument mischaracterizes that portion of the trial prosecutor's testimony. He stated that "part of the reason" he struck that particular venireperson was ***because the venireperson looked similar***, had the same glasses, and the same "piercing eyes" as Williams.

(App. 250) (emphasis added).

There is no "mischaracterization" by the Prosecuting Attorney; the ***court*** rewrote the witness's testimony so that it differs from the transcript. The court did not even acknowledge the other damaging admissions from the trial prosecutor, like the fact that the fact that Williams and the juror were young Black men was "not necessarily the full reason" (but necessarily part of the reason) he thought they were so similar. (App. 177-78) ("Q. Okay. And so these were both young black men, right? . . . 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.") (emphasis added).

In sum, the evidentiary record shows that the alleged resemblance between Williams and the juror cannot be treated as a "race-***neutral*** basis" for the strike. *Foster*, 578 U.S. at 499-500 (emphasis added). Furthermore, the Supreme Court of Missouri was not the fact-finder, and these conclusions are entitled to any deference.

The Supreme Court of Missouri further wrote that the Prosecuting Attorney "did not present any new evidence on this claim." (App. 250). On the contrary, the trial prosecutor testified for the first time under oath and was subject to both direct and cross-examination. No testimonial evidence was before the Supreme Court of Missouri on direct appeal in 2003; only a colloquy with the trial court.

Further, as discussed *supra,* the Prosecuting Attorney has conceded this error. He also identified several lines of argument that Williams did not advance to the Supreme Court of Missouri in 2003. These arguments are consistent with newer case law surrounding *Batson* challenges, which has continued to develop to a substantial degree in the past 20 years, and which was not available to Williams at the time of his direct appeal. *See Flowers,* 588 U.S. 284; *Foster,* 578 U.S. 488; *Miller-El*, 545 U.S. 231; *McFadden*, 191 S.W.3d 648.

As this Court has found, "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.* "In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many." *Flowers v. Mississippi*, 588 U.S. 284, 298 (2019).

Here, new evidence, discussed *supra*, makes clear that at least one strike was the result of exactly such discriminatory intent. Indeed, while the Eighth Circuit declined to review this new evidence, it was not for lack of merit. In her concurrence with the disposition of Williams' Rule 60b motion asking the federal court to re-open William's *Batson* claim, the Hon. Jane Kelly made note that "[t]he 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." (App. 233, Order, *Williams v. Vandergriff*, No. 24-2907 (8th Cir. Sep. 21, 2024) (Kelly, J., concurring), (citing *Buck v. Davis*, 580 U.S. 100, 124 (2017)); *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)).

On its face, 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)). Like in *Foster v. Chatman*, there is no independent state ground preventing a court from hearing the new evidence in this claim, raised in this proceeding not by Williams, but by the prosecutor's office itself.

"Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process." *Buck*, 580 U.S. 100 at 124 (quoting *Davis v. Ayala*, 576 U.S. 257, 285 (2015)). There is no case where the public's confidence needs more restoration than the execution of an individual after a trial infected with racial bias. This Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 23, 2024.

Respectfully submitted,

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