CLAIM 5 - THE *BATSON* CLAIM

A. Introduction

In petitioner's case – a high-profile, first-degree murder/death penalty case in which petitioner, an African-American man from the inner-city, was accused of killing a well-liked, upper-middle class Caucasian woman, who wrote for the St. Louis Post-Dispatch and was married to a prominent physician -- St. Louis County Prosecutors Mark Bishop and Keith Larner used 6 of 9 peremptory strikes (that is, 67 percent) against all but one (that is, 6 of 7, or 86 percent) of the African-American prospective jurors. (Tr. 1568) (listing State's peremptory strikes against Prospective Jurors 8, 14, 18, 53, 58, 64, 65, 69, and 72); (Tr. 1569) (listing Prospective Jurors 8, 12, 58, 64, 65, 69, and 72 as African-American); (Tr. 3202; 3210). *See Miller-El v. Cockrell ("Miller-El I"),* 537 U.S. 322, 342 (2003) (where prosecutors used 10 of 14 peremptory strikes (that is, 71 percent) against African-American prospective jurors, this "statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors"), and *Miller-El v. Dretke ("Miller-El II"),* 545 U.S. 231, 239, 240-241 (2005) (same case) ("[t]he numbers describing the prosecution's use of peremptories are remarkable").[7] As a result, eleven

[7]*See also Ford v. Norris,* 67 F.3d 162, 164, 167 (8th Cir. 1995) (affirming grant of habeas relief under *Swain v. Alabama,* 380 U.S. 202 (1965), where

Caucasian (and only one African-American) jurors sat on petitioner's case. Despite the fact that no physical evidence or eyewitness linked petitioner to the crime, the jury found him guilty and sentenced him to death.

B. St. Louis County prosecutors have a pattern and practice of striking African-American jurors for racially discriminatory reasons.

Earlier this year, at the oral argument in *State v. McFadden ("McFadden II")*, 216 S.W.3d 673 (Mo. banc 2007),[8] the Missouri Supreme Court recognized and voiced their disapproval of St. Louis County prosecutors' pattern and practice of using peremptory strikes against African-American prospective jurors:

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prosecutor struck all African-American prospective jurors); *Devose v. Norris*, 53 F.3d 201, 203-205 (8th Cir. 1995) (affirming grant of habeas relief under *Batson v. Kentucky*, 476 U.S. 79 (1986), where prosecutors used all peremptory strikes to strike 60 percent of African-American prospective jurors).

[8]Petitioner cites this decision as *McFadden II* in order to distinguish it from *State v. McFadden ("McFadden I")*, 191 S.W.3d 648 (Mo. banc 2006). In both cases, the Missouri Supreme Court reversed the murder convictions (for different crimes) and death sentences of Vincent McFadden, an African-American, under *Batson* because St. Louis County Prosecutor Mark Bishop's explanations for his peremptory strikes against African-American prospective jurors were pretexts for purposeful racial discrimination. *See McFadden I, supra*, 191 S.W.3d at 656; William C. Lhotka, *Murder Conviction Rejected, But Defendant is Expected to Face Execution in Another Killing*, St. Louis Post-Dispatch (May 17, 2006), 2006 WLNR 8502544; William C. Lhotka, *Woman's Killer Gets Death Penalty*, St. Louis Post-Dispatch (May 25, 2006), 2006 WLNR 9024098.

Prosecutor Bishop, incidentally, prosecuted petitioner. (*See, e.g.*, Tr. 1095).

Justice: *It's disappointing that there are no African Americans on the jury again in St. Louis County*. Now that's troublesome.

Justice: *An awful lot of our Batson cases come from there*.

Justice: *All of them recently*.

Oral Arg. CD, submitted to this court with petitioner's Notice of Filing, Exh. 15.

(emphasis added);

Justice: What about the statement of the prosecutor, not so much the judge's motives. What about the statement of the prosecutor that you're calling me a liar and a racist? That was never refuted.

Counsel for State: Well, nobody, and I'm not saying it did or didn't happen. But -

Justice: Well what's wrong with him defending himself about it?

Counsel for State: I think there's nothing wrong, nobody wants to be called a racist and, you know, there's a tendency

Justice: *But is it okay to behave like a racist?*

State: *Right*.

(*Id*. at 26:14-26:37) (emphasis added);

Justice: But can you tell us something about the makeup of the panel too? *I mean, how did it happen? Again? In St. Louis County?*

Counsel

for State: Honestly Your Honor, I can't because there are jury questionnaires in the record. I don't recall that those listed the race of the jurors. I don't recall anything in the record.

Justice: They don't? On the jury information sheets?

Counsel for State: I don't remember seeing it and maybe I just missed it, but I don't remember seeing that.

Justice: But the counsel doesn't need a selection as to see whether there are African Americans in the jury or not.

(*Id*. at 28:32-29:03) (emphasis added); and

Justice: And prior to *Batson*, after *Batson*, I have to say in the civil context, which is where most of my life experience came from, we struck and kept jurors all the time because of who they were, ethnically, racially and so forth. It's part of life. So if you're going to eliminate racial bias in peremptory challenges, it strikes me that the way to do that is to eliminate peremptory challenges. But that doesn't solve your problem because your problem is that *we have a fairly repetitive pattern, as Judge Limbaugh indicated, of having a problem with St. Louis County. Because St. Louis County is a county, it's the county where I reside, that has a substantial African American community and we are having, we are seeing still all white juries and that's not mathematically probable*.

(*Id*. at 31:48-32:48) (emphasis added).

The Missouri Supreme Court thereafter reversed McFadden's murder conviction and death sentence in a *per curiam* opinion, holding that Prosecutor Bishop used five of nine peremptory strikes against minority prospective jurors, and

that his explanation for one such strike – that the prospective juror had "crazy red hair"[9] -- was implausible and race-based, thus constituting a pretext for purposeful racial discrimination. *McFadden II, supra,* 216 S.W.3d at 674-677.

St. Louis County prosecutors, as *McFadden II* reveals, have a notorious reputation for using peremptory strikes against African-American prospective jurors for racially discriminatory reasons. McFadden's other murder conviction and death sentence was also reversed because Prosecutor Bishop's explanations for striking five African-American prospective jurors were all pretexts for purposeful racial discrimination. *McFadden I,* 191 S.W.3d 648, 656, 657 (Mo. banc 2006). And in 2005, another murder conviction from that county was reversed because the trial court improperly accepted a proposed remedy (the strike of a similarly situated Caucasian juror) from a St. Louis County prosecutor in exchange for his racially discriminatory strike of an African-American prospective juror. *State v. Hampton*, 163 S.W.3d 903, 904-905 (Mo. banc 2005). The court held that:

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[9]The trial court had agreed with Bishop that the prospective juror's hair "[made] her separate from the crowd, and very individualistic," and denied McFadden's *Batson* challenge. *McFadden [II], supra,* 216 S.W.3d at 676. *Cf. State v. Hopkins,* 140 S.W.3d 143, 156-157 (Mo. Ct. App. 2004) (reversing conviction under *Batson*; trial court held St. Louis prosecutor's partial explanation of strike against African-American prospective juror as not liking juror's hair was race-based).

> Having determined there was a Batson violation, the *only* appropriate remedy was to quash the state's strike of [African-American prospective juror] Jones.... Instead, the trial court allowed the state to strike a similarly situated white venireperson, thus leaving the racial composition of the jury intact as if no attempt had been made to remedy the Batson violation. The trial court's remedy does not comport with this Court's precedent regarding the appropriate remedy for a Batson violation because it does not vindicate the equal protection rights of Jones or [defendant] Hampton.

Id. at 905.

Missouri's intermediate appellate courts have also reversed a number of St. Louis County convictions because prosecutors struck African-American prospective jurors for racially discriminatory reasons. *See State v. Hopkins,* 140 S.W.3d 143 (Mo. Ct. App. 2004) (prosecutor's explanations for striking three minority prospective jurors were pretexts for purposeful racial discrimination); *State v. Holman,* 759 S.W.2d 902 (Mo. App. Ct. 1988) (rejecting prosecutor's explicit explanation for striking African-American female prospective juror because she was a "woman" and "black"); *State v. Robinson,* 753 S.W.2d 36 (Mo. Ct. App. 1988) (prosecutor struck the only three African-American prospective jurors and failed to rebut defendant's *Batson* challenge); *State v. Williams,* 746 S.W.2d 148, 157 (Mo. Ct. App. 1988) (prosecutor struck the only three African-American prospective jurors; his explanation

for one such strike, that the juror was same age as the defendant, was a pretext for purposeful racial discrimination).[10]

Pattern and practice evidence regarding a county's prosecutors' peremptory strikes against African-American prospective jurors constitutes persuasive relevant evidence to a reviewing court's *Batson* analysis. *Miller-El I, supra,* 537 U.S. at 347 (pattern and practice evidence "is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case"); *Miller-El II,* 545 U.S. at 253 ("the appearance of discrimination is confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected."); *Id*. at 263 ("for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries"). *See also, Lark v. Beard*, _ F.Supp 2d _, 2007 W.L. 2007967 (E.D.PA. 2007)(prosecutor's "habit" of striking minority jurors is relevant to pretext inquiry).

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[10]In addition to this caselaw, petitioner attached Exh. 11 to his Habeas Petition, which consisted of nine affidavits from regularly-practicing St. Louis County criminal defense lawyers, all of whom averred that St. Louis County prosecutors for many years systematically struck African-American prospective jurors. (See also Hab. Pet. at 65-68).

Under *Miller-El*, evidence of systematic discrimination by the prosecutor over a long period of time persuasively demonstrates pretext.

C. Because the Missouri Supreme Court failed to address the third element of the *Batson* test -- whether petitioner had shown that the St. Louis County prosecutors' proffered explanations for striking African-American prospective jurors were pretexts for purposeful racial discrimination -- the standard of review provisions of 28 U.S.C. § 2254(d) do not apply to this court's analysis of pretext.

The Missouri Supreme Court decision here failed to address both the first *Batson* element (that is, whether petitioner made a *prima facie* showing that the State exercised its peremptory strikes on the basis of race)[11] and the third *Batson* element (whether petitioner showed that the prosecutors' explanations for their strikes were pretexts for purposeful racial discrimination). *State v. Williams,* 97 S.W.3d 462, 471-472 (Mo. banc 2003) (analyzing *only* second *Batson* element; finding that the State presented race-neutral explanations for its strikes). *See Batson v. Kentucky,* 476 U.S. 79, 96-98 (1986) (setting forth test's three elements). While the first question (of the *prima facie* showing) becomes moot upon a prosecutor's offer of a race-neutral explanation, *Hernandez v. New York,* 500 U.S. 352, 359 (1991),[12] *the third question*

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[11]Neither the state decision nor respondent disputed that petitioner met this first element.

[12]"A neutral explanation... here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial

(of whether such an explanation was a pretext) does not so evaporate in the *Batson* inquiry. *Miller-El II, supra,* 545 U.S. at 251-252 (*Batson requires* plausibility of prosecutor's explanation to be assessed "in light of all evidence with a bearing on it"); *Miller-El I, supra,* 537 U.S. at 329, 338 (court must determine whether defendant has shown purposeful discrimination); *Purkett v. Elem,* 514 U.S. 765, 768 (1995) (error occurs where Batson's second and third questions are conflated: "[i]t is not until the *third step* that the persuasiveness of the [prosecutor's] justification becomes relevant-the step in which the...court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.") (emphasis added) (citing *Batson, supra,* 476 U.S. at 98; *Hernandez, supra,* 500 U.S. at 359); *Batson, supra,* 476 U.S. at 98 (after race-neutral explanations for strikes are offered, court has "*duty* to determine if the defendant has established purposeful discrimination") (emphasis added).[13]

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validity of the prosecutor's explanation." *Hernandez*, supra, 500 U.S. at 360.

[13]This third *Batson* element, pretext, focuses on the plausibility, persuasiveness, and credibility of the State's explanations for its peremptory strikes of African-American prospective jurors. Implausible explanations by the State, such as those asserting reasons applicable to similarly situated non-African-American prospective jurors whom it did not strike, are pretexts for purposeful discrimination. *Miller-El II, supra,* 545 U.S. at 246, 252, 258 n. 17; *Purkett, supra,* 514 U.S. at 768; *Ford v. Norris,* 67 F.3d 162, 169 (8th Cir. 1995) (under *Swain*); *Walton v. Caspari,* 916 F.2d 1352, 1361-1362 (8th Cir. 1990) (under *Swain*); *Garrett v. Morris,* 815 F.2d 509, 513-514 (8th Cir. 1987) (under *Swain*).

Thus, the standard of review set forth in 28 U.S.C. §2254(d) does not apply to this Court's analysis of the third element of the *Batson* test. *See Wiggins v. Smith,* 539 U.S. 510, 534 (2003) (where element of relevant legal test is not reached by state court, standard of review in 28 U.S.C. §2254(d) does not apply); *Skillicorn v. Luebbers,* 475 F.3d 965, 972 (8th Cir. 2007); *Honeycutt v. Roper,* 426 F.3d 957, 961 (8th Cir. 2005) (citing *Wiggins, supra*); *Nooner v. Norris,* 402 F.3d 801, 810 (8th Cir. 2005) (same); *Taylor v. Bowersox,* 329 F.3d 963, 967-968 (8th Cir. 2003). Alternatively, the state decision's failure to conduct a comparative juror analysis in order to evaluate pretext is "contrary to" Supreme Court precedent and involves "an unreasonable determination of the facts" under §§2254(d)(1) and (2). *See e.g. Kesser v. Cambra*, 465 F.3d 351, 358 (9th Cir. en banc 2006).

D. <u>The Missouri Supreme Court decision's finding that the St. Louis County prosecutors' explanation for striking prospective Juror 64, Henry Gooden, an African-American man, because he physically resembled petitioner, also an African-American man, provided a valid, race-neutral explanation for the strike constituted an unreasonable application of</u>

Unpersuasive explanations -- for example, proffers of a prosecutor's alleged concern about which he never inquired of the African-American prospective juror before striking him -- are pretexts for purposeful discrimination. *Miller-El II, supra,* 545 U.S. at 250 n. 8. And, the credibility of a prosecutor's explanation "can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El I, supra,* 537 U.S. at 338.

Supreme Court law, as well as an unreasonable determination of the facts.

The St. Louis County prosecutors explained that they struck prospective Juror 64, Henry Gooden, an African-American man, because: Gooden "looked very similar to the defendant [Williams]" and "reminded [Prosecutor Larner] of the defendant [Williams]," (Tr. 1586); *Williams, supra,* 97 S.W.3d at 471-472. The Missouri Supreme Court decision found that this explanation of Gooden's physical resemblance to Williams -- that is, the one African-American man's physical resemblance to another African-American man -- was neither "an overt, racially motivated reason" nor "inherently race based." *Williams, supra,* 97 S.W.3d at 472. This was an unreasonable application of the *Batson* line of cases, as well as an unreasonable determination of the facts, as perhaps even respondent now realizes, because he has specifically declined to defend this justification in his response. (Resp. 24-26, 28).

This decision was an unreasonable application of the *Batson* line of cases because the prosecutors are prohibited from striking African-American men on the basis of their race (as well as their gender[14]). *See, e.g.*, *Georgia v. McCollum,* 505

[14]*See Rice v. Collins,* 546 U.S. 333, 126 S.Ct. 969, 973 (2006) (in evaluating prosecutor's peremptory strike against African-American prospective juror, trial court correctly disallowed prosecutor's reliance on prospective juror's gender, as

U.S. 42, 59 (1992) ("the exercise of a peremptory challenge must not be based on... the race of the juror"). Additionally, this decision also involved an unreasonable determination of the facts because the prosecutors struck Gooden on obviously racial grounds, involving Gooden's and petitioner's shared racial identity. *Ford v. Lockhart*, 861 F.Supp. 1447, 1463 (E.D. Ark. 1994) (it was "obvious information" that prosecutor struck prospective jurors who had same skin color as defendant), *aff'd, Ford v. Norris,* 67 F.3d 162 (8th Cir. 1995).[15]

To meet the second part of the *Batson* test, the prosecutor's purportedly "neutral" explanation cannot be based upon the race of the juror. *Hernandez v. New York*, 500 U.S. 352, 360 (1991). The prosecutor's explanation here, that Gooden resembled the African-American defendant on trial, is undoubtedly "a proxy for race." *See United States v. Wynn*, 20 F.Supp.2d 7, 15 (D.D.C. 1997). Petitioner has been

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such was "troubling" to court); *J.E.B. v. Alabama ex rel. T. B.,* 511 U.S. 127, 129 (1994) ("gender, like race, is an unconstitutional proxy for juror competence and impartiality"); *United States v. Omoruyi,* 7 F.3d 880, 881-882 (9th Cir. 1993) (prosecutor's explanation of peremptory strikes of unmarried female prospective jurors on the basis that they would be physically attracted to defendant constituted admission of purposeful gender-based discrimination).

[15]Like petitioner, Ford was an African-American man facing capital murder charges in the high-profile killing of a Caucasian. *Ford, supra,* 67 F.3d at 164; *Ford v. Lockhart,* 861 F.Supp. 1447, 1450 (E.D. Ark. 1994). He was found guilty of shooting a state trooper and sentenced to death by an all-Caucasian jury. *Ford, supra,* 67 F.3d at 164.

unable to locate any published decision where a reviewing court considered a neutral explanation for a *Batson* challenge involving the similarity between the appearance of the juror and a black defendant. This lack of authority is undoubtedly due to the fact that prosecutors are usually far too clever to use a criteria tied to racial identity.

The most analogous situation that repeatedly appears in *Batson* jurisprudence involves the situation where the prosecutor attempts to justify a strike by noting that the juror lives in a predominantly African-American inner-city neighborhood. *See e.g. United States v. Mitchell*, 877 F.2d 294, 303 (4th Cir. 1989); *United States v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990). In such situations, where a prosecutor's explanation is so closely tied to race, reviewing courts must determine when such criteria "cease being race-neutral and become a surrogate for impermissible racial bias." *United States v. Bishop*, 959 F.2d 820, 823 (9th Cir. 1992). In *Bishop*, the court found that the government could not meet the second part of the *Batson* test because its explanation that the prospective juror lived in a predominantly African-American area, was not race-neutral because there was no nexus between the juror's residence and any issue in the trial. *Id.* at 825. In the case at hand, the evidence of racial discrimination is significantly stronger for the obvious reason that no Caucasian juror could possibly resemble the defendant.

Therefore, it is inescapable that the St. Louis County prosecutors' strike of Gooden was *not* race-neutral. *See United States v. Wilson,* 884 F.2d 1121, 1123-1124 (8th Cir. en banc 1989) (prosecutor's explanation for his striking African-American prospective juror was not race neutral where it was based on his "belief that [African-American criminal defendants' African-American] friends were more likely to contact [African-American prospective juror] than [a white prospective juror]"). The Missouri Supreme Court's finding to the contrary was objectively unreasonable.

E. The state's remaining purported reasons for striking prospective Juror 64, Henry Gooden, an African-American man, were pretexts for purposeful racial discrimination.

As noted above, this court must review *de novo* the issue of whether the state's reasons offered to justify its strike of Gooden were pretexts for purposeful racial discrimination. The focus of *Batson's* third element is the plausibility, persuasiveness, and credibility of the prosecutors' explanations. The credibility of a prosecutor's explanation "can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El I, supra,* 537 U.S. at 338.

The prosecutors' additional explanation that they struck Gooden because he "was weak" on the death penalty, (Tr. 1586), is implausible, unpersuasive, and lacks

credibility. This explanation is directly contradicted by Gooden's statements on the record; the prosecutors' strike of another African-American prospective juror who was "stronger" than Gooden on the death penalty; and the prosecutors' failure to strike non-African-American prospective jurors who were "weaker" than Gooden on the death penalty. *See Ford v. Norris,* 67 F.3d 162, 168-170 (8th Cir. 1995) (granting habeas relief under *Swain* because prosecutor's explanation that African-American prospective juror "was not strong" on death penalty was contradicted by record and applied to other non-African-American prospective jurors not stricken).

Regarding his view on the death penalty, the entire exchange between the prosecutors and Gooden consisted of:

MR. LARNER: All right.
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.

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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).

This record undeniably shows that Gooden could seriously consider imposing the death penalty, could sign the verdict of death, and had previously favored the death penalty in appropriate cases. These facts directly contradict the prosecutors' assertion that Gooden was "weak" on the death penalty. As the Eighth Circuit has held, where an African-American prospective juror answers"yes" to whether she "could and would impose the death penalty in a proper case," a prosecutor's subsequently-asserted explanation for striking her on the basis that "she was not strong on the issue of the death penalty" constitutes a pretext for purposeful racial discrimination. *Ford, supra,* 67 F.3d at 167, 168-169. As the court stated:

> [we cannot] understand how the prosecutor, from this record, could conclude that [this prospective juror] was not strong on the death

> penalty.... the record is entirely devoid of evidence to support the prosecutor's proffered reason.

Id.

At the same time that the prosecutors justified their strike of Gooden on the alleged basis that he was "weak on" the death penalty, they struck another African-American prospective juror, Linda Jones, who was "strong on" the death penalty, because she stated it must be imposed upon a person who is guilty of killing another; that if a person "take[s] a life, then [his] life should not be spared"; and that "[i]f the death penalty is the penalty, then [she] would have no problems with it." (Tr. 226-227, 228; 1569-1571). This strike of a African-American juror who strongly believed in the death penalty provides powerful evidence that the prosecutors' explanation for striking Gooden as "weak on" the death penalty was, in fact, a pretext for purposeful racial discrimination.

Additionally, the prosecutors failed to strike the following Caucasian prospective jurors who, unlike Gooden, made statements showing that they were "weak on" the death penalty:

First, Prospective Juror 57/McCarthy, who sat as a juror on petitioner's case, said that:

> Hypothetically speaking, as we are here today, I would have to say that if you guys decided and proved beyond a reasonable doubt that someone had done the crime, that I would feel comfortable with life in prison. If the mitigating circumstances were outweighed by the aggravating circumstances, I don't necessarily have a clear answer on that . . .

(Tr. 663-664); and

> I would have to say that my belief is as I've already outlined, you know. We're speaking hypothetically here. When it comes down to the brass tacks of actually listening to it, and sitting there, and hearing things, looking across the aisle at the person for three weeks, and hearing what their life is all about, as the events unfolded, you just don't know.
> My belief is that yes, I could say death penalty. But I'm just not a hundred percent.

(Tr. 666).

Second, Prospective Juror 42/Taylor, who sat as a juror on petitioner's case, said that the death penalty was "not something [he] would rush towards" and that while he "absolutely could consider the death penalty," that did not mean that he would. (Tr. 564-565). Third, Prospective Juror 92/Riedy, who was eligible to sit as an alternate juror on petitioner's case, did not raise his hand when asked to do so if he could seriously consider imposing the death penalty. Also, he said that he did not know if he wanted to "[i]mpose the death penalty on somebody"; he would require the State to prove more than the beyond a reasonable doubt standard (that is, being firmly convinced of guilt); and he was "wavering on" the death penalty. (Tr. 1010-1017).

In a remarkably similar situation, the Supreme Court of Mississippi found a *Batson* violation, rejecting a similar justification where the juror who was struck answered "yes" to a voir dire question of whether she could consider a death sentence. *Flowers v. State*, 947 So.2d 910, 924-925 (Miss. 2007).

In sum, the St. Louis County prosecutors' alleged explanation for striking Gooden for being "weak on" the death penalty was a pretext for purposeful racial discrimination. This explanation is implausible because it is, at least, equally applicable to Caucasian prospective jurors who were not stricken. *Miller-El II, supra,* 545 U.S. at 246, 252, 258 n. 17; *Purkett, supra,* 514 U.S. at 768; *United States v. Pospisil*, 186 F.3d 1023, 1028 (8th Cir. 1999); *United States v. Brooks,* 175 F.3d 605, 607 (8th Cir. 1999); *Ford v. Norris,* 67 F.3d 162, 169 (8th Cir. 1995) (under *Swain*); *Davidson v. Harris,* 30 F.3d 963, 965-966 (8th Cir. 1994); *Walton v. Caspari,* 916 F.2d 1352, 1361-1362 (8th Cir. 1990) (under *Swain*); *Garrett v. Morris,* 815 F.2d 509, 513-514 (8th Cir. 1987) (under *Swain*). This reason is also unpersuasive because the prosecutors could have, but failed to, inquire further of Gooden regarding his views on the death penalty. *Miller-El v. Dretke, supra,* 545 U.S. at 250 n. 8; *Davidson, supra,* 30 F.3d at 965-966 (because civil rights defendants failed to ask prospective juror about their alleged explanation for striking her, the strike was pretext for purposeful racial discrimination).

The prosecution's additional explanation for striking Gooden, because of his clothing and job, was also pretextual. This criticism of Gooden's clothes (worn on just one of the four days of *voir dire* before strikes were made) was that: his shirt, which had an orange dragon and either "Chinese or Arabic lettering," was "wild;" his religious cross was a "large gold cross very prominent outside his shirt, which [they] thought was ostentatious looking;" and his pants were gray and shiny. (Tr. 1586.)

In response, defense counsel argued that the prosecutors' criticism, if real, obligated them to make a record on the day that Gooden actually wore these clothes, so that, if necessary, defense counsel could have a fair opportunity to refute it, as well as call to the court's attention the dress of other prospective jurors. (Tr. 1587-1589). This objection by defense counsel - although rejected by the trial court - was particularly insightful, almost as if he had a crystal ball predicting the Missouri Supreme Court's later *McFadden II* decision. McFadden's counsel "refuted the [St. Louis County prosecutors'] conclusion that [the prospective juror's] hair color was crazy and [also] noted that [the juror] was neatly dressed." *McFadden II, supra,* 216 S.W.3d at 676. *See People v. White*, 669 N.Y.S.2d 503, 505 (N.Y. App. 1998) (neither the dress of nor the unemployment of African-American prospective jurors were sufficient reasons to justify striking them); *Rector v. State*, 444 S.E.2d 862, 865 (Ga. App. 1994) (explanation of strike of African-American prospective juror due to

her gold tooth was not race-neutral where prosecutor could not explain tooth's relevance to the case).

Finally, regarding Gooden's employment as a U.S. Postal Service mail processing supervisor, the prosecutors asserted, without inquiring of Gooden, that his job was both "a patronage job" involving a political appointment and that Gooden handled mail and was a clerk. (Tr. 1494, 1586).[16] They also asserted, again without inquiry, that mail handlers and clerks were politically liberal. (Tr. 1586). Prosecutor Larner said that "postal service workers are very liberal. And I'm talking about mail handlers and clerks. People that work at the post office in that capacity, especially, are that way, it's been my experience when I go into the post office, seeing the people that work there." (Tr. 1586-1587). Petitioner's defense counsel specifically disputed that postal workers were liberal. (Tr. 1588-1589).

The prosecutors' occupation based justification is inherently incredible. The prosecutors *never* asked Gooden any question about his job or political views. And their characterizations of his job – both a patronage position *and* a lower-level mail handler position – appear to contradict each other. *See Moran v. Clarke*, 443 F.3d 646, 650, 652-653 (8th Cir. 2006) (trial court rejected civil plaintiff's contradictory and

[16]No facts in the record support these assertions.

"difficult to reconcile" explanations for striking four African-American prospective jurors). Additionally, Larner's explanation that his experience in observing mail handlers and clerks when he visited the post office revealed to him that postal clerks are liberal is subjective, improbable, and incredible. In our numerous trips to the post office over the years, neither undersigned co-counsel has ever heard a postal clerk "talk politics" with a customer. Larner's "political" justification also lacks credibility because postal workers are specifically prohibited by the Hatch Act from engaging in political activity on the job. 5 U.S.C. §§7321-7326; (*See also* Exh. 17, pp. 3-4 attached hereto.).

Respondent cites *Williams v. Groose*, 77 F.3d 259 (8th Cir. 1996) for the proposition that the Eighth Circuit has explicitly approved the "postal worker justification" against a *Batson* challenge. (Resp. at 28). That case's entire discussion regarding the prosecutor's peremptory strikes of postal workers was:

> After the prosecutor used peremptory challenges to remove prospective black jurors from the venire panel, Williams objected to their removal. The prosecutor explained that he removed jurors Lacy and Tillman because they are postal workers. This reason is race neutral. [. . . .] Williams did not argue the prosecutor's race-neutral reason was pretextual. Thus, the record supports the district court's finding of no discrimination in the removal of Lacy and Tillman.

77 F.3d at 261. *Groose* is distinguishable because pretext was not an issue in that case.

All of the prosecutor's explanations here, viewed in their totality, demonstrate that they struck Gooden because of his race. Apart from being inherently race based, the "appearance" justification can also be considered as persuasive evidence indicating that the other facially neutral explanations are pretextual. In such situations, reviewing courts have held that explanations that disproportionately exclude jurors on the basis of their race constitute evidence of pretext if they have no connection to the facts of a particular case. *United States v. Wynn*, 20 F.Supp.2d at 15.

The remaining criteria articulated by the prosecutor, Gooden's dress and occupation, are subjective and implausible. The following passage from a recent *Batson* decision aptly describes these justifications. As Judge Bybee stated: "[The prosecution's] ostensibly 'race-neutral' reasons show themselves to be only a veneer, a pleasing moss having no depth." *Kessler v. Cambra*, 465 F.3d 351, 362 (9th Cir. en banc 2006). The appearance and employment excuses had nothing to do with the case to be tried. Coupled with the St. Louis County prosecutor's habit of striking black jurors in criminal cases for decades, petitioner has shown by clear and convincing evidence that these justifications were a pretext to strike Gooden because of his race.

F. The explanations for striking Prospective Juror 65, William Singleton, an African-American man -- that he "was not definite enough" regarding whether he could consider the death penalty and that he had been court-martialed for stealing $160 -- were pretexts for purposeful racial discrimination.

As set forth earlier, the Missouri Supreme Court's failure to address pretext requires this court to review this issue *de novo*. The St. Louis County prosecutors' explanations for their strike of Prospective Juror 65, William Singleton, an African-American man -- that he was " not 'definite enough' on whether he could consider the death penalty....even though even though he had "stated that he could consider the death penalty," and that he had been "court-martialed...for stealing money,"*Williams, supra,* 97 S.W.3d at 472 -- were implausible and pretexts for purposeful racial discrimination

The explanation that Singleton was "not definite enough" on the death penalty is contradicted by the record, which shows that Singleton said that he could vote for the death penalty, keep an open mind throughout the process, make a decision based on the evidence and the law, and follow the State's burden of proof beyond-a-reasonable-doubt. (Tr. 763, 768, 775-776, 778). He did not think that either of the two sentencing options (the death penalty or life imprisonment) was more lenient than the other: "[e]ither way, [the defendant]'s gone for the rest of his life." (Tr. 766). Significantly, the prosecutors chose not to strike a similarly situated Caucasian prospective jurors, Prospective Juror 70/Brueggerman, sat on petitioner's jury despite his statement at voir dire that life without the possibility of parole is "as bad as or

worse than the death penalty." (Tr. 789; 1611). *Miller-El II, supra,* 545 U.S. at 246, 252, 258 n. 17; *Purkett, supra,* 514 U.S. at 768; *United States v. Pospisil*, 186 F.3d 1023, 1028 (8th Cir. 1999); *United States v. Brooks,* 175 F.3d 605, 607 (8th Cir. 1999); *Ford v. Norris,* 67 F.3d 162, 169 (8th Cir. 1995) (under *Swain*); *Davidson v. Harris,* 30 F.3d 963, 965-966 (8th Cir. 1994); *Walton v. Caspari,* 916 F.2d 1352, 1361-1362 (8th Cir. 1990) (under *Swain*); *Garrett v. Morris,* 815 F.2d 509, 513-514 (8th Cir. 1987) (under *Swain*).

The State's other alleged explanation for striking Singleton -- his court-martial and subsequent guilty plea in 1988, to the misdemeanor of wrongful appropriation of $160 in government funds -- was also a pretextual explanation. (Tr. 1420-1421). Singleton served forty-eight days of confinement, paid restitution, and had his rank reduced. At the time of petitioner's trial in 2001, he had been honorably discharged and was currently serving in the Reserves. *Id*. In comparison, the prosecutors chose not to strike similarly situated Caucasian prospective jurors: Prospective Juror 32/Vinyard, who sat on petitioner's jury, and Prospective Juror 67/McDermott. (Tr. 1413-1414; 1594; 1611). McDermott had been convicted of indecent exposure fifteen years earlier (Tr. 1425, 1427), and Vinyard had been convicted of receiving stolen property twenty-four years earlier. (Tr. 1413-1414; 1420-1421; 1611).