IN THE
SUPREME COURT OF THE UNITED STATES

MARCELLUS WILLIAMS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. _____**
	)	
DONALD ROPER,	)	
	)	
Respondent.	)	

MOTION TO PROCEED IN FORMA PAUPERIS

COMES NOW petitioner, Marcellus Williams, by and through counsel, and moves this Court for leave to pursue his Petition for a Writ of Certiorari in the above-captioned action without prepayment of costs and to proceed *in forma pauperis*. In support of this motion, petitioner states that he is an indigent prisoner who is without funds to pay for the costs associated with this petition and undersigned counsel have been appointed to this case pursuant to the Criminal Justice Act.

WHEREFORE, for all the foregoing reasons, petitioner respectfully requests that he be allowed to proceed in this cause of action *in forma pauperis*.

Respectfully submitted,

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COUNSEL FOR PETITIONER

No. _____

CAPITAL CASE

IN THE
SUPREME COURT OF THE UNITED STATES

MARCELLUS S. WILLIAMS,

Petitioner,

v.

DONALD L. ROPER,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In this Missouri capital habeas case, the United States District Court granted petitioner, Marcellus Williams, penalty phase relief by finding trial counsel was constitutionally ineffective in failing to investigate and present mitigating evidence under *Wiggins v. Smith*, 539 U.S. 510 (2003). The Warden appealed and petitioner filed a timely cross-appeal. *Williams v. Roper*, Eighth Circuit Nos. 10-2579, 10-2682. Before both the District Court and the Eighth Circuit, petitioner filed detailed applications for a certificate of appealability ("COA"), in which he contended, among other things, that the issues involving the District Court's denial of petitioner's discovery requests that sought further DNA testing to help establish his innocence and the prosecutor's use of peremptory strikes to exclude African-American veniremen from his jury were worthy of plenary review in his cross-appeal. However, both the District Court and the Eighth Circuit summarily denied petitioner a COA and a judgment was entered dismissing the cross-appeal.

Based upon the foregoing facts, this case presents the following questions:

1. In light of *Harbison v. Bell*, 129 S. Ct. 1481 (2009), is a certificate of appealability required to allow a habeas petitioner advancing a claim of innocence to appeal from district court orders, issued prior to final judgment, denying discovery and DNA testing?

2. Does the Eighth Circuit's practice of issuing unexplained blanket denials of certificates of appealability in capital habeas cases conflict with 28 U.S.C. § 2253 and this Court's decisions in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Barefoot v. Estelle*, 463 U.S. 880 (1983) by preventing the condemned prisoner from obtaining meaningful appellate review of his first habeas petition?

3. Whether the Court of Appeals' summary denial of a certificate of appealability on petitioner's equal protection claim under *Batson v. Kentucky*, 476 U.S. 79 (1986) conflicts with this Court's decision in *Miller-El*?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal

State

Other Authority

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Marcellus Williams, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals below, which denied him a certificate of appealability and dismissed his cross-appeal from the denial of his first petition for federal habeas corpus relief without explanation.

OPINIONS BELOW

The March 26, 2010 memorandum, order and judgment of the United States District Court for the Eastern District of Missouri granting in part and denying in part petitioner's habeas corpus petition pursuant to 28 U.S.C. § 2254 is unpublished and is published in the appendix at A-2. The December 15, 2010 judgment of the Eighth Circuit Court of Appeals denying petitioner a certificate of appealability in No. 10-2682 and dismissing petitioner's cross-appeal is unpublished and is published in the appendix at A-1. The February 23, 2011 order of the Eighth Circuit Court of Appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc is unpublished and is published in the appendix at A-49.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its judgment on December 15, 2010. Petitioner's petition for rehearing and rehearing en banc was denied on February 23, 2011. Under 28 U.S.C. § 2201(c) and Rule

13.1, the present petition for a writ of certiorari was required to be filed by petitioner within ninety (90) days. Upon application of petitioner under Rule 13, Associate Justice and Eighth Circuit Justice Samuel L. Alito, Jr. extended the time for filing a petition for a writ of certiorari in this cause up to and including July 23, 2011. Jurisdiction of this Court is invoked under 28 U.S.C. § 2254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution that states, in pertinent part: "no state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves 28 U.S.C. § 2253, which provides as follows:

> (a) In a habeas corpus proceeding or a proceeding under § 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
>
> (A) the final order in a habeas corpus proceeding in the which the detention complained arises out of process issued by a state court; or

(B) the final order in a proceeding under § 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

This case also involves 28 U.S.C. § 2254(a), which provides:

> The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United States.

This case also involves F.R.A.P. 22(b), which provides:

> (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district clerk must send to the court of appeals the certificate (if any) and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 (if any), along with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue it.
>
> (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.
>
> (3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

STATEMENT OF THE CASE

A. Procedural History

A St. Louis County jury convicted Marcellus Williams in 2001 of one count of first degree murder, first degree burglary, first degree robbery, and two counts of armed criminal action. The jury subsequently sentenced petitioner to death on the murder conviction.

On direct appeal, the Missouri Supreme Court affirmed petitioner's convictions and sentences in 2003. *State v. Williams*, 97 S.W. 3d 462 (Mo. banc 2003). This Court subsequently denied certiorari from petitioner's direct appeal on June 23, 2003. *Williams v. Missouri*, 539 U.S. 944 (2003).

Petitioner subsequently sought post-conviction relief pursuant to Missouri Supreme Court Rule 29.15. The St. Louis County Circuit Court denied 29.15 relief to petitioner on May 14, 2004 after refusing to grant petitioner an evidentiary hearing on any of the constitutional claims that were subsequently raised in this action. (29.15 L.F. 800). The Missouri Supreme Court subsequently affirmed the denial of post-conviction relief in 2005. *Williams v. State*, 168 S.W.3d 433 (Mo. banc 2005).

Petitioner commenced the present federal habeas corpus proceeding by filing a timely habeas petition in the United States District Court for the Eastern District of Missouri on August 29, 2006. *Williams v. Roper*, No. 4:05-CV-01474-RWS.

The case had been previously assigned to District Judge Rodney W. Sippel. Petitioner's habeas petition advanced thirteen constitutional claims. After the district court denied petitioner's requests for discovery, further DNA testing, and an evidentiary hearing, (*See* Dist. Ct. Docs. 10, 11, 16; A-50-74), Judge Sippel issued a memorandum, order and judgment on March 26, 2010 granting the petition as to the penalty phase of petitioner's trial and denying habeas relief on all other claims. (A-2-48).

Respondent filed a timely notice of appeal and petitioner thereafter filed a timely cross-appeal and moved for a certificate of appealability ("COA") in the district court. (Dis. Ct. Docs. 68, 71, 73). On July 26, 2010, three days after petitioner filed his COA application, the district court summarily denied petitioner a COA. (Dist. Ct. Doc. 76).

After the Warden's appeal and petitioner's cross-appeal were docketed in the Eighth Circuit and designated as Nos. 10-2579 and 10-2682 respectively, petitioner filed a fifty-five page application for a COA before the Eighth Circuit requesting to brief eleven issues on cross-appeal. Petitioner's COA motion placed particular emphasis on his *Batson v. Kentucky*, 476 U.S. 79 (1986) claim and the district court's interlocutory orders denying discovery and further DNA testing. The Eighth Circuit ordered the state to respond to the COA application and, after the state did so, petitioner filed a brief reply. Approximately one week later, on

December 14, 2010, the Eighth Circuit issued a summary blanket denial of the COA application and dismissed both the cross-appeal and the state's appeal. Later the same day, the court vacated this order and issued a new order on December 15, 2010, denying a COA and dismissing petitioner's cross-appeal. (A-1). Rehearing and rehearing en banc was subsequently denied on February 23, 2011. (A-49).

B. Facts Surrounding The Homicide And Petitioner's Arrest And Trial

On August 11, 1998, Felicia Gayle was stabbed to death in her home in University City, Missouri. (Tr. 1712, 2163). Because Ms. Gayle had worked for the St. Louis *Post-Dispatch* years earlier and her husband was a prominent St. Louis area physician, the crime received an extraordinary amount of pretrial publicity. (Tr. 1730, 2820-28). Months went by without any charges being filed. On November 29, 1999, Henry Cole and Laura Asaro came forward and claimed that petitioner had confessed to committing the murder in order to lay claim to a $10,000.00 reward that was offered for information about the homicide. As a result, the state charged petitioner with first degree murder and armed criminal action. (L.F. 14). Subsequently, on January 6, 2000, petitioner was indicted on these offenses and the additional charges of burglary in the first degree, robbery in the first degree and an additional count of armed criminal action. (L.F. 18).

Henry Cole is a career criminal with convictions dating back thirty years. Mr. Cole also has a long history mental illness, evidence that the jury did not hear.

The state's other star witness, Laura Asaro, also has a checkered background. She is an admitted crack addict and prostitute, who was supposedly petitioner's girlfriend for a two-month period around the time of the Gayle murder. Both of these witnesses testified at trial that petitioner admitted to them that he had murdered Ms. Gayle. Mr. Williams' alleged jailhouse confession to Mr. Cole gave a much different account of the crime than his alleged "pillow talk" confession to his prostitute girlfriend.

Trial counsel, Joseph Green and Christopher McGraugh, were hired as contract counsel by the Public Defender System to represent petitioner at his trial. Both Green and McGraugh were admittedly unprepared for trial. In fact, Green unsuccessfully sought a continuance because he was involved in another highly publicized St. Louis County capital murder trial involving Kenneth Baumruk, which started just a month before Mr. Williams' trial commenced. *See State v. Baumruk,* 85 S.W.3d 644 (Mo. banc 2002).

Trial began on Monday, June 4, 2001. (Tr. 136). During voir dire, the state used its peremptory challenges to strike six of the seven qualified black venirepersons, leaving only one African-American to serve on the jury. (*Id.* 1569-70). Trial counsel's *Batson* challenges to three of these strikes were denied. (*Id.* 1591).

During trial, the state presented evidence that on the morning of August 11, 1998, Dr. Daniel Picus left his house in University City. (1705). When Picus arrived home that evening, he found his wife Felicia Gayle's lifeless body on the floor between the stairs and the front door. (Tr. 1710-12, 2198). He immediately called 911. (Tr. 1712, 1717). Three fingerprints were lifted from within the house. (Tr. 2221-22). In the front hall there were two shoe impressions in blood, as well as a third footprint. (Tr. 2224-27, 2245). Hairs were taken from the rug and from Ms. Gayle's shirt. (Tr. 2871-72, 2920).

The police collected blood and skin samples from under Gayle's fingernails. (Tr. 2268, 2962-63). Frustrated by the lack of progress in solving the crime, Dr. Picus offered a $10,000.00 reward for information on his wife's murder. (Tr. 1783, 1814). The police still had no leads in the case until June 4, 1999, when twelve-time convicted criminal Henry Cole, came forward. (Tr. 2379-82).

Between April and June of 1999, Cole testified he was in the city jail with petitioner. (Tr. 2382). After a few weeks, he and petitioner realized they were distantly related and, according to Cole, became friends. (Tr. 2385-87). Cole stated that in early or mid-May, he was watching television with petitioner, when a story came on about Felicia Gayle's death, reporting that there were still no suspects and that a reward for $10,000 had been offered. (Tr. 2388-89).

According to Cole, who had known petitioner only for a few weeks, petitioner admitted to him that he had committed the crime. (Tr. 2390).

Cole also claimed petitioner had indicated to him that the only other person he had told about the crime was Laura Asaro. (Tr. 2414). In November 1999, officers went to Ms. Asaro's mother's house to speak with her. (Tr. 1910). Her mother believed that the officers were there to arrest Ms. Asaro on outstanding warrants. (Tr. 1923). The police offered to help Asaro with her warrants if she would provide information about the murder. (Tr. 1980). Asaro agreed to cooperate and became the second material witness against petitioner. (Tr. 1910).

Asaro testified that at the time of the crime she had been dating petitioner for two or three months, living at times in his car. (Tr. 1840-41). Asaro claimed that, on the day of the murder, petitioner drove her to her mother's house around 9:00 a.m. and returned in the car later that afternoon at about 3:00 p.m. (Tr. 1841-43). Asaro claimed petitioner was wearing a jacket zipped to the top, despite the August heat and the car having no operable air-conditioner. (Tr. 1841-42).

After removing the jacket, Asaro claimed she saw blood on his shirt and fingernail scratches on his neck. (Tr. 1843, 1855). Petitioner allegedly explained he had been in a fight. (Tr. 1843). Later that day, Asaro claimed that petitioner took off his clothing, placed it in his backpack, and threw it down a sewer. (Tr. 1845).

Because the state's case hinged on two highly unbelievable witnesses, defense counsel at trial focused on the lack of forensic evidence linking petitioner to this extremely bloody murder scene, and suggested that police could easily have fed information to Cole and Asaro to resolve this long-unsolved, high-profile crime. For example, numerous hairs were discovered on the victim's shirt and on the rug where her body was found. (Tr. 2871-72, 2920). The rug had been vacuumed eleven days before the crime. (Tr. 2754-55). While some of the hairs matched Gayle or Picus, others did not match either of them or petitioner. (Tr. 2871-72, 2920). Similarly, two pubic hairs found on the rug did not match Gayle, Picus, or petitioner. (Tr. 2876-77). Head hairs also found on the rug also did not match any of these three individuals. (Tr. 2877).

In addition, fingernail clippings taken from Gayle that contained blood and skin could not be matched to petitioner. (Tr. 2961, 2964). Bloody footprints at the scene appeared to belong to a single assailant. However, another footprint was present which bore a different sole pattern, indicating that another unknown person was present at the crime scene. (Tr. 2230-31, 2881-82, 2886). This second shoeprint did not match any paramedics' shoes, nor did it match the shoes seized from petitioner upon his arrest. (Tr. 2882, 3140).

The jury deliberated more than five hours and convicted Mr. Williams on all five counts as charged. (Tr. 3069, 3072-74). At the penalty phase, the state

presented evidence of Mr. Williams' prior criminal conduct, including prior convictions and unadjudicated prior bad acts. (Tr. 3107-3117, 3122-29, 3130, 3132-36, 3143-59, 3167, 3168-71, 3184-87, 3188-92, 3193-97). The state also presented victim impact evidence, concerning both the impact of the Gayle murder on her family and the impact on the families of victims of *other* unrelated crimes committed by petitioner. (Tr. 3201-3284). The defense called Mr. Williams' family to briefly testify that he was a loving and caring father to his children. (Tr. 3301, 3444-45). The jury deliberated less than two hours and sentenced petitioner to death. (Tr. 3517-18).

C. Evidence Developed in State Post-Conviction Undermines State's Case.

In state post-conviction, petitioner presented substantial evidence undermining the conviction which the state based solely on the testimony of Cole and Asaro.[1] This evidence establishes that Cole and Asaro simply were unworthy of belief.

Cole wrote to his son, Johnifer Cole Griffin, while he was in jail with Mr. Williams. (Dist. Ct. Doc. 9-7 (Habeas Exh. 4)). Henry Cole bragged that he had a

[1] For over a year prior to trial, the state failed to disclose the actual addresses of Cole and Asaro. The prosecutor regularly contacted both Cole and Asaro, but actively concealed their whereabouts. (29.15 L.F. 95-97, 99). Police were in regular contact with Cole and bought him a bus ticket to New York, making him unavailable to be contacted by the defense. (L.F. 99, 102; Exh. 13 at 44). The trial prosecutor had personally interviewed Asaro three times, but told the court he was unable to locate her. (29.15 L.F. 99-102).

"caper" going on and something "big" was coming. (*Id.*) Johnifer knew that his father had made false allegations against others in the past, beginning in the 1980s and continuing throughout his life. (*Id.*) Indeed, Henry Cole even served as an informant against Johnifer, his own son, in order to get a deal from the authorities. (*Id.*)

Similarly, Cole's daughter, Bridget Griffin, knew that Cole could not be trusted. (29.15 L.F. 129-30). She knew of his well-known reputation of providing false information to the police in exchange for leniency. (*Id.* 130). She also had personal knowledge of prior false allegations Cole had made. (*Id.* 130).

Ronnie and Durwin Cole, Henry's nephews, confirmed that Cole had made false allegations in the past and was extremely unreliable. (Dist. Ct. Doc. 9-8, 9-9 (Habeas Exh. 4 and 5)). Cole concocted scams, lied about others, and then left town. (*Id.*) He would do or say anything for money. (*Id.*) Cole's niece, Twanna, could confirm these family accounts. (29.15 L.F. 136-37). She had witnessed her uncle's crazy and bizarre behavior. (*Id.* 136). She knew Henry needed money for drugs and would provide false information to get it. (*Id.* 137). As with the rest of her family, she did not trust her uncle, based on his history of making false

(Id.).

reported that Henry Cole often hallucinated, recounting one existent bugs in his hair and drinking glass. (Dist.

Ct. Doc. 9-9 (Habeas Exh. 5)). Other members of his family also recounted that Cole often had auditory hallucinations and sometimes failed to take his psychiatric medications. (29.15 L.F. 133). His family also confirmed that he had been diagnosed as mentally ill and received disability benefits because of his mental illnesses. Members of the family also recalled other incidents of bizarre behavior by Mr. Cole brought on by his mental illness. (*Id.* 136).

Asaro's testimony is equally undermined. Edward Hopson and Colleen Bailey could have testified that Asaro admitted to them that she had "set up" Mr. Williams to get the $10,000 reward, that Asaro desperately needed this money to feed her crack cocaine addiction, and she had made prior false allegations against others. (29.15 L.F. 78-79, 151-157). Both Mr. Hopson Ms. Bailey indicated that she was a known police informant and had engaged in a pattern of lying to police to get herself out of trouble. (*Id.*)

Asaro's mother, Cynthia Asaro (29.15 L.F. 165-166), Walter Hill, and Latonya Hill, (Dist. Ct. Doc. 9-11, 9-12 (Habeas Exh. 8 and 9)), established that Asaro lied when she testified at trial that petitioner drove his car on the date of the murder. Each witness indicated that Mr. Williams' car was not running on that day. Additionally, all revealed that Asaro lied when she stated that she did not have access to the trunk of petitioner's car. (*Id.*) These witnesses could have testified that Asaro had a set of keys to the car and that she could have gotten into

the trunk and planted incriminating evidence linking him to the murder of Ms. Gayle. (29.15 L.F. 165-166). Cynthia Asaro reported that her daughter gave her coupons similar to those found in the victim's purse. (*Id.* 165-166).

In sum, the state's case was wholly dependent on the believability of Cole and Asaro, in the eyes of the jury because no scientific or physical evidence tied petitioner to this crime. However, the evidence developed in state post-conviction proceedings[2] undermines the reliability and credibility of the State's evidence.

D. Petitioner's Discovery/DNA Requests Before The District Court.

On August 29, 2006, petitioner filed a motion for discovery before the district court to compel the state to conduct further DNA testing of unmatched genetic materials pursuant to Rule 6 of the rules governing 2254 cases and pursuant to the Eighth Circuit's decision in *Toney v. Gammon*, 79 F.3d 693 (8th Cir. 1996). (Dist. Ct. Doc. 10; A-50-54). On the same date, petitioner also filed a broader motion to authorize discovery requesting relevant impeachment material pertaining to Henry Cole and Laura Asaro, evidence regarding a similar uncharged 1998 murder of Debra McClain that occurred in the adjoining suburb of Pagedale, Missouri and evidence of governmental misconduct pertaining to the search of petitioner's car. (Dist. Ct. Doc. 11). According to St. Louis Coroner Dr. Mary

[2] As noted earlier, petitioner was denied an evidentiary hearing by the state post-conviction motion court, which precluded him from fully developing his claims pertaining to Cole and Asaro.

Case, there were extraordinary similarities between the Gayle and McClain homicides. (*See* Pet. Ex. 16).

Petitioner's DNA motion contended that unmatched trace evidence and other genetic materials, including hairs and fingernail scrapings should be run through Missouri's statutorily-mandated felony convict database (*see* § 650.050 et seq. R.S.Mo. (2000)) and the FBI's CODIS database. (A-50-54). Petitioner's motion alleged that the DNA testing was necessary to allow petitioner to fully develop his claims of actual innocence, that he was convicted based on the perjured testimony of Henry Cole and Laura Asaro, and an ineffectiveness claim that were all advanced in Claims 3 and 4 of petitioner's habeas petition. (*Id.* 51). After these discovery/DNA issues were thoroughly briefed by the parties, Judge Sippel entered an order denying petitioner's motions for further DNA testing, for discovery and for an evidentiary hearing. (A-55). After petitioner moved for reconsideration of this order, the district court issued a subsequent order denying reconsideration. (*Id.* at 71).

After the district court entered its final judgment, petitioner, in his COA applications before both the district court and the Eighth Circuit, argued that he should be allowed to advance these DNA/discovery issues on cross-appeal without the necessity of the issuance of a COA pursuant to this Court's decision in *Harbison v. Bell*, 129 S. Ct. 1481 (2009). Alternatively, petitioner argued that a

COA should issue because it is debatable among reasonable jurists whether the district court erroneously denied his DNA testing and discovery requests, which precluded petitioner from fully developing his claim of innocence and his other claims for relief. Without explanation or analysis, as noted earlier, a panel of the Eighth Circuit denied petitioner a COA in a one line order and dismissed petitioner's cross-appeal. (A-1). The present petition for a writ of certiorari is now before this Court for its consideration.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE EIGHTH CIRCUIT IMPROPERLY DISMISSED APPELLANT'S CROSS-APPEAL BECAUSE A COA IS NOT REQUIRED UNDER THIS COURT'S DECISION IN *HARBISON V. BELL* TO APPEAL INTERLOCUTORY ORDERS SUCH AS THE DNA AND DISCOVERY MOTIONS FILED BY PETITIONER.

The Eighth Circuit's summary blanket denial of a COA to petitioner and its judgment dismissing petitioner's cross-appeal, which precluded petitioner from seeking reasonable discovery and further DNA testing in order to prove his innocence and establish that his conviction and death sentence violated the Constitution, presents this Court with an ideal opportunity to clarify the meaning and scope of the recent decision in *Harbison v. Bell*, 129 S. Ct. 1481 (2009). In Harbison, this Court held that a COA is unnecessary to appeal on issues or

interlocutory orders that do not finally dispose of the merits of a case or constitute a final judgment, like the discovery/DNA issue here.

As this Court described in Harbison:

> Section 2253(c)(1)(A) provides that unless a circuit justice or judge issues a COA, an appeal may not be taken from "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." This provision governs final orders that dispose of the merits of a habeas corpus proceeding -- a proceeding challenging the lawfulness of the petitioner's detention. *See generally Slack v. McDaniel*, 529 U.S. 473, 484-485 (2000); *Wilkinson v. Dotson*, 544 U.S. 74, 78-83 (2005).

Harbison, 129 S. Ct. at 1485. Pursuant to *Harbison*, Mr. Williams does not need to obtain a COA to appeal the district court's failure to allow factual development to support a claim for relief. As a result, the pre-judgment rulings of the district court denying factual development, including DNA testing, should have been allowed to be briefed and argued in Mr. Williams' cross-appeal after final judgment.[3]

In opposing petitioner's COA request before the Eighth Circuit, respondent conceded that petitioner's discovery and DNA testing requests were not final appealable orders. (Resp. Sugg. in Op. p.13). Thus, under *Harbison* and the text of 2253, which provides an appeal may not be taken from "the final order in a

[3] This Court has held that pre-judgment discovery orders cannot be appealed under 28 U.S.C. § 1291. *See, e.g., Mohawk Indus. v. Carpenter*, 130 S. Ct. 599 (2009).

habeas corpus proceeding in which the detention complained arises out of a process issued by a state court" unless a COA issues, the Eighth Circuit panel's dismissal of petitioner's cross-appeal clearly conflicts with this Court's decision in *Harbison*

Pursuant to *Harbison*, petitioner requests this Court to grant certiorari, vacate and remand to the Eighth Circuit summary denial with directions that the Eighth Circuit address the merits of whether the district court erred in denying petitioner's discovery and DNA requests. A person should not be executed, with substantial evidence of probable actual innocence left wholly unexamined, and without a full and fair appeal in his first habeas petition.

Alternatively, and *assuming arguendo* that *Harbison* does not stand for this proposition, it is certainly debatable among reasonable jurists whether the district court abused its discretion in denying petitioner's discovery and DNA testing motions. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner made allegations before the district court, supported by the record, which, if true, establish the right to the relief he seeks.

Genetic trace evidence was recovered from the crime scene that could not be matched to petitioner, Felicia Gayle, or her husband. This evidence included hairs discovered on the victim's shirt and rug, pubic hairs and fingernail clippings taken from Ms. Gayle containing blood and skin tissue. (Tr. 2871-72, 2876-77). No

biological evidence linked petitioner to the crime. Indeed, the prosecutor conceded in closing argument: "I told you in voir dire I didn't have any forensic evidence . . . ." (Tr. 3061).

The State compared the evidence from the rug -- a blond head hair and two gray pubic hairs -- to the hair of the victim and her husband; they did not match. (Dist. Ct. Doc. 37-2 and 37-3 (3/24/99 and 6/7/99 Forensic Laboratory Reports of Missouri State Highway Patrol Crime Laboratory). Prior to trial, the State *never* tested these hairs, or the hairs found on the victim, against petitioner's hair. (Tr. 2867).

Petitioner's trial expert made these comparisons, finding that such hairs were not microscopically consistent with those of petitioner. (*Id.*). This expert also found that hairs from the victim's body, which were light brown to brown (as opposed to those of petitioner, an African-American man who has black hair), were not consistent with either the victim or her husband. (*Id.* 2870-72). And, finally, hairs from the victim's hands also did not match petitioner's hair. (*Id.* at 2877-79).

As a result, petitioner's motion before the district court reasonably requested additional DNA testing, requested comparisons with the known DNA profile of Laura Asaro, and further requested that this currently unknown DNA profile from the scene of the homicide be run through federal and state DNA databases. (Dist.

Ct. Doc's. 10, 37; App. 50-54). Specifically, petitioner requested, first, that the fingernail clippings and the hairs be tested for detectable DNA and, second, that any detectable DNA be submitted for comparison to DNA profiles contained in the Missouri DNA database and the FBI's CODIS database. (*Id.*). This was obviously a reasonable and necessary request because, if this DNA profile matched either Asaro or another person, this would establish that Asaro committed perjury and that petitioner is innocent.

Given the existence of these DNA databases and their prevalence in solving cold cases, it is debatable among jurists of reason whether the District Court abused its discretion in denying this DNA request. In *Toney*, the Eighth Circuit held that a district court abused its discretion in failing to grant discovery and order DNA testing to allow Missouri prisoner Steven Toney to establish that he was innocent of the rape and sodomy charges for which he was incarcerated and that his trial counsel was ineffective. *Toney*, 79 F.3d at 700-01. As in *Toney*, further DNA testing is necessary in petitioner's case because it is "indispensable to a fair, rounded, development of the material facts." *Id.* at 700. Certiorari should be granted so that current DNA technology can determine whether petitioner's jury condemned an innocent man.

There is additional material evidence and records concerning star witnesses Henry Cole and Laura Asaro relevant to petitioner's constitutional claims that have

never been disclosed to petitioner's trial or post-conviction counsel. Cole and Asaro were the state's key witnesses. Petitioner has never been able to gain access to a variety of records to fully and fairly present his constitutional claims involving the credibility of these two witnesses. Before the district court, petitioner requested access to records related to Cole and Asaro. (Dist. Ct. Doc. 11 at 3-8). Petitioner also sought access to records regarding the 1998 murder of Debra McClain, which the state itself conceded bore a strong resemblance to the homicide at issue here. (*Id.* 8-11). The disclosure of this information was essential to the fair and accurate resolution of the constitutional issues before the district court.

Petitioner arguably demonstrated that discovery was necessary to ensure a just and reliable determination of the issues. "[A] court's denial of discovery is an abuse of discretion if discovery is 'indispensable to a fair, rounded, development of the material facts.'" *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996) (quoting *East v. Scott*, 55 F.3d 996, 1001 (5th Cir. 1995)). Indeed, where the law imposes on a habeas petitioner the burden of proof, the petitioner "is entitled to have access to this evidence through discovery." *Toney*, 79 F.3d at 700.

The Eighth Circuit failed to give meaningful effect to *Harbison*, and thus, the Eighth Circuit's summary denial without any reasoning fundamentally conflicts

with this Court's authority. Pursuant to Rule 10(c), discretionary review is warranted.

II.

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE EIGHTH CIRCUIT'S POLICY OF ISSUING UNEXPLAINED BLANKET DENIALS OF COA APPLICATIONS IN A CAPITAL PRISONER'S FIRST HABEAS APPEAL CONFLICTS WITH THIS COURT'S DECISIONS IN *MILLER-EL* AND *BAREFOOT*.

As set forth earlier in this petition, the Eighth Circuit dismissed petitioner's cross-appeal after issuing a one-line order denying petitioner a COA on his cross-appeal without any analysis or explanation. (A-1). From undersigned counsel's experience, this has been an unwritten policy of the Eighth Circuit in first capital habeas appeals for the last fifteen years since the enactment of the AEDPA in 1996. *See, e.g., Griffin-El v. Bowersox*, S.Ct. No. 97-7022. In light of the substance of the issues that petitioner wished to brief in his cross-appeal, coupled with the fact that petitioner was denied a fair opportunity to establish his innocence through DNA testing, discretionary review is warranted in this case to determine whether this Eighth Circuit practice conflicts with 28 U.S.C. § 2253 and this Court's prior decisions in *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Slack v. McDaniel*, 529 U.S. 473 (2000) and *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*").

The panel's unexplained, blanket denial of a COA does not comport with the standards required by statute and settled case law. As this Court noted in *Miller-El I*: "the COA determination under § 2253(c) *requires* an overview of the claims in the habeas petition and *a general assessment* of their merits." 537 U.S. at 336 (emphasis added). This Court further noted that the COA process "must not be *pro forma* or a matter of course." *Id.* at 337. In *Miller-El I*, this Court reversed the Fifth Circuit's COA denial because it had "sidestep[ped]" the appropriate procedure. *Id.* at 336.

In *Slack*, this Court held: "The COA statute establishes procedural rules and *requires* a threshold inquiry into whether the circuit court may entertain an appeal." *Slack*, 529 U.S. at 482 (emphasis added); *see also Hohn v. United States*, 524 U.S. 236, 248 (1998). In *Tennard v. Dretke*, 542 U.S. 274, 283 (2004), this Court also reversed the Fifth Circuit for "paying lip service" to the COA standard, and remanded the case for further proceedings.

Both the district court and the Eighth Circuit panel failed to comply with the dictates of 2253 and F.R.A.P. 22(b). The unexplained, blanket denials of petitioner's COA motions also conflict with *Barefoot*. In *Barefoot,* this Court considered the Fifth Circuit's dismissal of a capital habeas appeal via a motion for stay of execution only after full briefing and unlimited oral argument where the

Fifth Circuit, thereafter, denied a COA by issuing an extensive written opinion on the merits of the claims. *Barefoot*, 463 U.S. at 893.

The Eighth Circuit's blanket COA denial failed to analyze and address the merits of petitioner's claims. Therefore, this Court's discretionary intervention is warranted because the panel failed to conduct a reasoned analysis as required by the statute, the federal rules and, conflicts with decisions from other circuits. *See Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (remanding COA application to district court because its "blanket denial" did not comport with Rule 22(b)(1)); *Porterfield v. Bell*, 258 F.3d 484, 485-487 (6th Cir. 2001) (same); *Porter v. Gramley*, 112 F.3d 1308, 1311 (7th Cir. 1997) (noting in procedural history it had previously remanded the case to allow the district court to comport with 22(b)(1)).

Ironically, where the "shoe was on the other foot," the Eighth Circuit criticized a district court's blanket grant of a certificate of probable cause in *Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). In *Tiedeman*, the Court of Appeals noted that, in certain circumstances a defective COA process in the court below would require a remand to the district court for corrective action. *Id.* at 522.

There are also two other important and problematic issues arising from the Eighth Circuit's blanket denial of a COA. First, although the panel indicated it had reviewed the entire district court record, neither the district court's nor the Eighth Circuit's docket sheets in this case indicate that the voluminous district court and

state court record was ever transmitted to the Court of Appeals prior to its December 15, 2010 order and judgment.

Second, perhaps the most troubling issue arising from this blanket denial practice that the Eighth Circuit routinely employs even in capital cases, is the inescapable fact that a summary denial of the COA without the issuance of a reasoned opinion analyzing the merits of any of petitioner's constitutional claims leaves nothing of constitutional substance to permit meaningful discretionary review before the Court of Appeals en banc or this Court. In light of this Court's repeated statements that "death is different" and that a heightened standard of review is necessary in capital cases, *see, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), a strong argument can be made that *Barefoot* requires a court of appeals to issue a detailed opinion on the merits of constitutional claims and procedural issues presented when it denies a COA in a **first** capital habeas appeal.

Pursuant to *Lonchar v. Thomas*, 517 U.S. 314 (1996), petitioner has an absolute right to have his conviction and death sentence to be reviewed by the federal courts. *Lonchar's* holding is rooted in the full and fair consideration of the merits of first habeas petitions. Otherwise, as noted in *Lonchar*, "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.* at 324 (citing *Ex parte Yerger*, 75 U.S.

85, 8 Wall. 85, 95, 19 L. Ed. 332 (1869) (the writ "has been for centuries esteemed the best and only sufficient defense of personal freedom")) (emphasis in the original).

Discretionary review and condemnation of this Eighth Circuit practice is long overdue because the Eighth Circuit continuously fails to give meaningful effect to this Court's *Barefoot*, *Miller-El I*, and *Slack* decisions. Thus, the Eighth Circuit's summary denial without any reasoning fundamentally contradicts this Court's prior commands. Pursuant to Rule 10(c), this Court should grant certiorari. Alternatively, this Court can vacate the judgment and remand petitioner's cross-appeal to the Eighth Circuit with directions to properly entertain petitioner's COA request.

III.

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER THE EIGHTH CIRCUIT'S DENIAL OF A COA ON PETITIONER'S *BATSON* CLAIM CONFLICTS WITH *MILLER-EL* AND *BAREFOOT*.

Apart from the interlocutory orders involving discovery and DNA testing which implicate the substantial probability that petitioner is innocent, petitioner wished to brief on his cross-appeal a compelling equal protection claim premised upon *Batson v. Kentucky*, 476 U.S. 79 (1986), which was raised as Claim 5 in his habeas petition. (*See* Dist. Ct. Doc. 9). Both at trial and during state court appeals, petitioner fully preserved *Batson* challenges to the state's use of preemptory strikes

to exclude three African-American veniremen from his petit jury: Henry Gooden, William Singleton, and Marvin Fortson. *See State v. Williams*, 97 S.W.3d 462, 471-472 (Mo. banc 2003). Although it is not possible to fully advance all of the arguments he advanced before the district court regarding the strikes of these three jurors in this petition, petitioner presented a particularly strong case of purposeful discrimination with regard to the prosecution's strike of juror 64, African-American venireman Henry Gooden.

After trial counsel asserted a *Batson* challenge to the state's strike of Mr. Gooden, the state articulated three facially permissible reasons for striking Mr. Gooden: (1) his appearance and clothing resembled Mr. Williams'; (2) his job as a postal worker; and (3) his views on the death penalty. (Tr. 1586). Trial counsel rebutted these three reasons for the strike of juror Gooden by stating, among other things, that Mr. Gooden bore no resemblance to petitioner other than their shared race, that there was no record made of Gooden's appearance, that other jurors who were not stricken wore similar or unusual clothing, that another postal worker who was Caucasian was not stricken by the state and that Mr. Gooden was unequivocal in stating that he could impose a death sentence. (Tr. 1587-1589).

The trial court, in upholding the strike of Gooden, did not directly address the issue of pretext. Instead, the trial court upheld the strike by merely stating that "it's my understanding . . . [the prosecution] is entitled to determine and use

preemptory strikes based upon their hunches . . . and the Court finds the reasons given to be race neutral and not of a pretextual nature." (Tr. 1591).

The record from the court below clearly demonstrates that petitioner's *Batson* claim regarding juror Gooden is debatably meritorious and deserved to be heard on appeal. In his COA motion before the Eighth Circuit, petitioner pointed out that he presented a strong case that Gooden was struck for pretextual reasons based upon statistical evidence, pattern and practice evidence, and the prosecutor's failure to strike similarly situated Caucasian jurors. (*See* Pet. Exh's. 11-17, attached to Dist. Ct. Doc. 9). Petitioner also pointed out in his COA application and traverse that since petitioner's habeas petition was filed, the Missouri Supreme Court has reversed two death penalty cases due to *Batson* violations committed by the specific prosecutor from petitioner's trial. *See State v. McFadden*, 191 S.W.3d 648, 656-657 (Mo. banc 2006); *State v. McFadden*, 216 S.W.3d 673, 674-677 (Mo. banc 2007). Thus, based upon the record from the court below, petitioner arguably demonstrated that each of the three race neutral justifications were pretextual under *Batson* in light of the entire record. *Snyder v. Louisiana*, 552 U.S. 472 478 (2008) (requiring a reviewing court to consider all of the circumstances surrounding a *Batson* claim).

In looking at the particular justification for the strike, the main reason the prosecutor struck potential juror Henry Gooden, because he looked similar to Mr.

Williams, is inherently dubious and discriminatory because a white venireman could not possibly have a similar appearance to petitioner due to their different skin color. Indeed, this cannot constitute a racially neutral justification for the strike. Absolutely no legal authority supports such an outrageous and racially offensive explanation. In addition, several reviewing courts have found *Batson* violations involving justifications for strikes involving jewelry or clothing where the state cannot explain how this justification relates to the case. *See, e.g., Rector v. State*, 444 S.E. 2d 862, 865 (Ga. App. 1994).

Regarding the postal worker justification, the prosecution stated to the trial court that he has a policy of striking postal workers because, from his experience, they have liberal political views. (Tr. 1596-1597). As petitioner pointed out in the district court, there was strong evidence that this justification was pretextual because the state failed to strike a similarly situated Caucasian postal worker, Clarence Jones. (*Id.* 1587). The prosecutor's political justification was also incredible because, as petitioner pointed out in the district court below, the Hatch Act precludes postal workers from engaging in political activity on the job. (*See* 5 U.S.C. §§ 7321-7326; Dist. Ct. Exh. 17). Further, the trial prosecutor never questioned Gooden regarding this topic. "[T]he failure to ask undermines the persuasiveness of the claimed concern." *Miller-El v. Dretke,* 545 U.S. 231, 250 n.8 (2005) *("Miller-El II").*

Regarding the "weak on the death penalty" justification, petitioner pointed out in the court below that the following colloquy between the prosecutor and Gooden in voir dire directly refutes this contention:

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.

****

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).

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 also sat as a juror on petitioner's case, stated 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). Further, and as noted by this Court, this explanation is implausible because it is, at least, equally applicable to Caucasian prospective jurors who were not stricken. *Snyder*, 552

U.S. at 483 (observing that "[t]he implausibility of th[e] [proffered] explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'"). The foregoing facts clearly demonstrate that petitioner's *Batson* claim, with regard to juror Gooden meets both the *Barefoot* and *Miller-El* tests for allowing appellate review.

The facts surrounding petitioner's *Batson* claim bear significant similarities to the facts this Court confronted in *Miller-El I*, 537 U.S. 322. Like *Miller-El* where the prosecution where prosecutors used 10 of 11 peremptory strikes (91%) against African-American prospective jurors *(id.* at 331), the prosecution herein struck six of the seven eligible African-American jurors, or 86%. *See Miller-El II*, at 240-241 ("[t]he numbers describing the prosecution's use of peremptories are remarkable").

As in *Miller-El I*, petitioner presented evidence through the affidavits of several St. Louis County attorneys that the St. Louis County Circuit Attorney's Office engaged in a historical practice of systematically excluding black jurors from service in criminal cases. (*See* Pet. Exh. 11, attached to Dist. Ct. Doc. 9). These affidavits were similar in nature to the evidence of historical discrimination by the Dallas County District Attorney's Office that was presented in *Miller-El I.* 537 U.S. at 334-335.

In *Miller-El I*, this Court also found it significant that "the district court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case." *Id.* at 341. The district court opinion addressing the merits of petitioner's *Batson* claim is also similarly flawed. (A-21-26). Like the district court in *Miller-El*, the district court here did not fully consider or analyze all of the evidence and arguments advanced by petitioner in support of his *Batson* claim, such as the statistical and historical evidence and the prosecution's failure to strike similarly-situated Caucasian jurors. (*Id.*). The district court here, like the court in *Miller-El I*, also "accepted without question the state court's evaluation of the demeanor of the prosecutors and the jurors in petitioner's trial." 537 U.S. at 341; (A-26).

Finally, like the strike of juror Gooden here, the prosecution in *Miller-El* attempted to justify its strikes of several African-American veniremen because of ambivalence or reluctance to impose the death penalty. As in *Miller-El I*, in this case, "petitioner identified two impaneled white jurors who expressed ambivalence about the death penalty in a manner similar to their African-American counterparts who were subject of prosecutorial peremptory challenges." *Id.* at 343; *see also Snyder*, 552 U.S. at 483.

It is simply baffling that the Eighth Circuit summarily denied a COA on this compelling *Batson* claim, particularly in light of the fact that they have reviewed

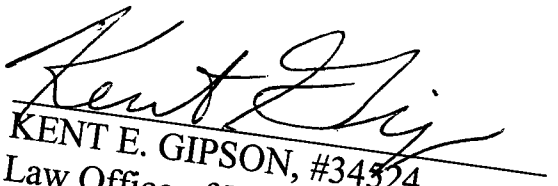
Batson claims in other habeas corpus appeals that were clearly weaker than petitioner's. *See, e.g.*, *Bell-Bey v. Roper*, 499 F.3d 752, 755 (8th Cir. 2007); *Hall v. Luebbers*, 341 F.3d 706, 711 (8th Cir. 2003). Because the Eighth Circuit's summary denial of a COA on this compelling equal protection violation conflicts with *Miller-El* and *Barefoot*, discretionary review is warranted. As this Court noted, "[w]hether a comparative juror analysis would demonstrate the prosecutors' rationales to have been pretexts for discrimination is an unnecessary determination at this stage, but the evidence does make debatable the District Court's conclusion that no purposeful discrimination occurred." *Miller-El I*, at 343.

The Eighth Circuit failed to give meaningful effect to *Batson*, *Miller-El I*, *Miller-El II*, and *Snyder*. Pursuant to Rule 10(c), certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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