Hill v. Gammon, 2018 U.S. App. LEXIS 12606

United States Court of Appeals for the Eighth Circuit

May 15, 2018, Decided

No: 18-1092

Reporter
2018 U.S. App. LEXIS 12606 *

Gregory **Hill**, Appellant v. James **Gammon**, Appellee

Prior History: **[*1]** Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis. (4:96-cv-02510-CDP).
Hill v. Gammon, 2017 U.S. Dist. LEXIS 184842 (E.D. Mo., Nov. 8, 2017)

Counsel: Gregory Hill, Petitioner - Appellant, Pro se, Mineral Point, MO.

For James Gammon, Respondent - Appellee: Michael Joseph Spillane, Assistant Attorney General, Attorney General's Office, Jefferson City, MO.

Opinion

ORDER

The petition for rehearing by the panel is denied.

May 15, 2018

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1092

Gregory Hill

Petitioner - Appellant

v.

James Gammon

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:96-cv-02510-CDP)

JUDGMENT

Before WOLLMAN, COLLOTON and SHEPHERD, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

March 28, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Hill v. Gammon, 2017 U.S. Dist. LEXIS 184842

United States District Court for the Eastern District of Missouri, Eastern Division

November 8, 2017, Decided; November 8, 2017, Filed

Case No. 4:96 CV 2510 CDP

Reporter
2017 U.S. Dist. LEXIS 184842 *

GREGORY HILL, Petitioner, vs. JAMES A. GAMMON, Respondent.

Subsequent History: Petition denied by Hill v. Gammon, 2018 U.S. App. LEXIS 12606 (8th Cir. Mo., May 15, 2018)

Prior History: Hill v. Gammon, 2000 U.S. Dist. LEXIS 23482 (E.D. Mo., Feb. 8, 2000)

Core Terms

habeas petition, certificate, Appeals, merits, successive petition

Counsel: **[*1]** Gregory A. Hill, Petitioner, Pro se, Mineral Point, MO.

For James Gammon, Respondent: Michael J. Spillane, LEAD ATTORNEY, ATTORNEY GENERAL OF MISSOURI, Assistant Attorney General, Jefferson City, MO.

Judges: CATHERINE D. PERRY, UNITED STATES DISTRICT JUDGE.

Opinion by: CATHERINE D. PERRY

Opinion

MEMORANDUM AND ORDER

In 1989, after a five day jury trial petitioner was convicted in Missouri state court of two counts of forcible rape, two counts of forcible sodomy, one count of robbery in the second degree, and one count of felonious restraint. He was sentenced as a prior, persistent and

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class X offender to life imprisonment plus consecutive terms of imprisonment totaling 50 years. State v. Hill, 817 S.W.2d 609, 610 (Mo. Ct. App. 1991).

After appealing his convictions and the denial of post-conviction relief to the Missouri Court of Appeals, petitioner filed the instant case for habeas relief under 28 U.S.C. § 2254. This Court denied habeas relief on March 17, 2000. [34]. The Eighth Circuit Court of Appeals denied petitioner's application for certificate of appealability and issued the mandate. [38, 40]. Petitioner filed a motion to vacate the judgment under Fed. R. Civ. P. 60(b)(1) and (6) on February 15, 2001. [42]. The motion was denied on February 20, 2001. [43]. Petitioner now moves to reopen his closed § 2254 case **[*2]** under Fed. R. Civ. P. 60(b)(6). [45].

A court may grant relief under Rule 60(b)(6) for "any other reason that justifies relief" when a motion is made "within a reasonable time." Fed. R. Civ. P. 60(b)(6). Petitioners sometimes request relief under Rule 60(b) when the motion is more properly characterized as a successive § 2254 petition. See, e.g., Boyd v. United States, 304 F.3d 813, 814 (8th Cir. 2002). However, a state prisoner may file a second or successive motion under § 2254 only after obtaining authorization to do so from the appropriate United States Court of Appeals. 28 U.S.C. § 2244(b)(3). Where a prisoner files a Rule 60(b) motion following the dismissal of a habeas petition, the district court must determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack under 28 U.S.C. § 2254. Boyd, 304 F.3d at 814. If the Rule 60(b) motion "is actually a second or successive habeas petition, the district court should dismiss it for failure to obtain authorization from the Court of Appeals or, in its discretion, may transfer the motion . . . to the Court of Appeals." Id. "It is well-established that inmates may not bypass the authorization requirement of 28 U.S.C. § 2244(b)(3) for filing a second or successive § 2254 . . . action by purporting to invoke some other procedure." United States v. Lambros, 404 F.3d 1034, 1036 (8th Cir. 2005).

A Rule 60(b) motion that merely alleges a defect in the integrity of the habeas proceedings is not a second **[*3]** or successive habeas petition. See Gonzalez v. Crosby, 545 U.S. 524, 535-36, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005) (Rule 60(b) motion challenging district court's previous ruling on statute of limitations was not the equivalent of a successive habeas petition). A Rule 60(b) motion is also not a successive habeas petition if it "merely asserts that a previous ruling which precluded a merits determination was in error -- for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." Id. at 532 n.4. However, a Rule 60(b) motion is a successive petition if it contains a claim, which is defined as an "asserted federal basis for relief" from a judgment of conviction or as an attack on the "federal court's previous resolution of the claim on the merits." Id. at 530, 532. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." Id. at 532 n. 4. When a Rule 60(b) motion presents a claim, it must be treated as a second or successive habeas petition.

Petitioner's motion will be treated as a successive petition and denied because petitioner has not obtained certification to file a successive motion from the Eighth Circuit. Petitioner again attempts to challenge the state court's Batson ruling and this Court's determination **[*4]** that the ruling did not entitle petitioner to habeas relief. The state court denied petitioner's

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Batson claim on the merits. Hill, 817 S.W.2d at 610. In denying habeas relief, this Court also considered and denied petitioner's claim on the merits. [32 at 11-14]. Petitioner's motion presents a claim and must be treated as a second or successive habeas petition.

To avoid characterization as a successive petition, petitioner attempts to categorize his complaint as one attacking the defect in the integrity of the proceedings. He argues that the state court's prior ruling is really a procedural defect because it applied the wrong standard to evaluate his claim. Petitioner's argument is unavailing, for he is not asserting a defect in the integrity of the *habeas* proceedings. See Gonzalez, 545 U.S. at 535-36. A claim that the state court improperly evaluated his claim under the wrong standard is an attack on the merits of the state court decision, and as such it must be treated as a successive petition. Nor can petitioner allege that this Court refused to consider his claim based on a procedural ruling because it considered and denied each of petitioner's claims, including both of his Batson claims, on the merits. [32 at 11-16]. As petitioner **[*5]** has not obtained certification to file a successive motion from the Eighth Circuit, petitioner's successive petition will be denied.

Finally, I have also considered whether to issue a certificate of appealability. To grant a certificate of appealability, the Court must find a substantial showing of the denial of a federal constitutional right. See Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997). A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997) (citing Flieger v. Delo, 16 F.3d 878, 882-83 (8th Cir. 1994)). Because petitioner has not made such a showing, I will not issue a certificate of appealability.

Accordingly,

IT IS HEREBY ORDERED that petitioner's motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6) [45] is denied and dismissed as a second or successive habeas petition filed without the required precertification by the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 2244(b)(3).

IT IS FURTHER ORDERED that a certificate of appealability is denied as petitioner has not made a substantial showing of the denial of a federal constitutional right.

/s/ Catherine D. Perry

CATHERINE D. PERRY

UNITED STATES DISTRICT JUDGE

Dated this 8th day of November, 2017.

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Hill v. Gammon, 2000 U.S. Dist. LEXIS 23482

United States District Court for the Eastern District of Missouri, Eastern Division

February 8, 2000, Decided; February 8, 2000, Filed

Case No. 4:96CV2510 CEJ (TCM)

Reporter
2000 U.S. Dist. LEXIS 23482 *

GREGORY A. **HILL**, Petitioner, v. JAMES A. **GAMMON**, Respondent.

Subsequent History: Adopted by, Writ of habeas corpus denied, Objection overruled by, Certificate of appealability denied, Dismissed by Hill v. Gammon, 2000 U.S. Dist. LEXIS 23481 (E.D. Mo., Mar. 17, 2000)
Writ of habeas corpus denied, Dismissed by, Certificate of appealability denied Hill v. Gammon, 2017 U.S. Dist. LEXIS 184842 (E.D. Mo., Nov. 8, 2017)

Prior History: State v. Hill, 817 S.W.2d 609, 1991 Mo. App. LEXIS 1438 (Mo. Ct. App., Sept. 17, 1991)

Core Terms

rape, ineffective, juror, appellate counsel, venirepersons, mouth, venire members, peremptory, argues, grounds, state court, trial court, attorneys, challenges, reasons, strikes, forcible sodomy, prior jury, procedurally, appointed, stricken, highway, vagina, dirt, exit, seat, sexual intercourse, appellate court, direct appeal, trial counsel

Counsel: **[*1]** Gregory A. Hill, Petitioner, Pro se, Mineral Point, MO USA.

For James Gammon, Respondent: Michael J. Spillane, LEAD ATTORNEY, ATTORNEY GENERAL OF MISSOURI, Jefferson City, MO USA.

Judges: THOMAS C. MUMMERT, III, UNITED STATES MAGISTRATE JUDGE.

Opinion by: THOMAS C. MUMMERT, III

Opinion

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Gregory A. Hill ("Petitioner"), a Missouri state prisoner, petitions this Court for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. His petition is before the undersigned United States Magistrate Judge for a review and a recommended disposition. See 28 U.S.C. § 636(b).

Background

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The night of October 8, 1988, Aquilla LaGrone, an officer with the St. Louis City Police Department, was on patrol in O'Fallon Park when he saw a car in the park after curfew. (Resp. Ex. 2 at 367-70.) 1 LaGrone followed the car as it made a U-turn and traveled north. (Id. at 371.) He saw three people inside the car, two in the back seat, one in the driver's seat. (Id.) As the car was rolling down a hill, a woman jumped from the car. (Id. at 412.) Before she jumped, LaGrone saw the passenger holding the woman by her right arm as she was getting out of the car. (Id. at 374.) The woman, later identified as Karen Oliver, said that she had been raped. (Id. at 375.) Officer **[*2]** LaGrone testified that when Ms. Oliver got out of the car, her hair was a mess, her clothes were in disarray, her dress was hanging down in front, the zipper pull on her dress was broken, her dress was dirty, her neck was bruised, and she was not wearing shoes or stockings. (Id. at 382, 402, 407-08.) She asked that the men return her property. (Id. at 401.) One man, James Hill, took some jewelry and a purse from the car and gave them to the woman; when the other man, his brother, Gregory Hill, was booked he had a necklace and bracelet on him that Ms. Oliver identified as belonging to her. (Id. at 401, 408.) The two brothers were arrested and indicted on two counts of forcible rape; two counts of forcible sodomy; second degree robbery; and felonious restraint. (Resp. Ex. 6 at 102.) Gregory Hill, Petitioner, was also charged with being a prior and persistent offender. (Id.)

The first day of trial, James Hill moved to sever his trial from that of his brother, citing the anticipated testimony of Officer LaGrone that, when he stopped the brothers' car, Petitioner said, "'We were messing around in a park. She's my girlfriend.'" (Resp. Ex. 1 at 3.) The motion was denied. (Id. at 6 **[*3]** .) Petitioner then moved to waive his right to a jury trial. (Id. at 7.) This motion also was denied. (Id.)

At the conclusion of voir dire, the prosecutor peremptorily struck nine of the fifteen black venirepersons and four of twenty-one white venirepersons. (Resp. Ex. 2 at 301.) The black stricken venirepersons included Madelyn Nash, Betty Booker, Kathleen Hubbard, Aminee Jones, Mattie Keys, Darlene Johnson, Donn Rice, Caldonia Hackney, and Dewilla Jennings. (Id. at 302-03.) The defense peremptorily struck three of the remaining six black venirepersons: Misses Johnson, Kirby, and Thomas. (Id. at 305.) When called upon to explain his strikes of the nine black venirepersons, the prosecutor replied that he had struck Miss Nash because she knew Petitioner's attorney; Miss Booker because her husband was on probation or parole for felony assault; Misses Hubbard and Jones because they wanted off the jury and had no prior service; Miss Keys because she was on a murder jury that did not reach a verdict and because she kept her eyes closed during the examination; Miss Johnson because she was unemployed, had a brother in prison on a rape charge, characterized her brother's sentence as unfair on the grounds he did not do much, and had no prior jury service; **[*4]** Mr. Rice because he was unemployed; Miss Jennings because she served on a hung jury in a robbery case and was possibly related to someone that the prosecutor had prosecuted; and Miss Hackney because he did not have any prior jury service. (Id. at 306-19.) Additionally, the prosecutor explained that he "struck virtually all women. I wanted men on this jury. That's my philosophy in trying a rape cause . . . I think I have a total of two strikes against men on the panel out of twelve. Ten were against women." (Id. at 318.) When challenged as to why he did not peremptorily strike several white venirepersons who had no prior jury service, the prosecutor stated that those venirepersons were all male, and of the seven who were not stricken, one had a dad and brother who were police officers, one served as a reserve officer and was later stricken by the defense attorneys, one was robbed several times and was later stricken by the defense attorneys, and one was a victim of a burglary and was later stricken by the defense attorneys. (Id. at 321-24.) The trial court found that the prosecutor's reasons were not pretextual and overruled the defense attorneys' Batson 2 motion. (Id. at 325.)

The jury was sworn and seated, and the State began its **[*5]** case. Officer LaGrone, in addition to the testimony described above, testified that he and Ms. Oliver searched the area where Ms. Oliver said she had been attacked and found her earrings. (Resp. Ex. 2 at 383, 399.) The ground in that area had been disturbed. (Id.) Dr. Carla Courtney, an obstetrics and gynecology resident at Barnes Hospital, testified that Ms. Oliver told her that Petitioner and his brother had placed their penises in her mouth, but not in her vagina or rectum. (Resp. Ex. 3 at 474-80.) Dr. Courtney's examination of Ms. Oliver revealed dirt smeared around her mouth, bruises under her chin and jaw, scratches across her neck, an abrasion on her left hip, and dirt covering her vulva. (Id. at 481.) There was also dirt in her vagina. (Id. at 482.) Dr. Courtney testified that it takes force or placement to get dirt in a vagina. (Id. at 507.) She also testified that Ms. Oliver's wounds were consistent with her story. (Id. at 484.)

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Joseph Crow testified as a serologist, a person who analyzes blood and body fluids. (Id. at 529.) The vaginal, oral, and rectal smears taken from Ms. Oliver were negative for sperm. (Id. at 31.) When he did a color test on a vaginal swab taken from her it turned blue, and he found one human spermatoza head **[*6]** on the slide. (Id.) The spermatoza head was, however, consumed in the analysis. (Id.) Crow further testified that he did not have enough of a sample of seminal fluid to compare it with Petitioner's blood or saliva. (Id. at 555-56.)

Ms. Oliver's testimony, summarized by the state appellate court, was as follows.

> On October 8, 1988, victim traveled east on highway 44, looking for an exit to highway 55 south, which she intended to take home. Victim missed her exit, and became lost on highway 70. Victim exited the highway several times in an attempt to find a familiar area. While traveling in the inside lane, victim ran over something, which tore up the bottom of her car and caused a flat tire. After victim got out of the car and inspected it, she got back in her car and began crying. Since no one stopped to assist victim, victim got out of her car and started walking.
>
> As victim crossed a ramp, she saw a car coming down the ramp. The car, driven by Gregory Hill and James Hill as his passenger, pulled up beside the victim. Victim told them that her car had broken down and that she needed to get to a phone. They told victim that they would take her to a phone. Victim got in the back seat of the car, still **[*7]** crying. She could not see very well, as mascara was in her eyes.
>
> While riding down the highway, victim noticed that they passed an exit, but one of the Hill brothers informed her that there wasn't a telephone at the exit. When victim next looked up, she noticed that they were in a park. Realizing that there was not a phone nearby, and recognizing that something was wrong, victim jumped out of the car and took off.
>
> The Hill brothers chased her. Gregory grabbed victim by her arm, and James demanded her purse. Victim gave the men her purse. Gregory subsequently knocked victim to the ground. Gregory then demanded victim's jewelry. Gregory grabbed the rings off her fingers and began yanking on her necklaces. Victim thereafter took off her necklaces and gave them to the two men. James returned to the car with victim's purse.
>
> Gregory tried to get on top of victim, and began pulling off her panty hose. When victim screamed, he told her to shut up or he would kill her. James arrived back from the car. Victim pleaded with James to help her, but James refrained from so doing, and again returned to the car at Gregory's request. After James left, Gregory raped victim, tore her dress, and fondled her **[*8]** breasts. Victim told Gregory she was sick, so he leaned up. Victim turned over, got up and ran. Gregory chased her, grabbed her and dragged her to a little grove of trees. Gregory raped her again.
>
> Victim could hear someone blowing a horn. Shortly thereafter, James returned from the car. Gregory encouraged James to partake. As James raped victim, Gregory placed his penis in her mouth. The two men switched places, and continued to rape her and sodomize the victim. Thereafter, the two men took victim back to the car; James drove the car, while Gregory sat with victim in the back seat.

State v. Hill, 808 S.W.2d 882, 885-86 (Mo.Ct.App. 1991) (James Hill's appeal).

On direct examination, Ms. Oliver testified that Petitioner's penis did not fully enter her vagina because she was fighting back. (Resp. Ex. 3 at 592.) At one point, Petitioner "said something about me being real small, and he went and was putting his hand up in me, his fingers..." (Id. at 597.) She did not know whether either brother ejaculated, but had told the doctor that neither had ejaculated in her vagina or her mouth. (Id. at 598, 612.) On cross examination, Ms. Oliver testified that she felt like she was looking down on herself as Petitioner and his brother raped her. (Id. at 629.) "All I know is when someone **[*9]** is choking you, and you just feel like every bit of breath is leaving your body, to me it felt like an out-of-body experience." (Id. at 642.)

Petitioner's only witness was himself. He first testified that he had a prior criminal record, specifically a conviction for second degree burglary, one for carrying a concealed weapon, and one for first degree tampering. (Resp. Ex. 4 at

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809.) He then testified about the night of October 8. He and his brother picked up Ms. Oliver as she was walking on the highway, she got into their car without any fear or trepidation, and, as they were driving toward an exit with service station and telephone, she insisted that they stop in the park so that she could go to the bathroom. (Id. at 796-803.) Neither he nor his brother raped, sodomized, hit her, or choked her. (Id. at 803-08.) Petitioner further explained that he and Ms. Oliver had ducked down when they were being followed by the police car because they had been snorting cocaine in the back seat. (Id. at 853.)

James Hill decided not to testify after hearing his brother's testimony. (Id. at 856.)

The jury returned a verdict of guilty against both brothers on all charges. (Id. at 949; Resp. Ex. 6 at 34-39.)

After Petitioner's motion for a new trial was denied and he **[*10]** was sentenced, Petitioner appealed. While his direct appeal was pending, Petitioner moved for postconviction relief pursuant to Missouri Supreme Court Rule 29.15. (Resp. Ex. 7 at 5-11, 14-20.) His motion was amended by appointed counsel. (Id.) An evidentiary hearing was conducted at which only Petitioner testified. (Resp. Ex. 5.) Petitioner testified that he had asked his attorney to investigate (a) the doctor who examined Ms. Oliver the night of October 8 and who testified at trial and (b) one of the men who Ms. Oliver had had dinner with that night and who could have been responsible for the bruises on Ms. Oliver's neck. (Id. at 18-22.) He had also asked his attorney to file a motion requesting that DNA testing be done on him, but his attorney refused on the grounds that such a motion would give the prosecution insight into their defense. (Id. at 26.) Additionally, Petitioner blamed his attorney for (a) failing to query Ms. Oliver about inconsistent statements she had given on whether there was any penetration and (b) telling the jury that there had been penetration. (Id. at 28-32.)

Petitioner's motion was denied, and he appealed. The two appeals were consolidated and were argued on the grounds that (1) the trial court erred by denying his Batson **[*11]** motion; (2) the trial court erred by denying his motion for a mistrial based on statements by the prosecutor in closing arguments (a) comparing the case to the "North-side Rapist," a publicized, unsolved case involving a series of rapes, and (b) questioning the sincerity of the defense attorneys; (3) the trial court erred in submitting a verdict director on felonious restraint and entering a conviction on that count as (a) the underlying acts which were the basis for the charge were also the acts used to accomplish the sex offenses and (b) the verdict director failed to specify which acts constituted felonious restraint; (4) the trial court erred in sentencing him to consecutive terms based on an incorrect interpretation of Mo.Rev.Stat. § 558.026.1 as requiring that sentences for multiple convictions for sex offenses be served consecutively; (5) the motion court 3 erred by not finding his trial counsel to be ineffective for failing to object to the prosecutor's closing argument outlined in (2), supra; (6) the motion court erred by not finding his trial counsel to be ineffective for failing to object to Crow's testimony that the victim had had sexual intercourse. (Resp. Ex. 8.)

The appellate court found each ground to be without merit, and affirmed the trial court and the motion court. **State v. Hill**, 817 S.W.2d 609 (Mo.Ct.App. 1991).

Petitioner now seeks federal habeas relief on six grounds. First, he argues that he was constructively deprived of his due process rights when an incompetent attorney was appointed to represent him on direct appeal. If his attorney had read the trial transcript, including the sentencing hearing, she would have included an argument that his conviction was unlawfully obtained because the jury selection revealed an intentional pattern of excluding venirepersons because of their race or sex. Second, the state denied him his constitutional rights by destroying exculpatory evidence and his appellate counsel was ineffective for failing to argue such. Specifically, the state destroyed the alleged sample of a human spermatoza head, which precluded him from subjecting the sample to further testing in order to prove his innocence. Third, the evidence of sodomy was insufficient to convict him, and his appellate counsel was ineffective for failing to argue such. Fourth, he was denied his right to confront and cross-exam the state's **[*13]** witness, Karen Oliver, when she testified under oath that she was unconscious when the second rape and sodomy allegedly occurred. Fifth, the state failed to meet its burden of proof on all essential elements of the crime of rape, specifically the element of sexual intercourse. And, finally, the state unconstitutionally denied him access to the rape kit for testing.

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Respondent contends that Petitioner's first ground is (a) without merit insofar as he argues that the prosecutor unconstitutionally used peremptory strikes to remove venirepersons based on race as that argument was presented to, and found to be meritless by, the appellate court, (b) procedurally barred insofar as he might claim that trial counsel was ineffective in how he presented the claim because it was not raised in his Rule 29.15 motion, (c) procedurally barred insofar as he was claiming that the prosecutor unconstitutionally used peremptory challenges to remove venirepersons based on gender because such claim was not raised at trial, in the motion for new trial, or on appeal. The second, third, and fourth grounds, Respondent further argues, are refuted by the record and are procedurally barred. Petitioner's claim that the evidence **[*14]** was insufficient for a conviction of rape is without merit and is procedurally barred, as his sixth ground. Petitioner counters that his Batson argument (a) is not without merit, but was incompetently presented by his appellate counsel and (b) the state bears the burden of his appellate counsel being ineffective because she was appointed by the state. In a separate pleading, Petitioner further argues that his claim that his appellate counsel was ineffective for failing to argue that the prosecutor unconstitutionally discriminated against women in the selection of the jury was presented to the state appellate court in a motion to recall the mandate. Petitioner again argues that the state bears the risk of his appellate counsel being ineffective because she was appointed.

Discussion

Ground One. Petitioner presents his first argument as a claim that the state denied him due process by appointing ineffective appellate counsel who did not (a) properly brief his Batson argument and (b) raise a gender discrimination claim.

A state prisoner seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254 must first fairly present his claims to the state courts in order to satisfy the exhaustion requirement of § 2254(b). **[*15]** See **Forest v. Delo**, 52 F.3d 716, 719 (8th Cir. 1995) (citing Vasquez v. Hillery, 474 U.S. 254, 257, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986)). A claim has not been fairly presented to the state courts unless the same factual grounds and legal theories asserted in the prisoner's federal habeas petition have been properly raised in the prisoner's state court proceedings. **Id.** See also **Morris v. Norris**, 83 F.3d 268, 270 (8th Cir. 1996) (same). Before the state courts, Petitioner presented the same factual grounds, the Batson challenges and the prosecutor's admitted consideration of gender as a basis for his peremptory strikes, but before this Court he argues a different legal theory than argued before the state courts.

In the interest of judicial economy, however, the question of whether this difference results in a procedural default need not be reached if the merits are easily resolvable. See **Barrett v. Acevedo**, 169 F.3d 1155, 1162 (8th Cir.) (en banc), cert. denied, 528 U.S. 846, 120 S. Ct. 120, 145 L. Ed. 2d 102 (1999); Tokar v. Bowersox, 198 F.3d 1039, 1049 (8th Cir. 1999); **Evans v. Lock**, 193 F.3d 1000, 1002 (8th Cir. 1999). The merits of Petitioner's first ground, and of the other five grounds, are easily resolvable.

"The Equal Protection Clause forbids a prosecutor from using preemptory challenges to exclude otherwise qualified persons from the jury panel solely on account of their race." **Devose v. Norris**, 53 F.3d 201, 204 (8th Cir. 1995) (citing Batson v. Kentucky, 476 U.S. 79, 96, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)). In Batson, the Supreme Court outlined a three step process for evaluating a claim that a prosecutor has used peremptory challenges in a manner **[*16]** violative of the Equal Protection Clause. **Hernandez v. New York**, 500 U.S. 352, 358, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (citing Batson, 476 U.S. at 96). First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race; second, if a requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question; and, finally, the trial court must determine whether the defendant has carried his burden of proving discrimination. **Id.** at 358-359 (citing Batson, 476 U.S. at 96-98). At the second step, "'the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation the reason offered will be deemed race neutral.'" **Purkett v. Elem**, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam) (quoting Hernandez, 500 U.S. at 360) (Purkett I). Thus, prosecutors need only state a reason that is neutral or, in other words, not inherently discriminatory, regardless of whether it makes sense. **Elem v.**

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Purkett, 64 F.3d 1195, 1198 (8th Cir. 1995) (citing Purkett I, 514 U.S. at 768). Whether an explanation is neutral is a question of comparability. **Devose**, 53 F.3d at 204. "'It is well-established that peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged.'" **Id**. (quoting Doss v. Frontenac, 14 F.3d 1313, 1316-1317 (8th Cir. 1994)). See also **United States v. Jenkins**, 52 F.3d 743, 747 (8th Cir. 1995); **United States v. Scott**, 26 F.3d 1458, 1465 (8th Cir. 1994). The **[*17]** explanation "may be 'implausible or fantastic,' even 'silly or superstitious,' and yet still be 'legitimate,'" but "cannot be a mere denial of racial motive or mere affirmation of good faith." **Elem**, 64 F.3d at 1198. In cases such as Petitioner's the preliminary issue of whether the defendant has made a prima facie showing becomes moot where the prosecutor defends his use of peremptory strikes. See **Hernandez**, 500 U.S. at 359. See also **Scott**, 26 F.3d at 1465 (district court required government to offer reasons for two preemptory strikes against African-Americans without expressly finding that defendant had made a prima facie showing); **United States v. Day**, 949 F.2d 973, 979 (8th Cir. 1991) (same).

The state appellate court concluded that the trial court's finding that the prosecutor had offered race neutral reasons for his peremptory challenges was substantiated by the record, specifically finding as follows.

> Venire member Nash knew the prosecutor. Venire member Booker's husband was charged with a felony assault and, during the time of the trial, was on probation or parole. Venire member Hubbard did not want to serve on the jury. Additionally, she had no prior jury service. Venire member Jones similarly stated that she did not want to serve as a juror. Venire member Keys sat on a murder trial **[*18]** which did not return a guilty verdict. Moreover, she kept her eyes closed during the prosecution's examination. Venire member Johnson: (1) was unemployed; (2) had a brother serving time on a rape charge; (3) felt her brother's situation was unfair because he didn't really do very much; and (4) had no prior jury service. Venire member Johnston was unemployed. Venire member Jennings served on a robbery case that ended in a hung jury. There was also a question about whether venire member Jennings was related to another Jennings that the state previously prosecuted. The prosecutory peremptorily struck venire member Hackney because she had no prior jury service and because she was a woman. The prosecutor stated that he prefers to have male jurors on rape cases.

Hill, 808 S.W.2d at 889. [4]

"A prosecutor's motive in excluding jurors presents a question of fact." **Shurn v. Delo**, 177 F.3d 662, 665 (8th Cir.), cert. denied, 528 U.S. 1010, 120 S. Ct. 510, 145 L. Ed. 2d 395 (1999). These findings of fact, which defeat Petitioner's Batson argument, are supported by the record and are presumed to be correct. **Id**.; **Malone v. Vasquez**, 138 F.3d 711, 720 (8th Cir. 1998); **Gibson v. Bowersox**, 78 F.3d 372, 374 (8th Cir. 1996). See also **Doss**, 14 F.3d at 1317 (strike was not violation of concept of "comparability" where Caucasian juror's **[*19]** exposure to same type of action that was at issue was vicarious, but African-American jurors' exposure was personal); **United States v. Ortiz-Martinez**, 1 F.3d 662, 673 (8th Cir. 1993) (no violation of "comparability" when Caucasian juror whose friend was prosecuted for crime was not removed but African-American juror whose sister was prosecuted was removed; Caucasian juror was not witness at trial, African-American juror was; Caucasian juror answered key question unequivocally, African-American juror did not); **United States v. Todd**, 963 F.2d 207, 211 (8th Cir. 1992) (prosecutor gave race-neutral explanation for peremptory strike of African-American venireperson who appeared inattentive, impatient, and hostile to prosecutor).

Petitioner further argues that his trial counsel should have objected to the prosecutor's admitted use of peremptory strikes to remove women. Petitioner was tried in May 1989. The appellate opinion rejecting both his direct criminal appeal and his postconviction appeal was issued in September 1991. See **Hill**, 817 S.W.2d at 609. At that time, the Missouri Supreme Court had noted when discussing the art of jury selection that, "[c]ounsel must rely upon perceptions of attitudes based upon demeanor, gender, ethnic background, employment, marital status, age, economic status, social position, religion, and many other **[*20]** fundamental background facts." **State v. Antwine**, 743 S.W.2d 51, 64 (Mo. 1988) (en banc) (emphasis added).

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In 1994, the United States extended Batson to prohibit potential jurors from being stricken because of their gender. **J.E.B. v. Alabama ex rel. T.B.**, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89(1994). This extension applied retroactively to all cases pending on appeal when the prohibition was announced. See **Griffith v. Kentucky**, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (applying Batson retroactively to cases pending on appeal when Batson was decided). See also **State v. Hayden**, 878 S.W.2d 883, 884 (Mo.Ct.App. 1994) (applying J.E.B. to case before it because it was pending on appeal when J.E.B. was announced). It did not, however, apply retroactively to on collateral review. See **Allen v. Hardy**, 478 U.S. 255, 106 S. Ct. 2878, 92 L. Ed. 2d 199 (1986) (Batson would not be applied retroactively on collateral review of convictions that became final before rule was announced); **Blair v. Armontrout**, 976 F.2d 1130 (8th Cir. 1992) (noting that death row inmate was disadvantaged because he was not entitled to Batson procedures, but was not entitled to such procedures because his case was pending on collateral review when Batson was announced). It does not, therefore, apply to Petitioner's case.

Petitioner argues that his appellate counsel, and his trial counsel, should have anticipated J.E.B. "Failure to anticipate a change in existing law does not amount to ineffective assistance of counsel." **Ruff v. Armontrout**, 77 F.3d 265, 268 (8th Cir. 1996). Thus, **[*21]** in Ruff the Eighth Circuit Court of Appeals held that a defense attorney's failure to raise a Batson argument at trial was not ineffective assistance because, even though the theory on which Batson was based was available, Batson itself had not yet been decided. **Id**. See also **Carter v. Hopkins**, 92 F.3d 666, 669-70 (8th Cir. 1996) (finding that counsel had not been ineffective for failing to make Batson challenge at trial; "[a]lthough the theory behind Batson was available to counsel at the time jury selection occurred here, Batson itself had not yet been decided"). Similarly, Petitioner's attorneys were not ineffective for not anticipating J.E.B. years before it was decided.

Ground Two. Petitioner next argues that the state denied him his constitutional rights by destroying exculpatory evidence, a sample of a human spermatozoa head found in seminal fluid taken from the victim, and his appellate counsel was ineffective for failing to argue such. This argument was not fairly presented to the state courts, but will also be reached on its merits for the reasons cited above.

The Sixth Amendment guarantees the right to effective assistance of counsel on direct appeal, **Douglas v. California**, 372 U.S. 353, 358, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963); however, to succeed on a claim of ineffectiveness of appellate counsel, a habeas petitioner **[*22]** must show, first, that appellate counsel's performance was below the reasonable standard of competence and, second, a reasonable probability that the result would have been different absent this deficient performance, **Strickland v. Washington**, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); **Gee v. Groose**, 110 F.3d 1346, 1352 (8th Cir. 1997). Appellate counsel is expected to winnow the issues on appeal to highlight the most meritorious issues and eliminate the sure losers. See **Jones v. Barnes**, 463 U.S. 745, 751-752, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); **Gee**, 110 F.3d at 1352; **Pollard v. Delo**, 28 F.3d 887, 889 (8th Cir. 1994). Nor does appellate counsel have a duty to raise every nonfrivolous claim on appeal. **Reese v. Delo**, 94 F.3d 1177, 1185 (8th Cir. 1996). See also **Parker v. Bowersox**, 94 F.3d 458, 462 (8th Cir. 1996) ("To perform competently under the Sixth Amendment, counsel is neither required nor even advised to raise every conceivable issue on appeal."). And, the performance of appellate counsel is evaluated in "light of the circumstances of the case." **Gee**, 110 F.3d at 1352; **Pollard**, 28 F.3d at 889-90. Thus, an attorney's decision not to raise an unwinnable issue on appeal is an important strategic decision in competent appellate advocacy and does not constitute ineffective assistance of counsel. See **Jones**, 463 U.S. at 751-52; **Horne v. Trickey**, 895 F.2d 497, 500 (8th Cir. 1990).

The unrefuted testimony of the serologist was that the human spermatozoa head found when color was added to the sample of seminal fluid was consumed in the analysis. There is no evidence that this was a purposeful destruction. Thus, Petitioner's argument that the **[*23]** state destroyed evidence is refuted by the record, and appellate counsel's decision not to raise an argument clearly lacking a factual basis is, under the standard delineated above, not ineffective assistance.

Ground Three. Petitioner contends in his third ground that the evidence of sodomy was insufficient to convict him, and his appellate counsel was ineffective for failing to argue such. Petitioner did not present this claim either on direct appeal or in a motion to recall the mandate. Again, however, the merits of the ground are easily resolvable.

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The jury was instructed, inter alia, that they must find Petitioner guilty of the first count of forcible sodomy if he, without Ms. Oliver's consent, placed his penis in her mouth and that such conduct constituted deviate sexual intercourse. (Resp. Ex. 6 at 47.) "Deviate sexual intercourse," as the jury was instructed and as Mo.Rev.Stat. § 566.010 reads, "means any act involving the genitals of one person and the mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any **[*24]** person." The jury was also instructed that if they found that James Hill had placed his penis in Ms. Oliver's mouth, without her consent, and that "with the purpose of promoting or furthering the commission of that forcible sodomy, the defendant Gregory Hill acted together with or aided or encouraged James Hill in committing that offense," then they must find Petitioner guilty of a separate count of forcible sodomy. (Id. at 53.) The jury returned a verdict of guilty against Petitioner on each count of forcible sodomy.

Ms. Oliver testified that both Petitioner and his brother placed their penises in her mouth. Dr. Courtney testified that Ms. Oliver told her that both Petitioner and his brother had placed their penises in her mouth. And, there was dirt around Ms. Oliver's mouth. Ms. Oliver's testimony was refuted by Petitioner. "'It is within the jury's province[, however,] to believe all, some, or none of the witness' testimony in arriving at their verdict.'" **State v. Huchting**, 927 S.W.2d 411, 421 (Mo.Ct.App. 1996) (quoting State v. Porter, 640 S.W.2d 125, 127 (Mo. 1982)). The jury believed Ms. Oliver's testimony, and that testimony described acts that satisfied the elements of forcible sodomy. See **Id**. (affirming conviction for sodomy based on victim's testimony that her attacker had placed his **[*25]** penis in her mouth; defendant's attack on that testimony as "contradictory" was irrelevant to finding of sufficiency of evidence). See also **State v. George**, 921 S.W.2d 638, 643 (Mo.Ct.App. 1996) (noting that generally uncorroborated testimony of victim in rape or sodomy case was sufficient to sustain a conviction).

Petitioner's third ground is without merit.

Ground Four. Petitioner's fourth argument lacks any support in the record.

Ms. Oliver tried to describe her feelings as she lay on the ground in a park, with a man trying to choke her, with his brother nearby, and with, according to her testimony, already having been raped once. She did not testify that she was unconscious. She did testify that she felt like she could see herself as she was being attacked. Petitioner was not denied his right to confront or cross-exam the victim; indeed, his attorney vigorously cross-examined her about her description of her "out-of-body" experience.

Ground Five. Petitioner's fifth ground is unavailing for the same reasons as was his third -- Ms. Oliver's uncorroborated testimony was sufficient to sustain the jury's verdict that Petitioner had sexual intercourse with her against her will. Additionally, there was some corroboration. Dr. Courtney **[*26]** testified that dirt was found in her vagina, and that it would require force to place it there. Crow testified that a human spermatozoa head was found in the vaginal swab.

Ground Six. In Petitioner's final ground he argues that the state unconstitutionally denied him access to the rape kit, thereby denying him an opportunity to test the hairs in the kit. Petitioner did not, however, produce any evidence that any hairs other than Ms. Oliver's were in the rape kit or that he moved for, and was denied, access to the rape kit. Thus, his ground fails for two reasons.

First, a conclusory allegation of undeveloped evidence with no factual support is unavailing. See **Neal v. Acevedo**, 114 F.3d 803, 806 (8th Cir. 1997) (habeas petitioner's failure to produce any examples of evidence counsel could have discovered through further investigation defeated conclusory allegation that such evidence should have presented); **Swindler v. Lockhart**, 885 F.2d 1342 (8th Cir. 1989) (conclusory allegation that certain evidence should have been introduced was unavailing absent showing of what that evidence really was). Second, having failed to develop that evidence in state court, Petitioner must show cause and prejudice for his failure before being granted an evidentiary hearing in federal court. **[*27]** See **Sidebottom v. Delo**, 46 F.3d 744, 750 (8th Cir. 1997). He has not shown either cause or prejudice. Moreover, "'[t]here is no requirement of a hearing where the claim[s] [are] based solely on vague, conclusory, or palpably incredible allegations of unsupported generalizations.'" **Id**. (quoting Amos v. Minnesota, 849 F.2d 1070, 1072 (8th Cir. 1988)).

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Conclusion

Petitioner's 28 U.S.C. § 2254 presents six grounds for relief that have not been fairly presented to the state courts. Each of the six grounds is clearly without merit.

Accordingly, for the foregoing reasons,

IT IS HEREBY RECOMMENDED that the 28 U.S.C. § 2254 petition of Gregory Hill be **DENIED** and this case be **DISMISSED** without further proceedings.

The parties are advised that they have eleven (11) days in which to file written objections to this Recommendation and the Memorandum incorporated herein pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained, and that failure to file timely objections may result in waiver of the right to appeal questions of fact. See **Thompson v. Nix**, 897 F.2d 356 (8th Cir. 1990).

/s/ Thomas C. Mummert, III

THOMAS C. MUMMERT, III

UNITED STATES MAGISTRATE JUDGE

Dated this 8th day of February, 2000.

Footnotes

1 Respondent's exhibits one through four are the trial transcript.

2 Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

3 On Petitioner's motion the trial **[*12]** court recused itself, and another judge was appointed.

4 These findings of fact were issued in James Hill's direct appeal. James Hill and Gregory Hill were tried together.

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