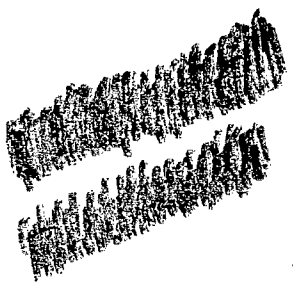
TABLE OF CONTENTS TO APPENDIX



UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appendix A

No: 08-1762

DeMarcus Wright,

Petitioner - Appellant

v.

Chuck Dwyer,

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:04-cv-00497-FRB)

JUDGMENT

Before WOLLMAN, COLLOTON, and GRUENDER, 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.

April 03, 2009

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

/s/ Michael E. Gans

Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DEMARCUS WRIGHT,	)	
	)	
Petitioner,	)	
	)	No. 4:04CV00497 FRB
	)	
v.	)	
	)	
CHARLES DWYER,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

Presently before this Court is the pro se petition of Missouri state prisoner DeMarcus Wright ("petitioner") for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Docket No. 1-1 ("Petition") filed April 28, 2004.) All matters are pending before the undersigned United States Magistrate Judge, with consent of the parties, pursuant to 28 U.S.C. § 636(c).

On April 13, 2000, a jury in New Madrid County, Missouri, convicted petitioner of forcible rape, burglary in the first degree, assault in the second degree, and armed criminal action in connection with his actions against Ms. Erin Schloss and Mr. Randy Koehler on July 24, 1999. (Resp. Exh. A3 at 442-44.) During petitioner's trial, state's witness Shondale Tipler testified that both he and petitioner had raped Ms. Schloss, and that petitioner had struck Mr. Koehler with a hammer. (Resp. Exh. A2 at 223-59.)

On May 23, 2000, the Honorable Fred W. Copeland sentenced petitioner to two terms of life imprisonment, and two additional terms of seven years and 15 years, all terms to run consecutively. (Resp. Exh. A3 at 453-54.) At present, petitioner is incarcerated at the Southeast Correctional Center in Charleston, Missouri.

Petitioner appealed his conviction and sentence to the Missouri Court of Appeals, alleging as follows: (1) the evidence adduced at trial was insufficient to sustain his conviction for armed criminal action, inasmuch as no reasonable juror could have found him guilty of using the hammer to aid or assist him in the rape; and (2) the trial court erred in overruling his Batson[1] objection to the State's peremptory strike of venireperson Nettia Smith. (Resp. Exh. C.) On September 14, 2001, the Missouri Court of Appeals affirmed petitioner's convictions and sentences. (Resp. Exh. E.)

On December 23, 2001, petitioner filed a pro se post-conviction motion. (Resp. Exh. G at 3-10.) Subsequently, counsel was appointed, and an amended motion was filed on March 25, 2002. (Id. at 11-18.) Therein, petitioner alleged ineffective assistance of trial counsel, stemming from counsel's failure to: (1) strike for cause juror Mary Mitchem;[2] and (2) failure to call Dwaun Thiele as an alibi witness. Id. An evidentiary hearing was held on

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[1]Batson v. Kentucky, 476 U.S. 79 (1986).

[2]In the trial transcript, Mary Mitchem's surname is mistakenly spelled "Mitchell."

August 2, 2002, during which petitioner was represented by counsel, and on August 12, 2002, the Circuit Court of New Madrid County, Missouri overruled petitioner's motion. (Id. at 19-26.) Petitioner appealed the denial of his post-conviction motion with the Missouri Court of Appeals, in which he advanced both of the ineffective assistance claims asserted in his amended post-conviction motion. (Resp. Exh. H, J.) The Missouri Court of Appeals affirmed on July 28, 2003. (Resp. Exh. J.)

Petitioner filed the instant petition for a writ of habeas corpus in this Court on April 28, 2004. (Docket No. 1-1, "Petition".) Therein, petitioner asserts the following grounds:

> 1. That his conviction was obtained by the use of evidence obtained pursuant to an unlawful arrest because the arresting officer coached state's witness Shondale Tipler;
>
> 2. That his jury was unconstitutionally selected and impaneled because: (a) it was all white; and (b) a venireperson indicating a motive to convict was impaneled while jurors not in favor of conviction were excused; and
>
> 3. Ineffective assistance of counsel because: (a) an alibi witness was not called to testify; (b) DNA evidence was inconsistent; and (c) "alleged victim gave wrong description of defendants."
>
> (Petition at 4-6.)

Respondent contends that the claims raised in Ground 1 and in Grounds 3 (b) and (c) are procedurally defaulted because petitioner failed to properly raise these issues in state court, and further failed to allege cause to excuse his procedural default

or provide any new evidence which would support a claim of actual innocence. Respondent also contends that the claims raised in Grounds 2 and 3(a) are without merit and should be denied.

I. Exhaustion Analysis

Before this Court may grant relief on the merits of a petition for a writ of habeas corpus, a petitioner must first exhaust his state law remedies. 28 U.S.C. § 2254(b)(1); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). This exhaustion requirement is satisfied if a petitioner has fairly presented his claims first in state court, or if there are no currently available non-futile state remedies. Smittie v. Lockhart, 843 F.2d 295, 296 (8th Cir. 1988). The court must first examine whether the constitutional dimensions of Petitioner's claims have been fairly presented to the state court. Id. If not, the petitioner may still meet the exhaustion requirement if there are no currently available non-futile state remedies by which he could present his claims to the state court. Id. Even if a petitioner meets the exhaustion requirement in this manner, the federal court still may not reach the merits of the petitioner's claim unless the petitioner: (1) demonstrates adequate cause to excuse his state court default, and actual prejudice resulting from the alleged unconstitutional error; or (2) that a fundamental miscarriage of justice would occur in the absence of federal review. Coleman v. Thompson, 501 U.S. 722 (1991). A review of the record shows that petitioner's claims are

exhausted inasmuch as he has either fairly presented them to the state court, or currently has no available non-futile state remedies.

II. Procedurally Defaulted Claims

In Ground 1, petitioner alleges that his conviction was obtained by the use of evidence obtained pursuant to an unlawful arrest because the arresting officer had coached state's witness Shondale Tipler, who was his nephew. In Ground 2(a), petitioner alleges that his conviction was obtained by the action of an unconstitutionally selected and impaneled jury because the jury was all white. In Ground 2(b), petitioner argues that his jury was unconstitutionally selected and impaneled because a juror who indicated a motive to convict was impaneled while jurors not in favor of conviction were excused. In Ground 3(b), petitioner alleges that his trial counsel was ineffective based upon inconsistent DNA evidence. In Ground 3(c), petitioner alleges that his trial counsel was ineffective based upon the victim's description. A review of the record reveals that petitioner did not adequately present his claims in Grounds 1, 2(b), 3(b), and 3(c) to the state courts.

A claim is procedurally barred from federal habeas review unless the petitioner has, at each step of the judicial process, fairly presented the substance of the claim to the state courts. Jolly v. Gammon, 28 F.3d 51, 53 (8th Cir. 1994); Wemark v. Iowa,

322 F.3d 1018, 1020-21 (8th Cir. 2003) (citing Anderson v. Groose, 106 F.3d 242, 245 (8th Cir. 1997)). This requirement ensures that the state courts have been alerted to "the federal nature of each claim," and have been given a "fair opportunity to apply controlling legal principles to the facts bearing upon [the] claim." Palmer v. Clarke, 408 F.3d 423, 430 (8th Cir. 2005) (citing Baldwin v. Reese, 541 U.S. 27, 29, (2004) and Wemark, 322 F.3d at 1020-21). Failure to present a claim on appeal from the denial of post-conviction relief constitutes a procedural default. Clay v. Bowersox, 367 F.3d 993, 1005-06 (8th Cir. 2004); Reese v. Delo, 94 F.3d 1177, 1181 (8th Cir. 1996).

A claim is deemed "fairly presented" to the state courts when a petitioner has "properly raised the 'same factual grounds and legal theories' in the state courts which he is attempting to raise in his federal habeas petition." Wemark, 322 F.3d at 1020-21 (citing Joubert v. Hopkins, 75 F.3d 1232, 1240 (8th Cir. 1996)). It is important that the claims petitioner seeks to advance in federal court are actually the same claims, involving the same factual basis and legal theories, that were raised in state court. See McCall v. Benson, 114 F.3d 754, 757 (8th Cir. 1997)("Mere similarity between the state law claims and the federal habeas claims is insufficient.") A habeas petitioner cannot avoid procedural default by raising claims which were alleged in state court under different legal theories; both the factual basis and the legal theories must match. Sweet v. Delo, 125 F.3d 1144, 1153,

n. 12 (8th Cir. 1997)(citing Abdullah v. Groose, 75 F.3d 408 (8th Cir. 1996)).

A review of the record shows that petitioner never raised the claims asserted in Grounds 1, 3(b) or 3(c) to the Missouri courts during any stage of his state court proceedings. These claims are, therefore, procedurally barred from review. See Jolly, 28 F.3d at 53.

The undersigned now turns to the claims petitioner attempts to advance in Ground 2. Therein, petitioner alleges as follows: "Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and inpaneled [sic]." (Petition at 4.) For his facts in support of this claim, petitioner stated: "All white jury, Juror that had stated information in which he already had a motive to convict, yet he was still chosen to be a Juror. Jurors who were not in favor of a conviction were excused from the jury." (Id.) Although respondent herein does not argue that any of the claims in Ground 2 are procedurally defaulted, this Court has "discretion to consider an issue of procedural default sua sponte." King v. Kemna, 266 F.3d 816, 822 (8th Cir. 2001).

In Ground 2(a), petitioner asserts that his jury was unconstitutionally selected and impaneled because it was all white. On direct appeal, petitioner argued that the trial court erred in overruling his Batson objection to the state's peremptory strike of African-American venireperson Nettia Smith. In support, petitioner

argued that, although Ms. Smith initially indicated that she would be affected by her cousin's pending prosecution for murder in the same county as petitioner was being tried, she later rehabilitated herself by stating that she could remain impartial. Liberally construing the instant petition, the undersigned concludes that petitioner indeed adequately presented his claim in Ground 2(a) on direct appeal, inasmuch as he argued that an African-American was struck from the venire panel. See Thompson v. Mo. Bd. of Parole, 929 F.2d 396, 399 (8th Cir. 1991) (pro se petitions should be given liberal construction) (citing Haines v. Kerner, 404 U.S. 519, 520 (1972)).

Petitioner did not, however, adequately present his claims in Ground 2(b) to the Missouri state courts. In Ground 2(b), petitioner challenges the selection and impaneling of his jury, alleging that a venireperson (to whom petitioner refers using a masculine pronoun) with a motive to convict was impaneled, while venirepersons with no such motive were excused. This claim is procedurally barred from federal review because petitioner raised no such claim on direct appeal. Habeas petitioners may not advance substantive jury claims in federal court which should have been raised on direct appeal. See Peltier v. United States, 867 F.2d 1125, 1126 (8th Cir. 1989) (petitioner "waived his opportunity to argue discrimination in the jury selection process" by not raising the issue on direct appeal; federal habeas relief is not a substitute for direct appeal).

In its brief, however, respondent addressed this claim on the merits after noting that petitioner, during his post-conviction proceedings, argued that his trial counsel was ineffective for failing to strike venireperson Mary Mitchem, who indicated a bias in favor of the testimony of police officers. Although petitioner's failure to raise these substantive jury issues on direct appeal erects a procedural bar to federal review, as noted, supra, the undersigned will, for the sake of argument, address the issue of whether petitioner's post-conviction argument was sufficient to preserve this issue for federal review.

In Ground 2(b), petitioner is arguing that an unnamed venireperson was selected for jury service despite an apparent bias. On appeal from the denial of his post-conviction motion, petitioner advanced a Sixth Amendment ineffective assistance claim stemming from counsel's failure to strike Ms. Mitchem, who had indicated a bias in favor of the testimony of police officers. Petitioner's post-conviction Sixth Amendment claim does not encompass his current, broad claim that his jury was unconstitutionally selected and impaneled, even though it may be reasonable to conclude that the two claims are based upon the same underlying facts. See Abdullah, 75 F.3d at 412(citing Ashker v. Leapley, 5 F.3d 1178, 1179-80 (8th Cir. 1993) (petitioner's Fourteenth Amendment due process claim presented to Missouri state court did not encompass Sixth Amendment claim even though the two claims were based on the same underlying factual basis). A

challenge to the composition of the jury and a Sixth Amendment ineffective assistance claim involve the analysis of different legal theories, and "there is no overlap between the two inquiries." Abdullah, 75 F.3d at 412.

For the foregoing reasons, the claims petitioner attempts to raise in Grounds 1, 2(b), 3(b) and 3(c) are procedurally barred from review.

A. Cause and Prejudice

Due to the procedurally defaulted nature of petitioner's claims in Grounds 1, 2(b), 3(b) and 3(c), this Court cannot reach the merits of the claims absent a showing of cause and prejudice, or a claim of actual innocence, which would warrant review on the merits on the grounds that failure to do so would result in a "fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

In his petition, petitioner makes no attempt to establish cause to excuse his procedural default. Because petitioner makes no attempt to establish cause, it is unnecessary to discuss the issue of prejudice, as both cause and prejudice must be established to overcome procedural default. Murray v. Carrier, 477 U.S. 478, 488 (1986).

B. Actual Innocence Claims

Petitioner does, however, appear to assert that he is actually innocent of the crimes. As exhibits to his Petition, petitioner filed two documents: an affidavit from Shondale Tipler, and a letter from Robert Allen, Ph.D. (Docket No. 6.) In his

affidavit, Tipler claims, inter alia, that he lied on the stand during petitioner's trial, and specifically,

> My name is Shondale Tipler of sound mind. On this date May 5, 2003 do there by make this statement/affidavit on my own free will. I am not being harmed or threatened in any way or form. I am here to tell the truth which I have given a false testimony. Everything that was said on the statement and in trial was a lie. My uncle Paul Tipler talked to me in the interviewing room and he told me what to say and how to say it to the detectives. He promised me that I wouldn't get a lot of time. He said that all they really wanted was one guy like they did in a previous case. He even called me jail to find out what was going on with the case. Two the three months prior to the dna test coming back he told my dad and brother that they had found my dna. Also the detectives that were on my case said that they would make sure that everything that they told me to do. They wrote a statement and forced me to sign it and then told me to acted as sympathetic as possible while I recited what they had written on the statement. The next day or two my uncle Paul Tipler put some money on my account but it wasn't what he said that it would be for doing what he asked. [sic]
>
> (Docket No. 6 at 3.)[3]

In his letter, Dr. Allen challenges the state crime lab's handling and analysis of the DNA evidence, and questions the conclusion that petitioner was involved in the rape. The undersigned will address these submissions inasmuch as they can be

[3]In the body of the affidavit, Shondale indicates a date of May 5, 2003; however, the Notary Public's signature block indicates that the affidavit was subscribed and sworn on May 20, 2003. (Docket No. 6 at 3.) The undersigned will therefore consider the latter to be the operative date.

viewed as petitioner's attempts to assert his actual innocence and avail himself of the "fundamental miscarriage of justice" exception to showing cause and prejudice.

To raise the fundamental miscarriage of justice exception to the procedural default doctrine, petitioner must present new evidence that "affirmatively demonstrates" that he is actually innocent of the crime. Abdi v. Hatch, 450 F.3d 334, 338 (8th Cir. 2006); see also Brownlow v. Groose, 66 F.3d 997, 999 (8th Cir. 1995). An actual innocence claim is not itself a constitutional claim, but is a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on its merits." Schlup v. Delo, 513 U.S. 298, 315 (1995). To establish a valid claim of actual innocence, petitioner must "support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial," and demonstrate "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id. at 324 (emphasis added). Evidence is "new" only if "it was not available at trial and could not have been discovered earlier through the exercise of due diligence." Johnson v. Norris, 170 F.3d 816, 818 (8th Cir. 1999) (citing Amrine v. Bowersox, 128 F.3d 1222, 1230 (8th Cir. 1997)(en banc)). The standard for evaluating claims of actual innocence is strict, and a petitioner generally cannot demonstrate actual innocence when sufficient evidence exists to support his conviction. See Johnson v. United States, 278 F.3d

839, 844 (8th Cir. 2002).

The undersigned turns first to petitioner's submission of the January 17, 2000 letter from Robert W. Allen, Ph.D. As respondent correctly notes, this letter, and all of the evidence therein, is not "new" evidence because it was available during petitioner's trial, his direct appeal, and his post-conviction proceedings. In fact, Dr. Allen appeared as a defense witness during petitioner's trial, and testified regarding the opinions he expresses in his January 17, 2000 letter. (Resp. Exh. A3 at 369-88.) This evidence is therefore not new, nor can petitioner possibly demonstrate that no reasonable juror would have convicted him in light of this evidence, inasmuch as the jury indeed convicted petitioner after hearing it. Dr. Allen's letter therefore cannot be used in these proceedings to establish petitioner's actual innocence. See Johnson, 170 F.3d at 818 (citing Amrine, 128 F.3d at 1230).

The undersigned next turns to petitioner's submission of Shondale Tipler's May 20, 2003 affidavit. Respondent in this case argues that the affidavit cannot be considered "new" evidence because it was available at the time of petitioner's post-conviction appeal.[4] However, the undersigned notes that the

[4]The undersigned notes that, although the affidavit indeed pre-dates the Missouri Court of Appeals' decision regarding petitioner's post-conviction appeal, the affidavit is dated later than the date petitioner appears to have actually filed his post-conviction appellate brief to the Missouri Court of Appeals, and therefore perhaps cannot be considered to have been "available" to petitioner.

affidavit post-dates petitioner's trial and direct appeal, and therefore cannot be considered to have been available to petitioner at those stages of his state court proceedings, when it would have been appropriate to present evidence challenging the sufficiency of the evidence to sustain his conviction. See Weaver v. United States, 418 F.2d 475, 476 (8th Cir. 1969) (challenges to the sufficiency of the evidence must be raised in direct appeal and are not the proper subject of collateral review).

Nevertheless, Shondale Tipler's affidavit cannot be considered new reliable evidence of petitioner's actual innocence because it contains very little that was not presented at trial. See Battle v. Delo, 64 F.3d 347, 353 (8th Cir. 1995) (affidavits containing "very little that was not already before the jury" and hearsay and disputed testimony did not establish actual innocence.) During petitioner's trial, the familial relationship between Shondale Tipler and Officer Tipler was disclosed to the jurors, and petitioner's attorney thoroughly cross-examined Shondale regarding the nature of the discussions he had with his uncle before he made his statement to detectives. Specifically, during Shondale's cross-examination, there was the following exchange:

> Question (by petitioner's attorney Mr. Chris Davis): Now a few days after that (the crimes), Cape Girardeau officer Paul Dale Tipler came over to your home?
>
> Answer (by Shondale Tipler): Yes.
>
> Q. Paul Tipler was your mother's brother?
>
> A. Yes.

Q. He's an uncle?

A. Yes.

. . .

Q. He drove you to the police station?

A. Yes.

Q. He took you to an interview room?

A. Yes.

Q. He told you about the case and told you that there was no way you could get out of it?

A. Yes.

Q. He told you that he knew about the girl who had been raped and he was standing toward you looking like he knew you'd done it?

A. Yes.

. . .

Q. Now, he told you how to talk to the detectives?

A. Yes.

Q. He told you what to say to the detective?

A. Yes.

Q. He told you that the only way to help yourself is to cooperate when the detectives come into the room, tell them to call the prosecuting attorney and find out if you can get a deal if you can cooperate?

A. Yes.

Q. Now, the detective came in after that, right?

A. Yes.

(Resp. Exh. A2 at 250-52.)

Shondale went on to testify during cross examination that, when the detective came in, he told him "what they wanted to know," and "what they wanted to hear;" signed a written statement which was entirely in the detective's handwriting; made a videotaped statement; and positively identified petitioner (who had been brought to the station) as being the person with whom he had raped Ms. Schloss. (Id. at 252-54.) Petitioner's attorney also cross-examined Shondale regarding the fact that he had received a drastically reduced prison term in exchange for his testimony. (Id. at 254, 256-57.)

Therefore, although Shondale's affidavit indeed post-dates petitioner's trial and direct appeal, almost everything alleged therein (that he was coached by his uncle who was the arresting officer; was given a favorable deal by the prosecutor; and signed a written statement that someone else wrote) was not only available during petitioner's trial, it was presented to and considered by the jury, who convicted petitioner nonetheless. Petitioner therefore not only fails to demonstrate that the evidence in Tipler's affidavit is "new, reliable evidence that was not presented at trial," he cannot demonstrate that "it is more likely than not that no reasonable juror would have convicted him" in light of the evidence. See Schlup, 513 U.S. at 324, 327.

The only element of Shondale's affidavit not presented to the jury was the assertion that he gave false testimony, and recantations of testimony are generally viewed with suspicion.

Wadlington v. U.S., 428 F.3d 779, 784 (8th Cir. 2005) (citing United States v. Provost, 969 F.2d 617, 619 (8th Cir. 1992)). The reason for this is because one who makes subsequent statements directly contradicting earlier testimony "either is lying now, was lying then, or lied both times." Provost, 969 F.2d at 620 (citing United States v. Bednar, 776 F.2d 236, 238-39 (8th Cir. 1985)). Tipler's recantation is fraught with significant credibility issues, and it is therefore very unlikely that Tipler's recantation would have been believed by the jury, and would have resulted in petitioner's acquittal. See Provost, 969 F.2d at 620 (probability that a recantation would lead to acquittal "rests in large part on the credibility of the recantation"). There are potentially several reasons Tipler is now recanting is testimony, none of which bear on petitioner's actual innocence. For example, Tipler indicates that his uncle put less money than allegedly promised on his prison account. Furthermore, it is suspicious that Tipler is recanting his testimony now, after he has already received a much-reduced prison sentence in exchange for his trial testimony. Petitioner has offered no explanation for why Shondale is willing to come forth now and admit he lied due to pressure from his uncle, rather than several years ago, during the trial in which petitioner's liberty was at stake. The undersigned cannot conclude that this is one of those "extraordinary" cases contemplated by Schlup for gateway passage.

Shondale Tipler's May 20, 2003 affidavit therefore "falls

far short of the showing of actual innocence that is required to meet the miscarriage-of-justice exception." Sweet, 125 F.3d at 1151-52. Because petitioner has failed to present new, reliable evidence of actual innocence, he cannot satisfy the "fundamental miscarriage of justice" exception to showing cause and prejudice. Schlup, 513 U.S. at 314-15; Washington v. Delo, 51 F.3d 756, 761 (8th Cir. 1995).

Because petitioner has failed to establish cause to excuse his procedural default, and because he is unable to invoke the "fundamental miscarriage of justice" exception to the procedural default doctrine, the claims raised in Grounds 1, 2(b), 3(b) and 3(c) are procedurally barred from review and are subject to dismissal without consideration of their merits. See Maynard v. Lockhart, 981 F.2d 981, 984-85 (8th Cir. 1992).

III. Merits of Claims

The facts adduced at trial and summarized by the Missouri Court of Appeals, in its supplementary Memorandum filed in conjunction with petitioner's direct appeal, show the following:

> Defendant and his friend, Shondale Tipler, broke into an apartment in Cape Girardeau, Missouri, shared by Erin Schloss (Victim) and her boyfriend, Randy Koehler. Once inside the apartment, Defendant went to the bedroom where Victim and Koehler were in bed. Defendant struck Koehler in the head with a hammer and told him to "shut the F- - - up and lay the F- - - down." Defendant struck Koehler with the hammer again after Koehler

> told him to leave the Victim alone. Defendant then handed the hammer to Tipler.
>
> Defendant grabbed Victim by her ankle and dragged her off the bed. When Victim pleaded with him to stop, Defendant told her to shut up and threatened to kill her. Defendant forced Victim to the bathroom floor, raped her and threatened to kill her several times during the attack. During this attack, Tipler stood over Koehler with the hammer and demanded money from him. Later Tipler also raped Victim. Eventually the intruders left the apartment with various stolen items.[5]
>
> (Resp. Exh. E at 2.)

Petitioner was tried in the Circuit Court of New Madrid County, Missouri before the Honorable Fred W. Copeland on April 13, 2000, cause number CR199-35FX. (Resp. Exh. A1-A3.) In his defense, petitioner claimed misidentification and alibi, and offered, inter alia, the testimony of his mother, Ms. Rosa L. Harris, who testified that petitioner was at home during the relevant time period. (Resp. Exh. A3 at 369-401.) Petitioner was nevertheless convicted. (Id. at 442-43.)

A. Ground 2(a) - Batson Challenge

In Ground 2(a), petitioner contends that his jury was unconstitutionally selected and impaneled inasmuch as it was all white. On direct appeal, petitioner argued that the trial court erred in overruling his Batson objection to the state's peremptory strike of African-American venireperson Nettia Smith. Upon review

[5]As petitioner does not rebut these facts with clear and convincing evidence, they are presumed correct. 28 U.S.C. § 2254(e)(1).

of the merits of petitioner's claim, the Missouri Court of Appeals denied relief.

Section 2254(d)(1) allows federal habeas courts to test the determinations of state courts "only against clearly established federal law, as determined by the Supreme Court of the United States," and prohibits the issuance of a writ of habeas corpus unless the state court's decision is "contrary to or involved an unreasonable application of clearly established federal law." Williams v. Taylor, 529 U.S. 362, 379 (2000). A state court's decision is contrary to clearly established Supreme Court precedent when it is opposite to the Court's conclusion on a question of law, or different than the Court's conclusion on a set of materially indistinguishable facts. Williams, 529 U.S. at 412-13; Carter v. Kemna, 255 F.3d 589, 591 (8th Cir. 2001).

At the time petitioner's conviction became final, the law was clearly established that the Fourteenth Amendment Equal Protection Clause forbids the prosecution from using its peremptory challenges to strike venirepersons "solely on account of their race." Batson, 476 U.S. 79, 89 (1986). Batson dictates a three-step process. It must first be determined whether the defendant made a prima facie showing that the prosecutor's peremptory strike was based solely on race. Id. at 96-97. If so, the burden shifts to the prosecutor to present a race-neutral explanation for the strike. Id. at 97-98. "Although the prosecutor must present a comprehensible reason, '[t]he second step of this process does not

demand an explanation that is persuasive, or even plausible'", and is sufficient "so long as the reason is not inherently discriminatory." Rice v. Collins, 546 U.S. 333, 338 (2006) (citing Purkett v. Elem, 514 U.S. 765, 767-768 (1995) (per curiam)). Batson does, however, require the prosecutor to "articulate a neutral explanation related to the particular case to be tried." Batson, 476 U.S. at 98. Finally, at the third step, it must be determined whether the defendant has met his burden of proving purposeful discrimination. Batson, 476 U.S. at 98. "This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" Rice, 546 U.S. at 338 (quoting Purkett, 514 U.S. at 768.)

In addition, in Missouri, once a race-neutral explanation has been offered, the law requires the defendant to prove pretext. State v. Parker, 836 S.W.2d 930, 939 (Mo. banc 1992). Federal courts are required to "respect state court procedures for treating Batson challenges." Jones v. Jones, 938 F.2d 838, 843-44 (8th Cir. 1991). In Batson, the Supreme Court explained that "[i]n light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." Batson, 476 U.S. at 99, n. 24.

State court factual findings are presumed to be correct.

28 U.S.C. § 2254(d). The presumption applies to factual findings made by the state appellate court. Smith v. Jones, 923 F.2d 588, 590 (8th Cir. 1991). State court findings may not be set aside unless they are unsupported by the record. Sumner v. Mata, 449 U.S. 539, 547-49 (1981); Spence v. Nix, 945 F.2d 1030, 1031 (8th Cir. 1991). Petitioner bears the burden of establishing that the state court's factual determinations are erroneous. Williams v. Armontrout, 912 F.2d 924, 930 (8th Cir. 1990) (en banc) (citing Sumner, 449 U.S. at 550.) Petitioner does not challenge the factual findings of the Missouri Court of Appeals, set forth herein. After carefully reviewing the record, the undersigned finds the state court's findings of fact are supported by the record. Thus, to the extent that the findings apply to the claims raised in the instant petition, the findings are adopted herein. See Williams, 912 F.2d at 930-31.

Petitioner challenges the selection and impaneling of his jury inasmuch as it was all white. A review of the record shows that the state used a peremptory challenge to strike Nettia Smith, an African-American venireperson, and that petitioner made a Batson objection, which the trial court overruled. On direct appeal, petitioner challenged the trial court's adverse ruling on his Batson challenge. In denying petitioner relief, the Missouri Court of Appeals applied the standard set forth in Batson, noting specifically that the prosecutor offered a race-neutral explanation for striking Ms. Smith, and the defendant made no attempt to show

pretext. Specifically, the court found as follows:

> Defendant claims in his last point that the trial court erred in overruling his **Batson** challenge to the State's use of a peremptory strike against venireperson Nettia Smith. Defendant claims the ruling was erroneous because the State's proffered reasons for striking Smith were a pretext for striking her since she was an African-American woman. Defendant is also an African American.
>
> During the State's voir dire, the prosecutor asked if any of the venirepersons had ever had a close friend or family member arrested or charged with any crime other than a traffic offense. Among others, Nettia Smith gave the following answers to the prosecutor's questions:
>
> NETTIA SMITH: I have a cousin accused of murder.
>
> PROSECUTOR: Is that a crime that's pending right now?
>
> NETTIA SMITH: Yes.
>
> PROSECUTOR: Has it gone to trial yet?
>
> NETTIA SMITH: No.
>
> PROSECUTOR: Is it here in New Madrid County or some other county?
>
> NETTIA SMITH: Yes, New Madrid.
>
> PROSECUTOR: Would the fact that you have a cousin accused of a serious crime affect your ability to sit as a juror to be fair to both sides in a criminal case?
>
> NETTIA SMITH: Yes.
>
> PROSECUTOR: You think it would effect [sic] your ability - -
>
> NETTIA SMITH: Yes.
>
> Defendant concedes that it would have been appropriate to consider striking Smith for cause based on this exchange. However, Defendant then points out his

following voir dire questions of Mrs. Smith and her answers:

COUNSEL:	Now, Ms. Smith, you gave a situation where you expressed it might be difficult for you to sit on this jury?
NETTIA SMITH:	U-huh (yes).
COUNSEL:	Could you sit on this jury and be fair to both sides?
NETTIA SMITH:	Yes.
COUNSEL:	You would listen to all the evidence and base your decision [solely] on the evidence that is presented before you?
NETTIA SMITH:	Yes.
COUNSEL:	And not let any outside factors affect your judgement? [sic]
NETTIA SMITH:	No.

After the prosecutor's peremptory strike of Nettia Smith, Defendant interposed a **Batson** objection because Smith and Defendant are African Americans. The prosecutor answered the challenge by describing that "she came within an eyelash of being struck for cause. She had said she had a relative charged with murder in this county and it would affect her ability to be fair to both sides in a criminal case." Continuing, the prosecutor stated that although Smith later said she could be fair to both sides, "her initial aim was that she could not be fair to both sides [which] caused me to strike her."

"A reviewing court may not reverse a trial court's decision as to whether the prosecutor discriminated in the exercise of his peremptory challenges unless it finds that decision clearly erroneous." **State v. Griffin,** 756 S.W.2d 475, 482 (Mo banc 1988), *cert. denied,* 490 U.S. 1113 (1989). "If the trial court's action is plausible under review of the record in its entirety, an appellate court may not reverse it although had it been sitting as the trier of fact it would have weighed the evidence

differently." **State v. Brinkley**, 753 S.W.2d 927, 930 (Mo. banc 1988). "*Batson* does not prohibit 'hunch' challenges so long as racial animus is not the motive." **Id.**

> A *Batson* challenge is a three-step process. First, defendant raises a challenge to the state's peremptory strikes based on race or gender and identifies the cognizable group to which the venirepersons belong. The state must then provide a reasonably specific and clear, race-neutral explanation for the strike. Once the state provides an acceptable reason, the burden shifts to the defendant to show that the state's reasons are pretextual and that the strikes are actually racially motivated.

State v. Nicklasson, 967 S.W.2d 596, 613 (Mo. banc 1998) (citations omitted). "[N]umerous courts have found that the arrest, prosecution or incarceration of a relative is a race-neutral reason for exercising a peremptory challenge." **State v. Johnson**, 930 S.W.2d 456, 461-62 (Mo.App. 1996).

If the State offers a race-neutral explanation for the strike, "the burden of production shifts back to the defendant to show that the proffered race-neutral explanation is pretextual and that the strikes were racially motivated." **Id.** at 460. "In order to meet this standard, defense counsel must present evidence or specific analysis showing that the State's explanation is pretextual." **Id.** In this case, Defendant properly raised a **Batson** challenge to the strike of Smith. The prosecutor then rebutted the **Batson** challenge by offering a race-neutral explanation. However, the record reveals that Defendant made no attempt to show that the State's proffered race-neutral explanation was pretextual. For this reason, Defendant's point has no merit.

"If an attorney fails to challenge the prosecutor's explanation s as pretextual, we must assume no challenge was made because the defense was satisfied with the State's reasons; thus, we are not in a position to find error." **State v. Gibson**, 856 S.W.2d 78, 81 (Mo.App. 1993). Point denied.

The judgment of conviction is affirmed.

(Resp. Exh. E at 5-9.)

The court's factual finding that the prosecutor gave a race-neutral reason for striking Ms. Smith, and that petitioner failed to meet his burden of showing pretext, was not an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. The prosecutor's articulated reason for striking Ms. Smith was race-neutral, and was "related to the particular case to be tried." See Batson, 476 U.S. at 98. Ms. Smith indicated that she had a relative who, like petitioner, was currently being prosecuted for a violent crime in New Madrid county. The Eighth Circuit has found similar explanations to be sufficiently race-neutral to withstand a Batson challenge. See Gibson v. Bowersox, 78 F.3d 372, 373-74 (8th Cir. 1996) (permitting removal of potential juror who had relatives that had previously been tried or convicted of a criminal offense); United States v. Jackson, 914 F.2d 1050, 1052-53 (8th. Cir. 1990) (upholding explanation for strike that venireperson's nephew was incarcerated). Furthermore, as the Missouri Court of Appeals correctly noted, petitioner offered no showing of pretext to combat the reason proffered by the prosecutor, as required by Missouri law. Parker, 836 S.W.2d at 939.

The state court's decision denying petitioner relief is well-based on law and fact. Petitioner does not offer, nor is this court aware of, any "clearly established Federal law, as determined

by the Supreme Court of the United States" of which the state court's decision runs afoul. Petitioner has not shown that the state court's determination "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). It therefore cannot be said that the state court's decision "resulted in a decision that was contrary to, or involved an unreasonable application of," clearly established federal law. 28 U.S.C. § 2254(d)(1). As such, petitioner's claim in Ground 2(a) is subject to dismissal.

B. Ground 3(a) - Ineffective Assistance of Counsel

In Ground 3(a), petitioner contends that his trial counsel was ineffective because "alibi witness was not called to testify, for the defendant." (Petition at 5.) Petitioner raised this claim during his post conviction proceedings, arguing that his trial counsel was ineffective for failing to call Dwaun Thiele as an alibi witness. Petitioner alleged that Thiele would have testified that at 6:00 a.m. to 6:20 a.m. she was playing video games with petitioner in his bedroom. (Resp. Exh. H at 25.) Following an evidentiary hearing, during which Thiele testified, the motion court overruled petitioner's motion. Petitioner raised this point on appeal from the denial of his post-conviction motion, and the Missouri Court of Appeals affirmed, finding that the calling of witnesses was generally a matter of trial strategy,

citing State v. Enloe, 914 S.W.2d 44, 46 (Mo. Ct. App. 1996). (Resp. Exh. J at 9.)[6] The court agreed with the motion court's determination that the testimony petitioner alleged would have been given by Thiele would have been merely cumulative, and would not have provided petitioner with a viable defense.

At the time petitioner's conviction became final, it was clearly established that the Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, ineffective assistance is defined as deficient performance resulting in prejudice, with performance being measured against an "objective standard of reasonableness." Strickland, 466 U.S. at 687-88. The petitioner bears a heavy burden in overcoming a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

The determination of whether to call certain witnesses is left to trial counsel as a matter of trial strategy. See U.S. v. Washington, 198 F.3d 721, 723-24 (8th Cir. 1999). The Missouri Court of Appeals noted this standard, citing Enloe, 914 S.W.2d at 46 (decisions regarding whether to call certain witnesses are generally matters of trial strategy) (Resp. Exh. J at 9).

In reviewing petitioner's claim that his trial counsel

[6]The Missouri Court of Appeals mistakenly spells the second named party's surname as "Enlow."

was ineffective for failing to call Dwaun Thiele as an alibi witness, the Missouri Court of Appeals identified the standard for determining claims of ineffective assistance as articulated in Strickland, and applied state law in evaluating counsel's performance. Specifically, the court noted as follows:

> To prevail, it is imperative that Movant proves, by a preponderance of the evidence, that counsel's performance was deficient and that Movant was prejudiced as a result thereof. **Clark v. State**, 94 S.W.2d [sic] 455, 460 (Mo.App. 2003). It is not sufficient to show that counsel's error might have conceivably effected [sic] the outcome; Movant must show that there is a reasonable probability that, but for counsel's error, the jury "would have had a reasonable doubt respecting guilt." **State v. Lay**, 896 S.W.2d 693, 702 (Mo.App. 1995). The totality of the evidence is to be considered in determining whether a reasonable probability exits. [sic] **Id.** Should Movant fail to carry his burden in proving that he received ineffective assistance of trial counsel, we need not consider whether prejudice resulted. **Clark**, 94 S.W.3d at 460.
>
> . . .
>
> In claims of ineffective assistance of counsel, Movant must overcome a strong presumption that trial counsel's action constitutes sound trial strategy. **Tripp v. State**, 958 S.W.2d 108, 111 (Mo.App. 1998). . . . Reasonable trial strategy is not subject to a claim of ineffective assistance of counsel. . **Clark**, 94 S.W.3d at 460.
>
> . . .
>
> Here again, decisions regarding the "[c]alling of witnesses is [sic] generally a matter of trial strategy." **State v.**

Enlow, [sic] 914 S.W.2d 44, 46 (Mo.App. 1996).

(Resp. Exh. J at 6-9.)

The court then analyzed the facts surrounding counsel's decision not to call Thiele as an alibi witness. The court noted that, during the evidentiary hearing, counsel testified that the risks inherent in having Thiele testify outweighed any potential benefit. (Resp. Exh. J at 9.) Counsel had explained that Thiele was being prosecuted for "juvenile delinquency," and had told counselors at the Cottonwood Treatment Center that she was trying to get pregnant by petitioner, and would lie for him on the stand. Id. Counsel had testified that these factors led him to conclude that the prosecutor had enough with which to impeach Thiele's testimony should she be called to the stand. Id.

This decision was well-based on law and fact and was not "contrary to," nor did it involve an "unreasonable application of," clearly established federal law. See 28 U.S.C. § 2254(d)(1). Furthermore, petitioner has not shown that the state court's determination "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." See 28 U.S.C. § 2254(d)(2). Under the instant facts, it cannot be said that counsel's performance was deficient, or that petitioner was prejudiced by counsel's failure to call Dwaun Thiele. As found by the motion court and the Missouri Court of Appeals, Thiele's

testimony would have been "merely cumulative" of the alibi testimony already offered by petitioner's mother. In addition, based on trial counsel's testimony during the evidentiary hearing, Thiele's testimony was vulnerable to impeachment. This significantly detracts from any ability petitioner may have had to demonstrate prejudice resulting from counsel's decision not to call Thiele as an alibi witness. The Missouri Court of Appeals applied the appropriate standard as noted in Strickland, and petitioner has failed to demonstrate that such application was unreasonable. The court's decision was well based on law and fact and was not "contrary to" nor did it involve an "unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d)(1). Petitioner's claim raised in Ground 3(a) of his Petition is denied.

Therefore, for all of the foregoing reasons,

IT IS ORDERED that petitioner DeMarcus Wright's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is dismissed without further proceedings.

IT IS FURTHER ORDERED that no certificate of appealability shall issue in this cause inasmuch as petitioner has failed to make a substantial showing that he has been denied a constitutional right.

Frederick R. Buckles

UNITED STATES MAGISTRATE JUDGE

Dated this 28th day of September, 2007.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appendix C

No: 08-1762

DeMarcus Wright,

Appellant

v.

Chuck Dwyer,

Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:04-cv-00497-FRB)

ORDER

The petition for rehearing by the panel filed by appellant has been considered by the court and is denied.

July 07, 2009

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

/s/ Michael E. Gans

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appendix D

No: 20-3485

DeMarcus Wright

Petitioner

v.

Paul Blair

Respondent

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:04-cv-00497-FRB)

JUDGMENT

Before COLLOTON, GRUENDER, and KOBES, Circuit Judges.

The request for authorization to file a successive 28 U.S.C. § 2254 petition in the district court is denied. Mandate shall issue forthwith.

February 04, 2021

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

Appendix D

/s/ Michael E. Gans

Additional material from this filing is available in the Clerk's Office.