No. _____

In The Supreme Court Of The United States

RICARDO WOODS,

Petitioner,

v.

BRIAN COOK,
WARDEN, SOUTHEASTERN CORRECTIONAL INSTITUTION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner Ricardo Woods respectfully requests leave to proceed *in forma pauperis*. Woods was declared financially eligible by the district court for appointed counsel under the Criminal Justice Act, 18 U.S.C. § 3006A(2). On December 30, 2016, the district court appointed the undersigned counsel to represent Woods in conjunction with his petition for habeas corpus relief pursuant to that statute. *See* 18 U.S.C. § 3006A(2).

Woods is presently incarcerated at the Southeastern Correctional Institution in Lancaster, Ohio and lacks the financial resources to afford retained counsel, court filing fees, and printing costs. He therefore moves to proceed with the filing of his Petition for Writ of Certiorari *in forma pauperis*.

Respectfully submitted,

JENNIFER M. KINSLEY
Counsel of Record
Kinsley Law Office
Post Office Box 19478
Cincinnati, Ohio 45219
513.708.2595
Kinsleylawoffice@gmail.com
Counsel for Petitioner Ricardo Woods

No. _____

In The Supreme Court Of The United States

RICARDO WOODS,

Petitioner,

v.

BRIAN COOK,
WARDEN, SOUTHEASTERN CORRECTIONAL INSTITUTION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JENNIFER M. KINSLEY
Counsel of Record
Kinsley Law Office
Post Office Box 19478
Cincinnati, Ohio 45219
513.708.2595
Kinsleylawoffice@gmail.com
Counsel for Petitioner Ricardo Woods

QUESTIONS PRESENTED

This case presents two critical questions of constitutional law, one related to the introduction of a suspect identification, made by a profoundly paralyzed witness blinking at a single photograph, and one related to the appropriate remedy when the trial court errs under *Batson v. Kentucky*, 476 U.S. 79 (1986).

The first question presented is whether state courts misapply this Court's clearly established authority in permitting the introduction of unconfronted, out-of-court, testimonial statements over a Confrontation Clause objection by applying a common dying declaration exception not endorsed by this Court. Contrary to the determination of the Ohio courts and the lower federal courts, this Court has never directly held that dying declarations are exempt from the protections of the Confrontation Clause. *See Giles v. California*, 554 U.S. 353, 358-9 (2008). Yet the Sixth Circuit elevated common law dying declarations to the same constitutionalized status occupied by the forfeiture by wrongdoing doctrine, a question this Court reserved in *Giles*. In so doing, the Sixth Circuit noted this that question remains in "High Court limbo," practically inviting this Court's intervention. *See Woods*, 960 F.3d at 300.

The second question presented is whether the state courts misapply this Court's clearly established authority of the use of racially-motivated peremptory challenges when the state courts determine that a *Batson* error occurred at trial, but subsequently declare that error harmless. More specifically, this question asks whether *Batson* errors at the trial court level are structural, and therefore incapable of being harmless, or whether they can be overcome by subsequent curative actions by the trial court. The Sixth Circuit's decision in this regard created a split between the Circuits on the nature of *Batson* errors, necessitating this Court's involvement. *Compare Woods*, 290 F.3d at 303; *McGahee v. Alabama Dept. of Corrections*, 560 F.3d 1252, 1261 (11th Cir. 2009).

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State of Ohio v. Ricardo Woods*, Hamilton County, Ohio Common Pleas Nos. B1100377, B1100741, Judgment Issued June 27, 2013

2. *State of Ohio v. Ricardo Woods*, Ohio First District Court of Appeals Nos. C1300413, C1300414, Judgment Issued September 10, 2014

3. *State of Ohio v. Ricardo Woods*, Ohio Supreme Court No. 2014-1843, Judgment Issued April 8, 2015

4. *Woods v. State of Ohio*, United States Supreme Court No. 15-6086, Judgment Issued November 2, 2015

4. *Woods v. Tibbals*, United States District Court for the Southern District of Ohio No. 1:16cv643, Judgment Issued March 29, 2018

5. *Woods v. Cook*, Sixth Circuit Court of Appeals No. 19-3254, Judgment Issued May 22, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

No. _____

In The Supreme Court Of The United States

RICARDO WOODS,

Petitioner,

v.

BRIAN COOK,
WARDEN, SOUTHEASTERN CORRECTIONAL INSTITUTION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Ricardo Woods respectfully prays that a Writ of Certiorari issue to review the May 22, 2020 decision of the Sixth Circuit Court of Appeals denying Woods' petition for habeas relief (App. 1) and the subsequent July 7, 2020 decision of the Sixth Circuit denying Woods' request for panel and *en banc* rehearing. (App. 19.)

OPINIONS BELOW

The opinion of the Sixth Circuit denying habeas relief is published at *Woods v. Cook*, 960 F.3d 295 (6th Cir. 2020), and is attached to the Petition at App. 1. The order of the Sixth Circuit denying Woods' petition for panel and *en banc* rehearing is unreported and is attached to the Petition at App. 19.

JURISDICTIONAL STATEMENT

The decision of the Sixth Circuit was issued on May 22, 2020. The Sixth Circuit rejected Woods' request for rehearing *en banc* on July 7, 2020. This Court this has jurisdiction under 28 U.S.C. § 1254(1) to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Confrontation Clause of the Sixth Amendment to the United States Constitution, which provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to…be confronted with the witnesses against him." This case also involves the Equal Protection Clause of the Fourteenth Amendment, which provides "nor shall any State … deny to any person within its jurisdiction the equal protection of the laws," and the Sixth Amendment right to trial by jury.

STATEMENT OF THE CASE

A. Procedural History

Ricardo Woods was indicted, tried, convicted, and sentenced to 36 years to life in prison for a murder and other offenses he did not commit. Both before and during his trial, Woods challenged the admissibility of an alleged photo identification made by the deceased victim by blinking while he was recuperating in the hospital. *State v. Woods*, 2014-Ohio-3892, at ¶ 10 (Ohio App. 1st Dist. 2014). More specifically, Woods sought to suppress the identification on Sixth Amendment Confrontation Clause grounds, but the trial court denied the motion. *Id*. at ¶ 16. In addition, Woods challenged the exclusion of black jurors by the prosecution, but the trial judge erroneously required Woods to show a pattern of discrimination before requiring the state to provide race-neutral reasons for its exclusions. *Id*. at ¶¶ 28-31.

Following his conviction, Woods filed a direct appeal that challenged numerous constitutional and statutory errors in his case. Primary among his claims was that the admission of evidence that the victim, who was paralyzed but not facing imminent death, identified Woods by blinking his eyes at a single photo lineup violated the Confrontation Clause. *Woods*, 2014-Ohio-3892, at ¶¶ 17-22. The Ohio court of appeals denied this issue on the basis that the victim may have believed he was going to die when he identified Woods. *Id*. In so doing, the appellate court interpreted the constitutional dying declaration test to be coterminous with the dying declaration hearsay exception under state evidentiary rules. *Id*. In other words, rather than adhering to this Court's historical test for dying declarations, the Ohio court of appeals instead substituted its own less stringent standard for when hearsay statements are admissible. The Ohio Supreme Court declined to review this important constitutional question.

In addition, Woods sought relief in state court on the basis that the trial court had improperly required Woods to demonstrate a pattern of discrimination before employing the *Batson* burden-shifting framework. *Id*. at ¶¶ 28-31. Woods objected promptly when the prosecution struck a black juror from the venire, an issue of critical importance given that Woods himself is black and the alleged victim was white. *Id*. But the trial court denied Woods' objection without further inquiry, in essence elevating Woods' *prima facie* burden at the first step of *Batson* beyond what this Court has required. *Id*. at ¶ 30. As a result of the trial court's delay in holding the prosecution accountable for offering a race-neutral basis for its initial strike, the black juror was excused from the courtroom absent any assurance that the prosecutor's action was not impermissibly based on race.

The Ohio court of appeals found that the trial court violated *Batson* by requiring Woods to demonstrate a pattern. *Id*. ("Woods is correct in his assertion that the opponent of a peremptory challenge is not required to demonstrate a pattern of discrimination….Thus, the trial court did err in concluding that Woods was required to demonstrate a discriminatory pattern.") (internal citations omitted). But it held that this error was harmless and therefore rejected Woods' appeal. *Id*. at ¶ 31.

Woods then petitioned for habeas corpus relief in the United States District Court for the Southern District of Ohio, which had jurisdiction under 28 U.S.C. § 2254. Among the bases for relief Woods identified were the Confrontation Clause and *Batson* issues he advanced in his state court appeal. The district court denied the Confrontation Clause claim outright, but its treatment of Woods' *Batson* claim was more complicated. Initially, the district court ruled in Woods' favor and granted habeas relief. *Woods v. Tibbals*, No. 1:16cv643, 2018 WL 1531491 (S.D. Ohio March 29, 2018). In so doing, it relied upon the trial transcript provided by the Warden along with his return of writ. *Id*. at *8. As cited by the district court, that transcript reflects the following exchange between the trial court, the prosecutor Mr. Prem, and defense counsel Ms. Calaway regarding Juror No. 7:

> THE COURT: . . . Mr. Prem, would you like to exercise a peremptory challenge?
>
> MR. PREM: Yes, Your Honor. At this time we ask the Court to excuse and thank Juror Number 7, Ms. Laury.
>
> MS. CALAWAY: Sorry, but I'm going to make a Batson challenge. I know that he hasn't demonstrated a pattern, but the facts of this case are particularly significant because it's a white victim and African-American defendant, and there's only three African-Americans in the veneer [sic], the rest are white. And so I think he should have to raise a neutral reason for striking the juror.

> THE COURT: Well, I think there has to have to be a pattern first. And I will cause [sic] the State to be mindful of Batson, which I know they are, I assume they will be. But, at this point in time I may require him to state a raise neutral reason, but there's no pattern yet. So I'm going to reserve that statement for later.

Id.

The district court also recounted a later challenge to the prosecution's strike of Juror No. 5:

> The second Batson challenge arose when the prosecutor used a peremptory challenge to strike Juror Number 5, Ms. Gilbert. The prosecutor then provided a race-neutral reason for striking Ms. Gilbert, which the court accepted. According to the transcript, the court then stated, "I'll have you move just to make your record as well." The prosecutor then began discussing the race-neutral reasons for striking Ms. Laury. Ms. Laury was not identified in the discussion, but the prosecutor referred to her as being "in quality assurance." Earlier in the jury selection process, Ms. Laury stated that her work was "quality assurance for a bank."
>
> After the prosecutor's explanation, the court stated:
>
> All right. I find that the State hasn't given a race-neutral explanation, so I'm gonna allow your Batson challenge, except assuming the next juror is not subject to a cause challenge, this will be our panel, and I'm gonna seat two alternates. Okay.
>
> What I just said is totally inaccurate. You get one peremptory remaining.
>
> The court then excused Ms. Gilbert.

Id. (internal citations omitted).

Based on this exchange, the district court sustained Woods' *Batson* claim. Guided by the Sixth Circuit's decision in *Drain v. Woods*, 595 Fed. Appx. 558 (6th Cir. 2001), the court found that the state courts had failed to appropriately remedy the *Batson* violation by holding that the trial court's error was harmless. *Id*. at *8.

Shortly after the issuance of the district court's order, the Warden filed a Fed. R. Civ. P. 60(b) motion for relief from the decision granting Woods' petition. He argued that the transcript

cited by the district court was incorrect to the extent it reflected the trial court's determination that the prosecution failed to offer a race-neutral reason for striking Juror No. 7. He presented an altered version of the transcript that was filed in the Ohio appellate court changing the trial court's statement that the prosecution *had not* presented a race-neutral reason to reflect that the prosecutor *had* offered a race-neutral reason. Woods objected to the submission of the altered transcript and presented affidavits from Woods' trial counsel that no one had discussed the change with them or sought to determine what they remembered about the jury selection problems before substituting the transcript. Relying on the new version of the transcript, the district court granted the motion for relief from judgment and denied Woods' *Batson* claim. *Woods*, 290 F.3d at 299.

On appeal, the Sixth Circuit affirmed the district court's ultimate denial of habeas relief. In so doing, it made two critical errors. First, it erroneously held, as a matter of first impression, that common law dying declarations are a well-recognized exception to the Confrontation Clause, despite its recognition that this issue is in what the court termed "High Court limbo." *Id*. at 300. In so doing, the Sixth Circuit turned this Court's Confrontation Clause jurisprudence on its head, elevating what this Court has described as a *potential* exception to a certain one. To be sure, this Court has consistently held that unconfronted, out-of-court, testimonial statements, like the one offered against Woods, violate the Confrontation Clause and has only identified one historical exception to that very clear constitutional principle – the forfeiture by wrongdoing doctrine. *See Giles*, 554 U.S. at 359. But the Court has never directly held that the Confrontation Clause is not violated by the admission of dying declarations, instead observing that these forms of unconfronted statements have *historical*, but not *constitutional* significance. *See Crawford v. Washington*, 541 U.S. 36, 56 n. 6 (2004). The Sixth Circuit departed from *Crawford* and *Giles* by elevating dying

declarations to the exception status this Court has observed is only historically occupied by the forfeiture by wrongdoing doctrine. *Woods*, 290 F.3d at 299-300; *Crawford*, 541 U.S. at 56 n. 6.

Second, the Sixth Circuit erred in creating conflict with its own decisions and decisions of its sister courts holding that *Batson* errors are structural and therefore cannot be harmless. To date, all of the federal circuits to consider the question have determined that *Batson* errors cannot be cured, but are structural constitutional flaws that mandate reversal. *See, e.g., McGahee*, 560 F.3d at 1261. The Ohio court of appeals held in no uncertain terms that the trial court violated *Batson*, a holding not appealed by the state and therefore not reviewable at the habeas stage. *Woods*, 2014-Ohio-3892, at ¶ 30. But the Sixth Circuit determined, in contradiction to the holdings of other circuit courts, that this error was capable of being cured, and in fact was cured, when the trial court later employed the *Batson* burden-shifting framework. *Woods*, 290 F.3d at 303.

For the reasons that follow, this Court should grant certiorari to review Woods' appeal.

B. Summary of Relevant Facts

During the early morning hours of October 28, 2010, David Chandler, his boyfriend James Spears, and their acquaintance William Smith drove to the corner of York and Linn Streets in the West End of Cincinnati to buy drugs. T.p. 1437.[1] The men had been smoking crack earlier in the evening and went to Price Hill to obtain money from Chandler's social security payee, Father Philip Seher. T.p. 1424, 1597-1602, 1918, 1921. As they were waiting for Chandler's dealer, a man approached the passenger side of the vehicle where Chandler was seated and said "you got my money?" T.p. 1440-1. The man then opened fire, striking Chandler in the neck. T.p. 1441,

[1]Citations to "T.p." are to the trial transcript, which comprises over 3,000 pages of typed text and more than 35 volumes. For the sake of brevity and efficiency, Woods has not included the transcript in the Appendix to his Petition.

2143. Spears, who was driving, and Smith, who crouched down in the back seat while the shots were fired, took Chandler to the hospital, where he was treated for paralysis, bleeding in the brain, and a bullet lodged in his cheek. T.p. 2143, 2219, 2239. Although Chandler was unable to walk or speak, he maintained consciousness and survived on life support for 15 days. T.p. 2160, 2195. Chandler passed away on November 12, 2010. T.p. 1604.

Chandler was an addict who purchased drugs from a variety of sources, including several dealers who lived near York and Linn. T.p. 1917-24. In fact, numerous individuals recognized Chandler before the shooting and tried to sell drugs to him. T.p. 1994. As Spears reported to the police, Chandler had also bought drugs from a dealer named Joe in Price Hill and was known as a snitch in that neighborhood. T.p. 2001, 2062-63. Two weeks before the shooting, Chandler ducked in the floorboard when driving by a dealer named Mark near the University of Cincinnati. T.p. 2058. Chandler also worked as a confidential police informant and performed two drug buys in July and August of 2010, shortly before the shooting. T.p. 2807.

Neither Smith nor Spears were able to identify the perpetrator. T.p. 1470-1479, 1942. 2539. Smith was shown two separate photo lineups containing Woods' picture, but did not identify him. T.p. 2582, 2593. Nevertheless, the police considered Woods a suspect early in their investigation and did not pursue other leads. T.p. 2669-70. When Chandler's condition stabilized, police questioned him about the identity of the shooter. Because Chandler could not talk, his medical team had established a system where Chandler would blink his answers to basic questions. T.p. 1659, 1851, 1857. As he was paralyzed, on a ventilator, and being administered memory-altering medications, his blinks were erratic at best. T.p. 1676, 1685-7, 1866. In fact, the day before the police met with him, Chandler's responses were accurate only 50% of the time. T.p.

1691. The police asked Chandler to blink on the letter of the alphabet that corresponded with the shooter's first name. T.p. 151-2. The second time through the alphabet, Chandler blinked at "O." T.p. 189. The police then showed Chandler a single photograph of Woods and asked if he was the shooter. T.p. 154-5. Although the video of the interview does not reveal a clear response, the police claim that Chandler blinked three times for "yes." T.p. 155.[2] Two separate medical professionals testified that, because of Chandler's injuries, treatment, and history of drug abuse, this response was unreliable. T.p. 2870, 3174.

Police later arrested Woods in Lorain County. T.p. 2545. Woods was jailed for three days with a convicted felon, Jermaine Beard. T.p. 2432. Beard's sentence was reduced in a prior case because he testified against an alleged murderer, and he hoped to get a light sentence in his pending burglary case by working against Woods. T.p. 2374-5. Beard had also admitted to disposing of a dead body on a golf course, but had not yet been charged with his participation in that crime and hoped not to be. T.p. 2376, 2413. Beard contacted the detective who assisted him before and reported that Woods confessed to him in jail. T.p. 2384, 2476.

Absent Chandler's unreliable identification and Beard's brokered testimony, there was no evidence connecting Woods to the shooting. Woods maintains his innocence.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Sixth Circuit Conflicts with the Court's Confrontation Clause Precedent and Improperly Elevates Dying Declarations to Confrontation Clause Exceptions.

As this Court has clearly held, an unconfronted, out-of-court testimonial statement is only admissible under the Sixth Amendment Confrontation Clause if there is an exception to the

[2]A video tape of the Chandler interrogation was admitted at trial as State's Exhibit 11.

confrontation right that was recognized under common law. *See Crawford*, 541 U.S. at 53-4. The principle behind this holding was articulated in *Crawford* and reaffirmed in *Giles*. In *Crawford*, the Court examined the common law history of the confrontation right and explained that the principal evil at which the Confrontation Clause was directed was the use of *ex parte* examinations against the accused. *Id*. Since that time, the purposes of confrontation and the dangers of admitting out-of-court statements have been the subject of frequent litigation and discussion. *See, e.g.,* Stephen J. Cribari, "Is Death Different? Dying Declarations and the Confrontation Clause after *Giles*," 35 Wm. Mitchell L. Rev. 1542 (2008-2009); Robert P. Mosteller, "*Giles v. California*: Avoiding Serious Damage to *Crawford*'s Limited Revolution," 13 Lewis & Clark L. Rev. 675 (2009). Confrontation both ensures that the witness will give his testimony under oath, thus impressing upon him the importance of truthfulness and further forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of the truth." *Giles*, 554 U.S. at 348.

While continuing to acknowledge the importance of the right to confrontation, the Court has allowed certain narrow categories of unconfronted testimony to remain admissible, observing that the Confrontation Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Giles*, 554 U.S. at 358 (citing *Crawford*, 541 U.S. at 54). In *Giles*, the Court identified two forms of testimonial statements which were admitted at common law even though they were not subject to cross-examination: dying declarations and forfeiture by wrongdoing. *Giles*, 554 U.S. at 358. In discussing the status of dying declarations, the Court limited its discussion to specific types of dying declarations: those made by a speaker actually on the brink of death and aware he was dying.

Id. (citing *King. Woodcock King v. Woodcock* (1789), 1 Leach 500, 501-504, 168 Eng. Rep. 352, 353-354; *State v. Moody*, 3 N.C. 31 (Super. L. & Eq. 1798); *United States v. Veitch*, (CC DC 1803), 28 F. Cas. 367, 367-368 (No. 16,614); *King v. Commonwealth* (Gen. Ct. 1817), 4 Va. 78, 80-81); *see also King v. Drummond* (1784), 168 Eng. Rep. 271, 272; *King v. Dingler* (1791), 168 Eng. Rep. 383, 384. While the Court expressly held in *Giles* that statements covered by the forfeiture by wrongdoing doctrine are admissible even if unconfronted, it declined to formally recognize a dying declaration exception to the Confrontation Clause. *Giles*, 554 U.S. at 358; *see also Crawford*, 541 U.S. at 56 n. 6. Stated another way, while common law may have supported an exception for statements made on the brink of certain death, the Court has never interpreted that historical exception to rise to constitutional magnitude or to be formally imported into the Confrontation Clause. *Id*.

Nevertheless, the Sixth Circuit elected to remove the dying declaration doctrine from what it termed "High Court limbo" and to formalize its status as an exception to the constitutional requirement that out-of-court, testimonial statements be confronted. *Woods*, 290 F.3d at 300. The Court previously declined to address whether dying declarations in fact occupy this constitutional status or instead are merely a holdover from common law not relevant to Confrontation Clause analysis. *Crawford*, 541 U.S. at 56 n. 6. This case provides an ideal vehicle for the Court to assess the role of dying declarations in its Confrontation Clause jurisprudence, particularly given the Sixth Circuit's invitation to resolve this "High Court limbo." *Woods*, 290 F.3d at 300.

II. The Sixth Circuit's Decision That Trial Court *Batson* Errors Can Be Remedied Created A Split Of Authority In The Circuits.

It is well-settled that the state may not exercise peremptory challenges in jury selection on the basis of race. *Batson v. Kentucky*, 476 U.S. 79 (1986). The principles underlying *Batson* are

significant and extend beyond the rights of individual defendants to society as a whole. As the Court observed in *Powers v. Ohio*, 499 U.S. 400, 406 (1991) (internal citations omitted):

> In *Batson,* [the Court] spoke of the harm caused when a defendant is tried by a tribunal from which members of his own race have been excluded. But [the Court] did not limit [its] discussion in *Batson* to that one aspect of the harm caused by the violation. *Batson* "was designed 'to serve multiple ends,'" only one of which was to protect individual defendants from discrimination in the selection of jurors. *Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large.

For this reason, several circuit courts have held that *Batson* errors are never harmless, because they perpetuate patterns of racial discrimination. *See, e.g., United States v. McFerron*, 163 F.3d 952 (6th Cir. 1998). *Batson* is unique in this respect, in that it "seeks to protect the rights of the litigants, the venire, and the entire community." *Rice v. White*, 660 F.3d 242 (6th Cir. 2011). Indeed, the harm that results from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror by undermining public confidence in the fairness of the legal system. *Batson*, 476 U.S. at 86-8.

The Court has articulated a three-step test for assessing *Batson* errors. First, the defendant must make a *prima facie* case of racial discrimination in the state's exercise of peremptory challenges. *Id*. at 94. Prior to *Batson*, the Court had required defendants arguing racial discrimination in jury selection to meet a higher threshold at the outset before courts were required to inquire into possible improprieties. *Id*. at 91-92 (citing *Swain v. Alabama*, 380 U.S. 202, 224 (1965)). While the Court was imprecise as to the defendant's burden, it was clear that the defendant must provide proof of discrimination, such as a pattern of repeated discriminatory strikes, beyond the facts of his own case. *Id*. But the *Batson* Court observed that this placed too stringent a burden on defendants to prove discrimination before knowing all the facts, thus making

preemptory challenges largely exempt from constitutional scrutiny. *Id*. at 92-93. The Court therefore relaxed the defendant's *prima facie* burden, instead requiring merely that a defendant show that he is a member of a cognizable racial group and that the prosecutor has exercised a preemptory challenge against a member of that group. *Id*. at 96. Because the discriminatory use of peremptory challenges taints the entire judicial system and significantly burdens the Fourteenth Amendment rights of the excluded juror, the mere exclusion of a single juror is enough to trigger *Batson*. *See, e.g., Walker v. Girdich*, 410 F.3d 120, 123 (2d Cir. 2005); *Jones v. Ryan*, 987 F.2d 960, 972 (3d Cir. 1993).

At the second stage, the burden shifts to the prosecution to offer a race-neutral justification. *Johnson v. California*, 545 U.S. 162, 168 (2005). The prosecution bears the burden of justifying each challenged strike. *See, e.g., Hernandez v. New York*, 500 U.S. 352 (1981). The trial court must then, at the third stage, determine whether the opponent of the peremptory strike has proved purposeful racial discrimination. *Id*.

Violations of *Batson* and with respect to the trial court's management of the three-part test are considered by all circuits with the exception of the *Woods* decision below to be structural errors not susceptible to harmless error review. *See, e.g., United States v. Kimbrel*, 532 F.3d 461, 469 (6th Cir. 2008). As such, when a trial court improperly rejects a defendant's *prima facie* showing at the first step of *Batson* or improperly conflates the second and third steps of *Batson*, reversal is required. *See, e.g., Galarza v. Keane*, 252 F.3d 630 (2d Cir. 2001) (vacating district court's denial of habeas relief and remanding when trial court failed to adjudicate step three of *Batson*); *Kimbrel*, 532 F.3d at 469-70 (reversing conviction because federal district court improperly merged steps two and three of *Batson*). In other words, when a state trial court fails to discharge its duties under

Batson, the federal courts may intervene and grant habeas relief. *See Galarza*, 252 F.3d at 640-41.

Such a scenario occurred in *McGahee v. Alabama Dept. of Corrections*, 560 F.3d 1252, 1261 (11th Cir. 2009), in which the Alabama Court of Criminal Appeals erred in its application of step three of *Batson*. Rather than considering "all relevant circumstances" in assessing whether discrimination occurred in jury selection, the state appellate court instead limited its analysis to the race-neutral explanations offered by the prosecutor and omitted crucial facts proffered by the defense. *Id*. at 1263. This failure to faithfully apply *Batson* analysis was deemed by the Eleventh Circuit to constitute an unreasonable application of clearly established federal law warranting habeas relief. *Id*. at 1266.

Consider as well *Drain*, 595 Fed. Appx. 558, a case in which the Sixth Circuit determined that the state court's failure to reverse the defendant's conviction under *Batson* violated clearly established Supreme Court case law. *Id*. at 560. At Drain's trial, the trial judge raised a *Batson* question *sua sponte* after the prosecution struck seven African-American jurors. *Id*. The court then found inadequate the prosecutor's proffered race-neutral explanation for the strikes and attempted to remedy the violation by requiring the prosecutor to seek the court's consent before striking any additional African-American jurors. *Id*. at 562. At no point did defense counsel object, either to the prosecutor's race-based peremptory strikes or to the trial court's proposed remedy. *Id*. at 561-2.

Addressing the adequacy of the trial court's corrective action, the Sixth Circuit in *Drain* held that a prospective remedy designed to prevent future discrimination in jury selection was insufficient to address the prior discrimination that had already occurred. *Id*. at 581. In so doing,

the court further observed that the only appropriate remedies for *Batson* violations are those suggested in *Batson* itself: either empaneling a new venire or recalling the unconstitutionally dismissed jurors. *Id*. The court also clarified the appropriate outcome when jurors who are later determined to have been stricken for racially discriminatory reasons are no longer available to serve. In such instances, "the only remaining remedy for the *Batson* violation would be to discharge the entire venire and start the process anew." *Id*. This Sixth Circuit in *Drain* also made clear that the responsibility for remedying *Batson* violations lies with the trial court, regardless of whether defense counsel appropriately objected to either the discriminatory strike or the trial court's proposed remedy. *Id*. "In the absence of any remedial action undertaken by the trial court, the existence of an unmitigated *Batson* violation requires that the conviction be vacated." *Id*.; *see also Rice*, 660 F.3d at 259-60 (holding that only available remedy for *Batson* violation once juror has been improperly excused and has left the courthouse is to empanel a new venire, and that failure of trial court to do so warrants habeas relief).

The Sixth Circuit's decision in this case deviates from its own precedent and the decision of the Eleventh Circuit in *McGahee*. Rather than correcting the violation found by the state court of appeals, the panel instead held the trial court's *Batson* error was cured when the trial court later inquired as to the prosecutor's basis for the strike. *Woods*, 290 F.3d at 303. But, as the Sixth Circuit previously held in *Rice*, 660 F.3d at 259, *Batson* errors cannot be "cured." *See also Lancaster v. Adams*, 324 F.3d 423, 433-35 (6th Cir. 2003) (holding that prosecutor cannot cure discriminatory peremptory challenge by seating another juror of a cognizable racial group). Once the trial court permitted the first juror to leave the courtroom without explanation from the prosecutor, the trial court infected the proceeding with potential racial discrimination. Reversal of

Woods' conviction is the appropriate remedy for the state appellate court's mistake. *See Rice*, 660 F.3d at 260 ("[i]n the absence of any remedial action undertaken by the trial court, the existence of an unmitigated *Batson* violation requires that the conviction be vacated").

The panel incorrectly analyzed Woods' *Batson* claim by focusing solely on whether there ultimately existed a race-neutral reason to justify the prosecutor's strike of Juror No. 7. *Woods*, 290 F.3d at 303. But this is the wrong inquiry. The trial court's attempt to cure its error in excusing Juror No. 7 from service by later making the prosecutor explain his decision is immaterial. What matters is that the trial court permitted an African-American juror to be excused and sent home without confirming that her rejection was not the product of invidious racial discrimination. Reflecting its structural nature, that error cannot be cured by later requiring what should have been proffered as a prerequisite to the juror's dismissal. The damage to Woods' fundamental rights, and the harm to society and the justice system as a whole, occurred when Juror No. 7 walked out of the courtroom.

The Sixth Circuit's departure from its own decisions on the nature of *Batson* errors and its decision that *Batson* errors can be harmless create a split of authority on this critical constitutional question. The Court should review this case to clarify the appropriate remedy when *Batson* is violated.

CONCLUSION

For the foregoing reasons, the Court should grant Woods' petition and issue a writ of certiorari to review the Sixth Circuit's erroneous decision.

Respectfully submitted,

JENNIFER M. KINSLEY
Counsel of Record
Kinsley Law Office
Post Office Box 19478
Cincinnati, Ohio 45219
513.708.2595
Kinsleylawoffice@gmail.com
Counsel for Petitioner Ricardo Woods

No. _____

In The Supreme Court Of The United States

RICARDO WOODS,

Petitioner,

v.

BRIAN COOK,
WARDEN, SOUTHEASTERN CORRECTIONAL INSTITUTION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that three copies of the enclosed Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari were served via first-class U.S. mail, postage prepaid, on the 5th day of October, 2020 upon:

Hilda Rosenberg
Assistant Attorney General
Ohio Attorney General's Office
411 Vine Street
1600 Carew Tower
Cincinnati, OH 45202

All persons required to be served have been served.

JENNIFER M. KINSLEY
Counsel of Record
Kinsley Law Office
Post Office Box 19478
Cincinnati, Ohio 45219
513.708.2595
Kinsleylawoffice@gmail.com
Counsel for Petitioner Ricardo Woods