No. 21-6245

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ROBIN MOORE, — PETITIONER
(Your Name)

vs.

JAMES DAVID GREEN, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ROBIN MOORE,
(Your Name)

EASTERN KY. CORR. COMPLEX, @)) RD. TO JUSTICE
(Address)

WEST LIBERTY, KY. 41472
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Whether the (Court's) failure to specifically find that the prosecution had made a preliminary showing of racial discrimination when denying a criminal defendant's peremptory strike violates Batson/McCollum and Petitioner's right to a fair trial by an impartial jury of Petitioner's choosing?

2. Whether the (Court's) rejection of a criminal defendant's race-neutral explanation as "not a good reason" or "speculation and intution" are contrary to this Court's admonition in Purkett, at 768, violating Batson/McCollum and Petitioner's right to a fair trial by an impartial jury of Petitioner's choosing?

3. Whether the (Court's) determination that the proponent of a peremptory strike should "do more to establish bias" in favor of the objector, improperly shifts the burden to prove the strike is not motivated by racial discrimination is in violation of Purkett, Batson/McCollum and Petitioner's right to a fair trial by an impartial jury of Petitioner's choosing?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[■] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. James D. Green, Warden of Eastern Ky. corr. Complex, 200 Road to Justice, West Liberty, Ky. 41472, Via Ky. Att. General.

2. Commonwealth of Kentucky, via, Ky. Attorney General's Office, 1024 Capitol Center Drive, Frankfort, Kentucky 40601.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

■ For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

■ reported at ? Case No. 20-5652; or,
[ ] has been designated for publication but is not yet reported; or,
■ is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

■ reported at ?- 2020 WL 2616739; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

■ For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

■ reported at ?- 2013 WL 1790303; or,
[ ] has been designated for publication but is not yet reported; or,
■ is unpublished.

The opinion of the N/A court appears at Appendix ___ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

■ For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 4/16/2021.

[ ] No petition for rehearing was timely filed in my case.

■ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 9/10/2021, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

■ For cases from **state courts:**

The date on which the highest state court decided my case was 4/25/2013. A copy of that decision appears at Appendix D.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

U.S CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254

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

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States;

STATEMENT OF THE CASE

Robin Moore, a pro se Kentucky prisoner, was convicted by a state jury of murder, tampering w/physical evidence and being a felon in possession of a handgun. The trial court sentenced Moore to sixty-five years of imprisonment, and the Ky. Supreme Court affirmed. See Moore v. Commonwealth, No. 2011-SC-0007000-MR, 2013 WL 1790303 (Ky. Apr. 25, 2013). The Ky. Court of Appeals denied Moore's claims for post-conviction relief. See Moore v. Commonwealth, No. 2016-CA-001438-MR, 2018 WL 1037706 (Ky. Ct. App. Feb. 23, 2018).

In June, 2019, Moore filed an amended §2254 petition, rasing a single claim: the trial court violated his rights under the Sixth and Fourteenth Amendments by denying him the right to exercise a peremptory strike on a prospective juror. The Ky. Supreme Court had denied this claim over a **dissenting** opinion, See Moore, 2013 WL 1790303, at *4-6, and the district court concluded that this decision was not contrary to or an unreasonable application of Supreme Court precedent or based on an unreasonable determination of facts. The district court therefore denied Moore's petition. The district court declined to grant Moore a COA, however, the Sixth Circuit Court of Appeals granted Moore's COA application and his motion to proceed in forma pauperis.

Moore, who is was a 51 yr old caucasion, was accused of murdering Charles Eldridge, a seventeen yr old African-American. During jury selection, Moore used his peremptory challenges to strike four of the six African American prospective jurors on his venire. The prosecution objected to these strikes under Batson v. Kentucky

476 U.S. 79 (1986).[1] The trial court sustained two of Moore's [illegible] strikes, and the prosecution withdrew its objection to a third. Thus, as is relevant here, Moore struk Juror 24, an African American woman, on the ground that one of her relatives had been prosecuted by the **same prosecutor's** office four years before his trial. The prosecutor pointed out, however, that Juror 24 stated in her juror questionaire that her relative's prosecution would not affect her impartiality. In response, the trial court stated, "I typically handle that, I tend to put them back in the pool-I don't-24 didn't say anything about being a police officer or have any relatives...I think 24 needs to go back in, to be honest with you, I **don't hear a good reason.**" Moore, 2013 WL 1790303, at*5(emphasis added).

> The Ky. Supreme Court affirmed this decision:
>
> "when called upon to rationalize the strike of juror 24, the only viable, **race-neutral** reason proffered by Appellant's counsel for the strike was his concern that Juror 24 would be biased because a relative had been prosecuted four years earlier and may still be on probation or in custody, implying concern that the Commonwealth may still have some influential impact upon juror's kinsman."

Id. at*6. The court then pointed out that Moore could have, but did not ask Juror 24 additional questions to clarify the situation concerning her relative's prosecution and whether she felt that her relative was unjustly prosecuted. See id. & n.2. The court

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1- Batson prohibits the prosecution from using its peremptory strike on jurors solely based on race. See 476 U.S. at 89. Georgia v. McCollum, 505 U.S. 42 (1992), extended Batson to the defense holding a criminal defendant may not use race as basis for strike and prosecution has stnding to challenge discrminatrory use. See id. at* 55-59.

concluded therefore that Moore's decision to strike Juror 24 was based on **"little more than his intuition"**. Id. at*6. The court recognized that the reason for a peremptory challenge need not rise to the level of a challenge for cause, but it stated that a perepmtory challenge **cannot be based on "self-serving explanations based on intuition or disclaimers of discriminatory motive"**. Id. (quoting Washington v. Commonwealth, 34 S.W.3d 376, 379 (Ky2000)). The court also noted that it is unusual for defendants to strike jurors who have relatives involved in the criminal justice system becaus **those jurors are biased against the prosecution**, not the defense. See id. n.2. The court thought that this atypical use of a peremptory strike called into question Moore's motivation for striking Juror 24. See id. The court concluded that the trial court did not err in sustaining the prosecution's Batson challenge because Moore's "stated reason for striking Juror 24 appears to have been **based primarily upon speculation and intuition**." Id.

The **dissent** concluded, however, that both the majority and the trial court misapplied the Batson test. The dissent noted that Moore **had supplied a race-neutral reason** for striking Juror 24, and concluded that it was "not totally absurd" for him to be concerned that she might be biased in favor of the prosecution. Id. at*12 (Noble, J., dissenting). The dissent noted further that there was **no evidence** that Moore had purposfully discrminated against Juror 24 and, moreover, that the trial court had not in fact concluded that he had engaged in purposeful discrimination. The dissent would have vacated Moore's convictions and remanded the case

for a new trial. See id. at*13.

The District court concluded that the Kentucky Supreme Court denial of this claim was not unreasonable, finding that it should defer to the state court's suspicion that Moore's reason for using a peremptory challenge to excuse a juror who might otherwise be expected to be sympathetic to the defense was a perfect pretext for discrimination.

The Sixth Circuit Court of Appeals panel denied Moore's petition without disscussing Justice Cook's five page COA, which was included by Moore. This decision by the Sixth Circuit was either lost or stolen completely by the Respondent (KY DOC). After mandate was issued Moore filed for relief to suspend the mandate and re-issue the decision. (Moore's Reply Brief also turned up missing after 44 days. It was never filed before the decision. See Moore's Motion for preliminary injuction -- KY DOC stealing all legal mail photocopying same then destroying inmates' originals.)

The Sixth Circuit denied Moore's petition for rehearing stating the petition was circulated around the court but no justice requested rehearing en banc. See appendix A.

REASONS FOR GRANTING THE PETITION

A Batson challenge proceeds in the three steps. First, the opponent of the peremptory challenge must make a prima facie showing of purposeful discrimination. See Purkett v. Elem, 514 U.S. 765, 767 (1995)(per curiam). Second, the proponent of the strike must offer a race-neutral explanation for removing the juror. See id. "The second step of this process does not demand an explanation that is persuasive, or even plausible." Id. at 767-68. Thus, unless the proffered reason is inherently discriminatory, it will be deemed race-neutral. See id. at 768. Third, the trial court must decide whether the opponent of the strike has established purposeful discrimination. See id. at 767. A trial court's impairment of a criminal defendant's right to exercise a peremptory challenge by misappliying the **Batson** test is a structural error that entitles him to a new trial. See United States v. McFerron, 163 F.3d 952, 955-56 (6th Cir. 1998).

First contrary to the Sixth Circuit and the district court's conclusion, neither the trial court nor the Ky. Supreme Court found that the prosecution had made a prima facie showing that Moore decision to strike Juror 24 was because of her race. Although the Ky. Supreme Court suggested that Moore's decision was suspicious, it did not specifically find that the prosecution had made a preliminary showing of discrimination. See Moore, 2013 WL 1790303, at *6n.2.

Second, Moore offered a race-neutral explanation for striking Juror 24 - her relative had been prosecuted by the **same prosecuto**

r's office that was presecuting him. Even if this explanation was atypical, it was not inherently discriminatory becuase, as the **dissent indicated**, Moore could have reasonably believed that her relative's situation might cause her to side with the prosecution - for instance, because she might have expected a favorable recommendation from the prosecution concerning her relative's jail sentence or probation. See id. at*12 (Noble, J., dissenting). And the trial court's rejection of Moore's race-neutral explanation as not "a good reason", and the Ky. Supreme Court's dismissal of his explanation as mere "speculation and intuition," id. at *6, were contrary to the Supreme Court's admonition that the proponent's reason does not need to be "persuasive, or even plausible." Purkett, 514 U.S. at 768. Indeed, the proponent's reason is not even required to "make[] sense" if it otherwise "does not deny equal protection." Id. 769. Additionally, the Kentucky Supreme Court misapplied **Batson** by suggesting that Moore lacked good cause for striking Juror 24 instead of accepting Moore's race-neutral explanation for excusing her. See Batson, 476 U.S. at 97.

And third, the Kentucky Supreme Court's decision was contrary to **Batson** because, in finding that Moore could have done more during voir dire to establish whether Juror 24 was biased in favor of the prosecution, it improperly shifted the burden to Moore to prove that he was not motivated by racial discrimination instead of requiring the prosecution to prove discrimination. See Purkett, 514 U.S. at 768.

Furthermore, if it can be said to be suspicious of Moore for

exercising his state created liberty interest; the same as the prosecution was allowed to do, in using a peremptory challenge on Juror 24, then it was at least equally suspicious that the very same prosecution's office did **not** use a peremptory strike on Juror 24. Moore certainly had every Constitutional right to be concerned about Juror 24 and the prosecution's office [not] using a peremptory challenge, since even the Courts have stated such is the [] ususal practice considering the alleged bias contributed to all jurors who have been struck by a prosecution office accross the country in Juror 24's position.

For all these reasons, the Sixth Circuit's resolution of Moore's Batson/McCollum claim should be considered by this Court to set a structral precedent of national importance, resolving the conflicts that are leading to erronious decisions that undermine Constitutional protections where a criminal defendant exercised his peremptory challenge and a trial court altered the composition of the jury in response to the prosecution's expressed wish.

Consider the words of Justice Scalian :

> "I agree with the Court that its judgment follows logically from Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991). For the reasons given in the Edmonson dissents, however, I think that case was wrongly decided. Barely a year later, we witness its reduction to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behlf of the state. JUSTICE O'CONNOR demonstrates the sheer inanity of this proposition..., and the contrived nature of the Court's justification's. I also see no need to add to her descussion, and differ from her views only in that I do not

> consider Edmonson distinguishable in principle --except in theprinciple that a bad decision should not be follwed logically to its illogical conclusion.
>
> "Today's decision gives the lie once again to the belief that an activist, 'evolutionary' constitutional jurisprudence always evolves in the direction of greater rights. In the interest of promoting the supposedly greater good of race relations in the society as a whole (make no mistake that that is what underlies all of this), we use the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish , to secure a jury that they consider fair. I dissent."

McCollum, 505 U.S. at n.*69.

C O N C L U S I O N

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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