No. _____

In the Supreme Court of the United States

GEORGE STEPHENSON, WARDEN, PETITIONER

v.

LAFAYETTE DESHAWN UPSHAW

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

PETITION FOR A WRIT OF CERTIORARI

Dana Nessel
Michigan Attorney General

Ann M. Sherman
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
ShermanA@michigan.gov
(517) 335-7628

Jared D. Schultz
Assistant Attorney General
Criminal Appellate and
Parole Appeals Division

Attorneys for Petitioner

QUESTIONS PRESENTED

Under 28 U.S.C. § 2254(d)(1), a federal court may grant relief on a claim that was adjudicated by a state court only if that adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." The phrase "clearly established Federal law, as determined by the Supreme Court" refers to the *holdings* of this Court. *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000). And to evaluate whether a decision is "contrary to, or involved an unreasonable application of," a holding of this Court, a federal court must apply substantial deference to the state court's decision and may grant relief only if that decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011). The questions presented are:

1. Does a rule announced in a four-Justice plurality opinion constitute a holding of this Court, and therefore "clearly established Federal law" under § 2254(d)(1), when no other Justice adopted—either explicitly or implicitly—the plurality's rule or any reasoning supporting that rule?

2. Did the Sixth Circuit violate § 2254(d)(1)'s strict limitations when it independently analyzed the prejudice prong of an ineffective-assistance claim without addressing the state court's prejudice analysis or explaining why the state court's opposite conclusion was "beyond any possibility for fairminded disagreement"?

PARTIES TO THE PROCEEDING

Petitioner George Stephenson was the Warden at the correctional facility where Respondent Lafayette Upshaw was being held in custody while the case was pending in the district court.

RELATED CASES

- *People* v. *Walker*, Michigan Court of Appeals, Docket No. 325195, Opinion issued May 19, 2016 (affirming conviction).

- *People* v. *Upshaw*, Michigan Supreme Court, Docket No. 154101, Order issued April 4, 2017, (denying leave to appeal).

- *Upshaw* v. *Stephenson*, United States District Court for the Eastern District of Michigan, Opinion and Order issued July 14, 2022 (granting petition for writ of habeas corpus).

- *Upshaw* v. *Stephenson*, United States Court of Appeals for the Sixth Circuit, Judgment issued March 28, 2024 (affirming district court).

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JURISDICTION

The judgment of the court of appeals was entered on March 28, 2024. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

And 28 U.S.C. § 2254(d) provides:

> 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.

* * *

INTRODUCTION

In 2014, respondent Lafayette Upshaw and an accomplice robbed a gas station. In the process, Upshaw shot toward the cashier (who was thankfully enclosed in bullet-proof glass) six times. A Michigan jury found him guilty, and the Michigan Court of Appeals affirmed. Yet nearly a decade later the Sixth Circuit granted habeas relief on not just one, but *two*, bases. In affording Upshaw this "extraordinary remedy," *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993), the Sixth Circuit failed to adhere to the strict limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

AEDPA prohibits habeas relief unless a state court's decision is contrary to "clearly established Federal law, as determined by the Supreme Court"—in other words, a federal habeas court must point to a *holding* of this Court. But what, exactly, is the holding when this Court issues a fractured decision with no majority opinion? In *Marks* v. *United States*, this Court said that a fractured decision is a holding of this Court only as to the "narrowest grounds" on which five Justices agree. 430 U.S. 188, 193 (1977).

The Sixth Circuit here identified the fractured decision from *Hernandez* v. *New York*, 500 U.S. 352, 359 (1991), as a basis to grant habeas relief. But the specific rule that the Sixth Circuit relied on—that the first step of an equal-protection claim is moot if the trial court bypassed the issue—was adopted only by *Hernandez*'s four-Justice plurality. No other Justice even discussed—let alone adopted, either explicitly or implicitly—the plurality's mootness rule. That rule, then, is not a holding under the *Marks* framework.

Therefore, the plurality's rule could not serve as a basis to grant relief. Allowing a non-binding rule from a plurality opinion to provide the means to upend a valid and final state conviction contradicts AEDPA, this Court's precedents, and the Eleventh Circuit. This Court should provide guidance to address the applicability of plurality opinions on habeas review.

Compounding its mistake, the Sixth Circuit found a second reason for granting relief based on its independent review of an ineffective-assistance-of-counsel claim. In doing so, the court failed to apply the mandatory deference owed to state court opinions.

Though Upshaw claimed his counsel should have called his grandmother as an alibi witness, the Michigan Court of Appeals reasoned that her testimony would not have made a difference in the trial's outcome given the strength of the evidence against Upshaw. That evidence included the cashier's unequivocal testimony that Upshaw was the shooter and Upshaw's subsequent arrest just hours later as he was burglarizing a house *with his accomplice who was undisputedly at the scene of the shooting*. The Sixth Circuit did not address that analysis at all when it determined that Upshaw was prejudiced by counsel's alleged failure to procure his grandmother's testimony. Instead, it relied on its own precedent, along with social-science studies suggesting that eyewitness testimony is unreliable, to undermine the strength of the prosecutor's case. The Sixth Circuit never explained why the state court's contrary analysis was unreasonable, which this Court has steadfastly maintained is a *requirement* under AEDPA. Review is warranted.

STATEMENT OF THE CASE

Around 3:30 a.m. on May 28, 2014, a man entered a gas station in Detroit. App. 135a. The man asked the cashier about the coffee machine, but he did not get any coffee and stood silently by the machine. App. 135a. Shortly thereafter, another man—armed with a gun—entered, robbed a customer, then demanded money from the cashier. App. 136a. The cashier refused, so the man fired his weapon at her six times. App. 136a. The shots did not hit their target because the cashier was standing behind bullet-proof glass. App. 136a. The armed assailant then tried to break into the cashier's work station, but he was unsuccessful and eventually fled the scene. App. 136a. During the altercation, the suspiciously acting first man remained by the coffee machine, then he fled in the same direction as the armed assailant. App. 136a. Surveillance footage at the gas station captured the robbery. App. 137a.

A few hours later, Respondent Lafayette Upshaw was arrested as he was exiting a window of a house while committing a home invasion. App. 136a. The police also apprehended Darrell Walker, who was exiting a different window of the same house. App. 136a. After the police identified Walker on the gas station surveillance footage as the first man and discovered that he had been arrested with Upshaw hours later, the police sought to set up a live lineup, but Upshaw refused to participate. App. 144a. The cashier later identified both men in separate photographic lineups—Upshaw, she said, was the shooter. App. 136a–137a.

The two men were tried together. App. 137a. During jury selection, the prosecutor exercised six of her first eight peremptory challenges against Black jurors. App. 149a. The defense raised an equal-protection challenge under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). App. 149a–150a. Without ruling on whether Upshaw had made a prima facie showing of discriminatory intent, the state trial court asked the prosecutor for a response and ultimately rejected the defense's challenge. App. 150a–151a.

Upshaw repeated his *Batson* challenge on appeal to the Michigan Court of Appeals. App. 148a. In a lengthy analysis, the state appellate court described the three steps that a trial court must engage in when faced with a *Batson* challenge, noting first that "the opponent of the peremptory challenge must make a prima facie showing of discrimination." App. 148a–149a (internal quotation omitted). The court described the trial court's ruling on that step as "unclear and muddled." App. 151a–152a. But "[a]ssuming that the trial court found that defendants had made a prima facie case of discrimination," the court said that was an erroneous ruling. App. 153a. The court noted that the defense had failed to make a record or argument as to the circumstances surrounding the prosecution's peremptory challenges, such as "the percentage of jurors of a particular race or ethnicity struck and the percentage of their representation on the venire, whether members of the relevant racial group served unchallenged on the jury, and whether the prosecutor used all or nearly all of his or her challenges to strike venire members of a particular race." App. 152a–153a (internal quotation omitted). And because the court was unable to determine those circumstances from the

record, it held that Upshaw had not made a prima facie case of discrimination. App. 153a. Given this analysis, the court further held that the remaining two steps were moot. App. 153a.

Upshaw also argued on appeal that his trial counsel was constitutionally ineffective for failing to investigate and present an alibi defense. App. 146a. He produced a letter from his grandmother in which she claimed that on the day of the robbery she had fallen asleep and was awoken by Upshaw knocking on the door. App. 48a. His grandmother specified that this occurred "between 3:20 and 3:30 [a.m.]" and that she knew this because she looked at the time on the television cable box when she heard the knock on the door. App. 48a. She further wrote that "he left at around 7:45 [a.m.]" and that she knew this because she "was still upset, sitting on [her] front porch." App. 48a.

The Michigan Court of Appeals rejected Upshaw's ineffective-assistance claim. App. 147a–148a. The court reasoned that Green's letter "implied or suggested that Upshaw remained at the home for several hours, but it did not expressly provide so, nor did [she] state that she observed him at the exact time of the robbery." App. 148a. The court also had noted the evidence against him, including the cashier's identification, the jury's ability to observe the surveillance footage, and Upshaw's arrest with Walker a few hours later. App. 146a. Consistent with this analysis, the court held that Upshaw could not show he was prejudiced by counsel's allegedly deficient performance. App. 148a. Upshaw appealed that decision to the Michigan Supreme Court, which denied leave. App.

132a. This Court also denied a petition for a writ of certiorari. *Upshaw* v. *Michigan*, 583 U.S. 965 (2017).

After filing collateral motions in the state courts raising claims not relevant here, Upshaw filed a petition for a writ of habeas corpus in the district court. He again raised his *Batson* and ineffective-assistance claims. With respect to the *Batson* claim, the district court pointed to *Hernandez* v. *New York*, 500 U.S. 352, 359 (1991), in which four Members of this Court, in a plurality opinion, stated that the prima facie step of a *Batson* analysis becomes moot once the trial court has ruled on the ultimate question of intentional discrimination. App. 77a. The Michigan Court of Appeals' decision to rest its analysis on the prima facie step, the district court held, was an unreasonable application of *Batson* and *Hernandez*. App. 78a. Accordingly, the district court reviewed the claim without the deference required under § 2254(d) and found that the state trial court erred when applying *Batson*'s second and third steps. App. 78a–88a. Specifically, the court noted that the prosecutor offered race-neutral reasons for only three out of its six peremptory challenges. App. 83a, 87a. And as to those three, the trial court did not sufficiently determine whether the prosecutor's race-neutral reasons were pretextual. App. 84a–85a. Holding that a constitutional violation occurred, the district court determined that a new trial was the only appropriate remedy. App. 88a–90a.

The district court also granted relief on Upshaw's ineffective-assistance claim. In assessing prejudice, the district court noted that the only evidence of Upshaw's guilt presented at trial was identification testimony from a victim along with undisputed

testimony that Upshaw was arrested mere hours after the robbery committing a home invasion with Walker. App. 68a–69a. The court found that evidence lacking, saying that the victim's ability to identify the robber was hampered by several factors. App. 68a–69a. As for Upshaw's later arrest, the court simply noted that the Sixth Circuit had "found prejudice in the face of far more damning evidence" in two other cases, citing those cases but providing no further comparative analysis. App. 70a (citing *Matthews* v. *Abramajtys*, 319 F.3d 780, 783–84, 789–90 (6th Cir. 2003) and *Stewart* v. *Wolfenbarger*, 468 F.3d 338, 343–44, 357–59 (6th Cir. 2006)).

The Sixth Circuit affirmed. App. 2a. In evaluating the *Batson* claim, the court first addressed the State's argument that the Michigan Court of Appeals' decision was not an unreasonable application of *Hernandez* because that opinion was not clearly established. App. 20a–22a. According to the court, the plurality opinion's mootness ruling was the narrowest ground supporting the judgment and therefore sets forth the controlling, and clearly established, law. App. 21a. Therefore, the prima facie inquiry in this case was moot on that basis, and the court ruled that the Michigan Court of Appeals unreasonably applied *Hernandez* when it nevertheless denied the *Batson* claim based on the prima facie step. App. 22a. And, according to the Sixth Circuit, because the state trial court failed to properly apply steps two and three of the *Batson* framework, the district court correctly granted habeas relief on the claim. App. 22a–26a.

The Sixth Circuit also addressed Upshaw's ineffective-assistance claim. App. 9a–19a. After determining that counsel's performance was objectively unreasonable because he failed to investigate and present Upshaw's grandmother as an alibi witness, App. 13a–15a, the court looked to the prejudice prong, App. 16a–19a. It primarily focused on the purported weakness of the cashier's eyewitness-identification testimony, noting its belief that "[e]yewitness testimony is notoriously unreliable." App. 16a. In support of this proposition, the court cited several Sixth Circuit opinions, along with "[e]mpirical studies" showing the supposed prevalence of mistaken eyewitness identification. App. 16a–17a. The court then described the State's case as "not overwhelming" because, other than the eyewitness-identification testimony, "the State's only evidence against Upshaw was that he had been arrested for home invasion with Walker several hours after the gas station was robbed." App. 17a–18a (internal quotations omitted). Without explaining anything more about the circumstances of Upshaw's arrest, the Court concluded that his grandmother's testimony that he was with her near the time of the robbery likely would have made a difference in the trial's outcome. App. 18a. The court thus affirmed the district court's decision that habeas relief was warranted for this claim. App. 19a.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's reliance on the *Hernandez* plurality's mootness rule contradicts AEDPA, this Court's precedents, and the Eleventh Circuit.

The Sixth Circuit determined that the mootness rule from the *Hernandez* plurality opinion constituted a holding of this Court and was thus "clearly established Federal law" under § 2254(d)(1). That is not a correct reading of the statute, and it is inconsistent with this Court's precedents. It also contradicts the Eleventh Circuit's treatment of the *Hernandez* mootness rule. This Court should determine whether that rule binds lower courts and resolve the conflict.

A. Under AEDPA, a federal court must identify a "holding" of this Court before granting habeas relief.

Before seeking relief in federal court, a prisoner held under a state criminal judgment must first present his or her claims to the state appellate courts. § 2254(b)(1)(A). If the state courts reject a claim on the merits, AEDPA prohibits a federal court from granting habeas relief unless the state court's adjudication "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." § 2254(d)(1). "[T]he phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the *holdings*, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-

court decision." *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000) (emphasis added).

The Michigan Court of Appeals adjudicated Upshaw's *Batson* claim on the merits. It identified the three-step process that this Court outlined in *Batson*: (1) the defendant must show a prima facie case of purposeful discrimination; (2) the prosecutor must then articulate a race-neutral reason for the challenged strike; and (3) the trial court must determine whether the prosecutor's reason was pretextual and whether the defendant has proved purposeful discrimination. App. 149a. Although it acknowledged that the trial court did not make a ruling under the first step, the Michigan Court of Appeals rejected the claim because it found that Upshaw had not even made out a prima facie case of purposeful discrimination. App. 149a–153a. Its reasoning was practical and sound: there was no evidence of any relevant circumstances surrounding the prosecutor's strikes—such as the race of the other potential jurors, the race of others struck, or the race of those who served—so Upshaw could not possibly show that the circumstances raised an inference that the prosecutor struck the jurors based on race. App. 152a–153a.

To grant habeas relief on this claim, then, the Sixth Circuit was required to identify a *holding* of this Court and show that the state court's prima facie analysis was "contrary to, or an unreasonable application of" that holding. Yet the Sixth Circuit did not point to *Batson* or any other majority opinion from this Court as establishing the relevant holding. Rather, it said that the mootness rule contained within the plurality opinion in *Hernandez* "provides clearly

established law." App. 21a. It did not explain how the plurality's rule could satisfy AEDPA's strict requirements, other than to conclusorily state that it represented the " 'narrowest grounds' " of a fragmented opinion. App. 21a (citing *Marks*, 430 U.S. at 193). As discussed in the next section, however, the rule was not a holding under this Court's precedents. And, not being a holding, it cannot establish "clearly established Federal law." The Sixth Circuit's habeas grant based on its assessment that the *Hernandez* plurality rule was "clearly established Federal law" was therefore contrary to AEDPA's plain language.

B. Under this Court's precedents, the plurality's mootness rule is not "clearly established Federal law."

This Court has provided direction on how to evaluate fragmented decisions. Under that precedent, the *Hernandez* plurality's mootness rule is not a holding of this Court and therefore cannot be "clearly established Federal law." § 2254(d)(1).

1. The mootness rule from *Hernandez* did not garner the votes of five Justices.

In *Hernandez*, the Court was presented with a challenge to a prosecutor's discriminatory use of peremptory strikes under *Batson*. 500 U.S. at 355 (plurality opinion). The plurality opinion—written by Justice Kennedy and joined by three other justices—reviewed each step of the three-step process for evaluating *Batson* claims. *Id.* at 358–70. It began by discussing the first step, which requires a defendant to "make

a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race." *Id.* at 358. According to the plurality, "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Id.* at 359. Analyzing step two, the plurality stated that a prosecutor's strikes could be unconstitutional if they were intended to cause a disparate impact on a certain race or ethnicity, but it determined that there was no evidence that the prosecutor in the case at bar had such an intent and, therefore, the prosecutor's reasons were race neutral. *Id.* at 362. Reviewing step three, the plurality held that the trial court's decision to believe those race-neutral reasons should be reviewed for clear error and that the trial court's decision was not clearly erroneous. *Id.* at 359–70.

Justice O'Connor, joined by Justice Scalia, concurred. In the very first paragraph of Justice O'Connor's opinion, she explained her points of agreement and disagreement with the plurality:

> I agree with the plurality that we review for clear error the trial court's finding as to discriminatory intent, and agree with its analysis of this issue. I agree also that the finding of no discriminatory intent was not clearly erroneous in this case. I write separately because I believe that the plurality opinion goes further than it needs to in assessing the constitutionality of the prosecutor's asserted justification for his peremptory strikes.

Id. at 372 (O'Connor, J., concurring). Justice O'Connor then went on to explain that, to show the prosecutor's stated reasons for strikes are unconstitutional, it is necessary to show that the strikes were exercised "*because of the juror's race*" and that a disproportionate effect may only "constitute evidence of intentional discrimination." *Id*. at 373 (emphasis in original), 375. Her disagreement was with the plurality's discussion about how to evaluate evidence of a disproportionate effect on a race or ethnicity. Nowhere in her opinion did she mention how she would evaluate the prima facie step.

Justice Stevens, joined by Justice Marshall, dissented.[1] In his view, if a prosecutor's justifications have a disparate impact, that constitutes objective evidence of discriminatory purpose and may be sufficient by itself to establish an equal protection violation. *Id*. at 377–78 (Stevens, J., dissenting). Applying that principle to the facts in *Hernandez*, Justice Stevens would have found that the prosecutor's justifications for his strikes were insufficient. *Id*. at 379. And in making this finding, he said merely that "[n]either the Court nor respondent disputes that petitioner made out a prima facie case"—but he said nothing about whether the first step was moot. *Id*.

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[1] Justice Blackmun also dissented. He filed a short statement indicating that he agreed with the part of Justice Stevens's opinion applying the proposed principles to the facts in the case. *Hernandez*, 500 U.S. at 375 (Blackmun, J., dissenting).

2. Because the mootness rule is not the narrowest grounds of the *Hernandez* opinions, it cannot be a holding.

Although a case like *Hernandez*, which has no majority opinion, can result in confusion, this Court explained how to treat such a circumstance: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Put differently, when the votes in an opinion are necessary to the Court's judgment, and when that opinion "rests upon the narrower ground, the Court's holding is limited accordingly." *United States* v. *Santos*, 553 U.S. 507, 523 (2008).

How, exactly, does a court determine the "narrowest grounds" of a fractured decision? This Court has not expounded on its now nearly 50-year-old rule. *Hughes* v. *United States*, 584 U.S. 675, 679–80 (2018) (declining to address the implication the *Marks* rule has on 4-1-4 decisions). But there have been two approaches. Under the first, "one opinion can be meaningfully regarded as 'narrower' than another[ ]only when one opinion is a logical subset of other, broader opinions." *United States* v. *Davis*, 825 F.3d 1014, 1020 (9th Cir. 2016) (quoting *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)) (en banc) (Silberman, J.); see also *Animal Legal Defense Fund* v. *Reynolds*, 8 F.4th 781, 785 (8th Cir. 2021) ("[W]here a concurring opinion is not a logical subset of the plurality's rationale, or vice-

versa, it is not possible to discern a holding in the case."). "In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *Id.* "The second approach looks to results rather than reasoning. It defines the narrowest ground as the rule that would necessarily produce results with which a majority of the Justices from the controlling case would agree." *Id.* at 1021 (internal quotation marks omitted).[2]

Under either of these approaches, the plurality's mootness rule is not the narrowest grounds in *Hernandez*. The concurring opinion did not even address the prima facie step in its analysis, so it is difficult to see how the plurality's mootness rule can represent a common denominator among the opinions. The concurrence's lack of a discussion about the prima facie step did not mean that those Justices adopted the mootness rule. Quite the opposite—had they agreed, the concurrence would have expressly said so, just like it did about the plurality's clear-error determinations. Nor is agreement implied. The concurrence could have found, for instance, that the first step was not moot but that the defendant had made out a prima facie

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[2] In *Ramos* v. *Louisiana*, 590 U.S. 83 (2020), this Court may have implicitly rejected the results approach. In that case, this Court ruled that there was no controlling opinion coming from the 4-1-4 split in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), because no other Justice adopted the *reasoning* employed by the concurring Justice. 590 U.S. at 101–04. Even the *Ramos* dissent noted that it was only the "narrow *common* ground" between the concurring and plurality opinions that was binding. *Id.* at 150 (emphasis added).

showing of intentional discrimination. The mootness rule is therefore not a "logical subset" of the concurrence's analysis.

Similarly, under the results approach, it is not known whether the concurring Justices would have agreed with the mootness rule. Without an explanation, it is not possible to ascertain how the concurring Justices viewed the issue. Accordingly, faced with a *Batson* challenge in which the trial court failed to rule on the prima facie step, it cannot be said that a majority of the Justices from the controlling case would agree that an analysis of the first step is moot. And they thus would not *necessarily* reach the same result.

Under either approach, the plurality's opinion—at least concerning its mootness rule—is not controlling. It therefore cannot be a "holding" under *Marks*. Because it is not a holding, *Williams* instructs that it cannot be the source by which a habeas court can grant relief. This Court should clarify that a rule adopted by only four Justices that is not a holding of the Court under *Marks* cannot be "clearly established Federal law, as determined by the Supreme Court." § 2254(d)(1).

C. The Sixth Circuit's treatment of the plurality's mootness rule conflicts with the Eleventh Circuit's.

At least one other federal court of appeals would have decided this case differently. The Eleventh Circuit has held that, because the mootness language in *Hernandez* is contained in a plurality opinion, it is not binding. *United States* v. *Stewart*, 65 F.3d 918, 924

(11th Cir. 1995) (stating that the mootness "language from *Hernandez* is from a plurality opinion, and plurality opinions do not bind this Court"). See also *United States* v. *Ochoa-Vasquez*, 428 F.3d 1015, 1044 n.38 (11th Cir. 2005) ("We acknowledge that district courts usually make the prima-facie-case determination under *Batson*'s first prong. Yet, that is not necessary if, as a matter of law, the defendant's evidence on the *Batson* issue is insufficient to show a prima facie case."); *Cent. Ala. Fair Housing Ctr, Inc.*, v. *Lowder Realty Co.*, 236 F.3d 629, 636 (11th Cir. 2000) ("[T]he threshold task in considering a *Batson* challenge, for a district court *as well as this Court*, is to determine whether a *prima facie* case was established." (emphasis added); *King* v. *Moore*, 196 F.3d 1327, 1334 (11th Cir. 1999) (rejecting a state prisoner's *Batson* claim in part because he could not show an inference of discrimination, even though the trial court did not make a determination under the prima facie step); *United States* v. *Saylor*, 626 F. App'x 802, 808 (11th Cir. 2015) (citing *Stewart* and declining to apply the *Hernandez* mootness rule, in part because it was contained within a plurality opinion and therefore not binding).

This Court should resolve this conflict. The current rule in the Sixth Circuit allows federal judges to undo valid and final state-court convictions based on an analytical framework that a majority of this Court has never agreed upon. The potential to undermine the comity and federalism principles that overlay our habeas jurisprudence is not just hyperbole. This is the third time the Sixth Circuit has granted habeas relief after finding that the state court unreasonably failed to apply the *Hernandez* plurality's mootness rule. See *Lancaster* v. *Adams*, 324 F.3d 423, 434–35 (6th Cir.

2003) ("[B]ecause the trial court here had ruled on the ultimate question under *Batson* . . . the Michigan Court of Appeals acted unreasonably under Supreme Court precedent set out in *Hernandez* when it rested its holding on an issue that had become moot."); *Drain* v. *Woods*, 595 F. App'x 558, 570 (6th Cir. 2014) (treating "*Hernandez*'s mootness holding as clearly established law" before ultimately affirming the district court's habeas grant). See also *Braxton* v. *Gansheimer*, 561 F.3d 453, 461 (6th Cir. 2009) (finding that the Ohio Court of Appeals erred when it addressed the prima facie step even though the state trial court did not rule on it, but denying relief because the decision also rested on other grounds). It is important to clarify that a state court's reasonable disagreement with a non-binding legal framework does not give federal courts license to upend state-court convictions.

This Court should therefore grant this petition.

II. The Sixth Circuit's refusal to apply AEDPA deference warrants this Court's intervention.

This Court has not hesitated to correct the Sixth Circuit when it has not applied the statutory mandated limitations on habeas review. See *Shoop* v. *Cassano*, 142 S. Ct. 2051, 2057 (2022) (Thomas, J., dissenting) ("Over the last two decades, we have reversed the Sixth Circuit almost two dozen times for failing to apply AEDPA properly."). It should do so again here.

Upshaw first raised his ineffective-assistance claim in the Michigan Court of Appeals. He asserted

that counsel should have called his grandmother as an alibi witness because, according to Upshaw, she would have testified that he was at home near the time of the gas station robbery. The state court rejected the claim, in part by finding that Upshaw could not show prejudice. App. 147a–148a. On top of Upshaw's refusal to participate in a live lineup, the court explained that the gas station cashier identified Upshaw in a photographic lineup, the jury saw the surveillance video of the robbery, and Upshaw was arrested burglarizing a home just hours later with his co-defendant, who was undisputedly at the scene of the gas station robbery. App. 146a.[3]

Under AEDPA, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams*, 529 U.S. at 411. This Court has described this high standard as "difficult to meet." *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011). Indeed, to obtain relief under AEDPA, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well

[3] The Michigan Court of Appeals did not explicitly include a discussion of the strength of the prosecution's case within its prejudice analysis of *this* issue. App. 148a. But it had just written that Upshaw could not demonstrate prejudice from the trial court's decision to allow evidence that he refused to participate in a live lineup. App. 146a. In doing so, it noted the strength of the prosecutor's case, including the facts discussed above. App. 146a. That those facts were not included within the court's analysis of the ineffective-assistance claim means only, in a fair reading, that it chose not to repeat what had already been said.

understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*.

The seminal case governing claims of ineffective assistance of counsel is *Strickland* v. *Washington*, 466 U.S. 668 (1984). To succeed on such a claim, a defendant must "show both that his counsel provided deficient assistance and that there was prejudice as a result." *Richter*, 562 U.S. at 104. Proving prejudice requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. That test is onerous: "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112.

And when the same ineffective-assistance claim is presented to a federal court in a habeas petition, the test is even more onerous. Under AEDPA's stringent limitations, a habeas petitioner claiming ineffective assistance of counsel "must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance." *Bell* v. *Cone*, 535 U.S. 685, 698–99 (2002). On habeas review, the question "is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Knowles* v. *Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Schriro* v. *Landrigan*, 550 U.S. 465, 473 (2007)) (internal quotation marks omitted). "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id*. Here, because the state court ruled on

the merits of the prejudice prong of *Strickland*, that determination is entitled to this high level of deference under AEDPA. See, in contrast, *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003) ("In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis.").

The Sixth Circuit did not faithfully apply that standard to this case. Indeed, within its four paragraphs dedicated to a prejudice discussion, it never once cited the Michigan Court of Appeals or explained how the state court made its determination that no prejudice occurred. App. 16a–19a. Instead of discussing whether rational jurists could agree with the state court's decision, the Sixth Circuit conducted its own independent review of prejudice. For example, it spent much of its analysis questioning the reliability of the cashier's identification by citing social-science studies on eyewitness identification that appear nowhere in the state court record. App. 16a–17a. It also relied on its own precedents to show that a prejudice finding is appropriate when the evidence against a petitioner includes eyewitness testimony. App. 16a–17a. And the court concluded by stating that "[t]he evidence presented at trial was not, as the *Warden* contends, 'extremely damning.' " App. 19a (emphasis added). But it is the state court's evaluation that controls. Yet, the Sixth Circuit declared its own view of the evidence and said nothing about the state court's view of the evidence.

When addressing the prejudice requirement of Upshaw's ineffective-assistance claim, the Sixth Circuit did not even "purport to hold that the Michigan

state courts had acted contrary to or unreasonably applied a decision of this Court." See *Brown* v. *Davenport*, 596 U.S. 118, 136 (2022) (holding that AEDPA requires deference to a state court's harmless-error determination). That's "not just wrong," but it is also a "fundamental error[ ] that this Court has repeatedly admonished courts to avoid." *Sexton* v. *Beaudreaux*, 585 U.S. 961, 967 (2018). The Sixth Court's decision on Upshaw's ineffective-assistance claim warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dana Nessel
Michigan Attorney General

Ann M. Sherman
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
ShermanA@michigan.gov
(517) 335-7628

Jared D. Schultz
Assistant Attorney General
Criminal Appellate and Parole Appeals Division
Attorneys for Petitioner

Dated: JUNE 2024