No. 24-_____

IN THE

SUPREME COURT OF THE UNITED STATES

TERRACE TYRONE PERKINS, SR., *Petitioner*,

v.

NICHOLAS LAMB, WARDEN, *Respondent*.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a circuit court can deny a certificate of appealability when the Applicant has made a substantial showing of the denial of important constitutional rights, including the right to an impartial jury of his peers, and the improper use of suggestive pretrial identification processes.

LIST OF PARTIES

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

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Terrace Tyrone Perkins, Sr. respectfully prays that a writ of certiorari issue to review the judgment of the Eighth Circuit Court of Appeals in Case No. 24-1840, entered June 10, 2024, and made final with a denial of rehearing and rehearing en banc on July 15, 2024. The final judgment denying Perkin's application for a certificate of appealability appears in the Appendix to this petition. Perkin's request for a certificate of appealability followed the final judgment on the merits denying his application for habeas corpus relief pursuant to 28 U.S. § 2254, which was filed by the United States District Court for the Southern District of Iowa on March 28, 2024, *Terrace Tyrone Perkins, Sr. v. Nicholas Lamb*, Case No. 4:21-cv-00270. State court postconviction proceedings were *Terrace Tyrone Perkins v. State of Iowa*, Case No. PCCE128273 and the postconviction appeal proceedings were at *Perkins v. State*, 954 N.W.2d 784 (Iowa Ct. App. 2020) (unpublished table opinion). State court criminal proceedings were *State of Iowa v. Terrace Tyrone Perkins*, FECR364417, and *State v. Perkins*, 884 N.W.2d 223 (Iowa Ct. App. 2016) (unpublished table opinion).

JURISDICTION

The date on which the United States Court of Appeals for the Eighth Circuit entered judgment was June 10, 2024. A petition for rehearing en banc and petition for rehearing by the panel was denied on July 15, 2024.

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

STATUTORY PROVISIONS INVOLVED

28 U.S.C. section 2253(c)(1): Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court

28 U.S.C. section 2253(c)(2): A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

In 2014, Terrace Perkins was charged along with co-defendant Matthew King in Scott County, Iowa, with robbery in the first degree and willful injury causing serious injury as a habitual offender. *State v. Perkins*, No. 15-0590, 884 N.W.2d 223, 2016 Iowa App. LEXIS 385, at *2 (Iowa Ct. App. April 27, 2016) ("*Perkins I*"); Appx p. 4. Perkins' first trial concluded in a mistrial. *Id.* at *2 n.1. Perkins was then convicted by a jury at trial, and was sentenced to a consecutive term of incarceration of twenty-five years for the robbery conviction and ten years for the willful-injury conviction, a combined term of thirty-five years. *Id.* at *10.

In Perkins direct appeal, he first argued the district court should have granted his motion to suppress the impermissibly suggestive voice identification procedure used by law enforcement, in violation of his Fifth and Fourteenth Amendment due process rights. *Id.* at *11. The complaining witness Gabriel had identified Perkins' co-defendant from a photo lineup, but failed to identify Perkins in two different photo arrays. After identifying the co-defendant, law enforcement obtained a recorded call between the co-defendant and Perkins which the appellate court found as "a one-on-one identification" and that "the procedure was inherently suggestive" but nevertheless determined such an identification was reliable because of "the five factors" used to establish reliability. *Id.* at *13–14.

Next, Perkins argued that his conviction was obtained in violation of the denial of a *Batson* challenge to the preemptory striking of a Black juror because she was "nervous" and "hesitant" when answering questions. Inexplicably, the jury selection process was not recorded,

and so appellate court was not able to contrast the stricken juror's responses against white juror's answers.

Perkins' Federal proceedings began in September of 2021, when Perkins filed a pro se Habeas petition. (Appx. p. 5). The case proceeded on the merits after the district court properly found Perkins' claims were fully exhausted, and that second amended petition was equitably tolled. (R. Doc. 28).

On March 27, 2024 the United States District Court for the Southern District of Iowa denied Perkins' writ for habeas corpus relief on its merits. The District Court found that the Iowa Court of Appeals applied the correct federal precedent in analyzing the out-of-court voice identification procedure and that when evaluated against "the entire body of federal case law that has emanated from *Biggers* and *Brathwaite*," even though the procedure was suggestive, and even though the facts were similar to *United States v. Ironroad*, No. 1:14-CR-239, 2015 WL 13732650 (D.N.D. July 14, 2015) that had come to a different conclusion. (R. Doc 41, p. 7). The District Court determined that a "fairminded jurist could agree" with the Iowa Court of Appeals' and therefore there was no basis for federal habeas relief. (R. Doc. 41, p. 8).

On Perkins' *Batson* challenge, the Court found that the Iowa Court of Appeals was reasonable in finding that hesitation and nervousness were acceptable race-neutral grounds upon which to survive a *Batson* challenge. (R. Doc. 41, p. 9). The District Judge denied an evidentiary hearing to establish the record for the unrecorded jury selection process was "postconviction court—not the federal habeas court," *Id.* at p. 9, despite the fact that the constitutional claim was raised on direct appeal (where there was no hearing), not in state postconviction.

The District Court and Eighth Circuit held that Perkins had not made a showing of a substantial denial of constitutional right, and denied a certificate of appealability. (R. Doc. 41, p. 10; Appx. p. 1–3).

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPEALABILITY CONFLICTS WITH U.S. SUPREME COURT AND EIGHTH CIRCUIT PRECEDENT ON WHEN A WRIT SHOULD BE GRANTED.

The Eighth Circuit's refusal to grant Perkins a certificate of appealability and consider the merits of his appeal is in conflict not only with decisions from the Eighth Circuit, but with the United States Supreme Court regarding the grant of certificates of appealability. *See e.g., Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Buck v. Davis*, 137 S. Ct. 759 (2017); *Tiedeman v. Benson*, 122 F.3d 518 (8th Cir. 1997). Additionally, the district court ruling improperly decides important constitutional issues that this Court's supervisory power should correct.

Because the district court did not issue a certificate of appealability, Perkins' appeal may not be taken to the court of appeals unless "a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1). Under section 2253(c)(2), a certificate of appealability may only issue if a petitioner "has made a substantial showing of the denial of a constitutional right." *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Tiedeman v. Benson*, 122 F.3d 518 (8th Cir. 1997). To make such a showing, (1) the issues must be debatable among reasonable jurists, (2) a court could resolve the issues differently, or (3) the issues deserve further proceedings. *Cox v. Norris*, 133 F.3d 565 (8th Cir. 1997) (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994)); *see also Miller-El*, 537 U.S. at 335-36 (reiterating standard). A court of appeals should limit its

examination at the certificate of appealability stage to a threshold inquiry into the underlying merit of the claims, and ask only if the district court's decision was debatable. *Buck v. Davis*, 137 S. Ct. 759 (2017).

In summarily denying Perkins' request for a certificate of appealability, the panel improperly failed to acknowledge whether the issues presented were debatable among reasonable jurists. Perkins submits that they are.

A. REASONABLE JURISTS WOULD DISAGREE WHETHER PERKINS MADE A SUBSTANTIAL SHOWING OF A DENIAL OF FIFTH AND FOURTEENTH AMENDMENT RIGHTS WHEN HIS CONVICTION WAS OBTAINED THROUGH AN INHERENTLY SUGGESTIVE OUT-OF-COURT IDENTIFICATION.

First, Perkins conviction was obtained through an inherently suggestive out-of-court voice identification in contravention of the Fifth and Fourteenth Amendments to the United States Constitution, as elucidated in *Neil v. Biggers*, 409 U.S. 188 (1972) and *Manson v. Brathwaite*, 432 U.S. 98 (1977) and their progeny. Prior to trial, the prosecutions star witness was unable to identify Perkins, even after twice being given his picture in a photo array, while identifying Perkins co-defendant immediately. *Perkins I*, 2016 Iowa App. LEXIS 385, at *7. This witness drank "six to eight 'tall' beers" as well as taking "shots of whiskey" and subsequently passing out during the material time frame. *Id.* at *8. The police had recorded a jail call between Perkins and his co-defendant (who had already been identified) and played only this one recording for the witness to identify Perkins. A reasonable juror could find, under this issue alone, that this identification procedure was impermissibly suggestive under Supreme Court precedent and that a certificate of appealability should issue.

The Iowa Court of Appeals correctly identified that "It is generally conceded that one-on-one confrontations or 'show ups' between an accused and an eyewitness are inherently

suggestive," *Id.* at *13, citing *State v. Jackson*, 387 N.W.2d 623, 631 (Iowa Ct. App. 1986). (R. Doc. 32-7, p. 5.) But, the state court then went on to determine "whether the identification was reliable in spite of the procedure." *Id.* at *13–14. The court identified five factors it used in eventually determining that Gabriel's identification was reliable, and held that the burden was on Perkins to establish that the identification was not reliable:

(1) the opportunity of the witness to [hear] the perpetrator at the time of the crime,

(2) the witness'[s] degree of attention,

(3) the accuracy of the witness'[s] prior description of the perpetrator,

(4) the level of certainty demonstrated by the witness at the confrontation, and

(5) the length of time between the crime and the confrontation.

Id. In so holding, the Court of Appeals explained,

> In determining whether the identification was reliable in spite of the procedure, we consider the five factors listed above. Gabriel had plenty of opportunity to hear the perpetrator; he drove the two men to the field, engaged in a scuffle with the men during the incident, and testified about the second man, Perkins, encouraging King to return to the field to find the iPhone. Additionally, although Gabriel had been drinking alcohol and may have passed out due to intoxication sometime before the incident occurred, as the district court stated, "[h]e was critically concerned and involved in the events taking place." In the call to the 911 operator, which took place immediately after the two perpetrators left the field, Gabriel can be heard speaking coherently as he explains his need for assistance. It is unclear from the record whether Gabriel made a prior description of the perpetrator's voice, but when he identified Perkins, Gabriel explained that he recognized the voice because of Perkins's word choices and the way he elongated certain words and syllables. Gabriel identified the voice as belonging to the second perpetrator almost immediately after Detective Ells began playing the recording, and he sounds confident in his assertion—not hesitating or second-guessing his identification. Detective Ells played the audio for Gabriel on August 20, 2014—a little over three weeks after the incident occurred.

Id.

This was both 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, and an unreasonable determination of the facts warranting relief under 28 USCS § 2254(d). This was certainly a debatable application of Supreme Court precedent to the facts of Perkins case, and "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336 (internal citation omitted). The witness stated that he recognized "Perkins word choices and the way he elongated certain words and syllables" but only after he was shown a recording of Perkins speaking with the only other perpetrator the witness had previously identified. *Perkins I*, 2016 Iowa App. Ct. LEXIS 385, at *14.

The State's complaining witness, Gabriel, stated that a man called "Twin" had shot him when he let Twin hold Gabriel's rifle. (R. Doc. 32-7, p. 2-3). He claimed a man he didn't know very well, known to him only as "T.T.", later he called him "K.K.", had been present when Twin shot him. (R. Doc. 32-7, p. 2-3). Gabriel claimed T.T./K.K. had pulled Gabriel away from Twin when they were wrestling for the gun. (R. Doc. 32-7, p. 2-3). Gabriel claimed the two men took his van keys, and a cell phone, and left the scene. (R. Doc. 32-7, p. 3).

Gabriel identified Twin from a photo lineup. (R. Doc. 32-7, p. 3). Officers provided Gabriel with two different photo arrays that included Perkins's photos, but Gabriel was unable to identify him from the photos. (R. Doc. 32-7, p. 3). A detective later took an audio recording from a call between King and Perkins to Gabriel's home and asked Gabriel if he could identify the voice of the man he was calling T.T. or K.K. Gabriel then identified Perkins's voice as the second man involved in the robbery and shooting.

The trial court denied his motion to suppress prior to his second trial, finding that even if the procedure used was unnecessarily or impermissibly suggestive, "under the totality of the circumstances there is not 'a very substantial likelihood of irreparable misidentification.'" (R. Doc. 32-7, p. 5).

While the Federal District Court found that the Iowa Court of Appeals had correctly began it's initial analysis of the out-of-court identification procedures, reasonable jurists would disagree whether Perkins had made a substantial showing of the misapplication of the five-step balancing test used to overcome the inherently suggestive identification procedures used by law enforcement to secure Perkins conviction. The Iowa Court of Appeals correctly began their investigation with the *Biggers* two step framework, and used the five-step visual identification process from *Neil*, but a reasonable jurist would disagree whether the conclusion the District Court reached was a reasonable application of federal precedent. This is because "reliability is the linchpin in determining the admissibility of identification testimony" for pretrial identification purposes. *Brathwaite*, 432 U.S. at 114. The factors set out in *Biggers* are "to be weighed [against] the corrupting effect of the suggestive identification itself." *Id.*

In relying on the District Court's determination, the Eighth Circuit incorrectly accepted the unreasonable application of the facts to clearly established Supreme Court precedent.

B. REASONABLE JURISTS WOULD DISAGREE WHETHER PERKINS WAS DENIED EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT WHEN JUROR WAS IMPERMISSIBLY STRICKEN UNDER BATSON.

Perkins was also denied protection afforded to him as a criminal defendant under the Equal Protection clause of the Fourteenth Amendment when a Black juror was stricken, and the subsequent reasoning for the strike from the prosecutor was purportedly because she was young, "nervous" and "hesitant." *See Batson v. Kentucky*, 476 U.S. 79 (1986); *Snyder v. Louisiana*,

552 U.S. 471 (2008). Perkins further submits that the state courts unreasonably determined the facts of this issue against the defendant without a record to rely upon, especially when it was the State's burden to support their strike at this second stage of the *Batson* analysis, not the defendant's burden.

A reasonable jurist could disagree with the District Court's finding that there was no *Batson* error. Looking "to the District Court's application of AEDPA" and asking whether there is a debate "amongst jurists of reason[,]" § 2253 "forbids" a "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 336. However, Perkins *Batson* claim "requires a preliminary, though not definitive, consideration of the three-step framework mandated by *Batson*" and it's progeny. *Id.* at 338. Unlike *Miller-El*, there is no transcript to be evaluated on appellate review. This should not terminate the analysis in the context of a COA petition.

As early as 1879, the United States Supreme Court recognized that prohibiting African-Americans from serving on a jury undermines the protections a jury system is intended to provide. *Strauder v. W. Virginia*, 100 U.S. 303, 308 (1879). The landmark case, *Batson v. Kentucky*, established the basic framework a court must employ when assessing a challenge to the strike of a juror under the Equal Protection Clause of the U.S. Constitution,

> [A] black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose. *Washington v. Davis,* [426 U.S. 229,] 239-242 [1976]. Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. *Alexander v. Louisiana,* 405 U.S. [625] at 632 [1972]. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties. *See Alexander v. Louisiana,* [405 U.S. at] 632, *Jones v. Georgia*, 389 U.S. 24, 25 (1967). Rather, the State must demonstrate that 'permissible racially

> neutral selection criteria and procedures have produced the monochromatic result.' *Alexander v. Louisiana*, supra, at 632; *see Washington v. Davis*, supra, at 241.

Batson, 476 U.S. at 85-86.

More than a century later, despite Batson, racial discrimination within the jury selection systems in the United States remains, often through the trial mechanism of peremptory strikes where a prosecutor identifies some sort of nonverbal response as their reason to strike a minority juror. *See, e.g., Snyder v. Louisiana*, 552 U.S. 471 (2008) (reversing conviction in capital murder case because the prosecution's strike of a black juror for "nervousness" was not borne out by the record and violated *Batson*). And, the elimination of even one minority juror has been demonstrated to have a prejudicial effect in the outcome of a criminal trial. The U.S. Supreme Court case *Flowers v. Mississippi* is illuminating. 588 U.S. 284 (2019). In that case, African-American criminal defendant, Curtis Flowers, was tried six times for murder. *Id.* at 287. For different reasons, including both prosecutorial misconduct and violations of Flowers' constitutional right to have a jury of his peers, each verdict reached in the six trials was ultimately reversed. In analyzing the sixth and final trial, and whether Flowers' constitutional rights had been violated in jury selection, the Court considered the racial makeup and peremptory strikes of jurors for each of Flowers' six trials, recounting them as follows:

> At Flowers' first trial, 36 prospective jurors—5 black and 31 white—were presented to potentially serve on the jury. The State exercised a total of 12 peremptory strikes, and it used 5 of them to strike the five qualified black prospective jurors . . . Flowers was tried in front of an all-white jury. The jury convicted Flowers and sentenced him to death . . .
>
> At the second trial, 30 prospective jurors—5 black and 25 white—were presented to potentially serve on the jury. As in Flowers' first trial, the State again used its strikes against all five black prospective jurors. But this time, the trial court determined that the State's asserted reason for one of the strikes was a pretext for

> discrimination. Specifically, the trial court determined that one of the State's proffered reasons—that the juror had been inattentive and was nodding off during jury selection—for striking that juror was false, and the trial court therefore sustained Flowers' Batson challenge. The trial court disallowed the strike and sat that black juror on the jury. The jury at Flowers' second trial consisted of 11 white jurors and 1 black juror. The jury convicted Flowers and sentenced him to death . . .
>
> At Flowers' third trial, 45 prospective jurors—17 black and 28 white—were presented to potentially serve on the jury. One of the black prospective jurors was struck for cause, leaving 16. The State exercised a total of 15 peremptory strikes, and it used all 15 against black prospective jurors . . . The jury in Flowers' third trial consisted of 11 white jurors and 1 black juror. The lone black juror who served on the jury was seated after the State ran out of peremptory strikes. The jury convicted Flowers and sentenced him to death . . .
>
> At Flowers' fourth trial, 36 prospective jurors—16 black and 20 white—were presented to potentially serve on the jury. The State exercised a total of 11 peremptory strikes, and it used all 11 against black prospective jurors. But because of the relatively large number of prospective jurors who were black, the State did not have enough peremptory challenges to eliminate all of the black prospective jurors. The seated jury consisted of seven white jurors and five black jurors. That jury could not reach a verdict, and the proceeding ended in a mistrial. . . .
>
> As to the fifth trial . . . [t]he jury was composed of nine white jurors and three black jurors. The jury could not reach a verdict, and the trial again ended in a mistrial.
>
> At the sixth trial, which we consider here, 26 prospective jurors—6 black and 20 white—were presented to potentially serve on the jury. The State exercised a total of six peremptory strikes, and it used five of the six against black prospective jurors, leaving only one black juror to sit on the jury . . . The jury at Flowers' sixth trial consisted of 11 white jurors and 1 black juror. That jury convicted Flowers of murder and sentenced him to death.

Flowers, 588 U.S. at 289–90. The Court's discussion of the six trials in *Flowers* offers unique evidence regarding the issue of ongoing race-based jury selection in America and its direct relation to trial outcomes.

In Perkins's case, the error in applying *Batson* is profound. First and foremost, jury selection was not recorded in a felony case of this magnitude, which is inexcusable. An evidentiary hearing to recreate the record of the jury selection, voir dire, and peremptory strikes is warranted in this case in the absence of this record. The District Court incorrectly stated that the need for this record "fails, first, because the time and place to make an evidentiary record was in the postconviction court – not the federal habeas case." (R. Doc. 41, p. 9). But, Perkins had exhausted his *Batson* claim on direct appeal, not in his state postconviction action. And, in the *Batson* analysis, the burden falls upon the State to present a race-neutral reason on the record, as well as to demonstrate that their proffered reason for the strike of the minority juror applied equally to white jurors. But, they had no record to support their burden. So any inferences in not having a record should be held against the State, not the defendant.

In short, at the very least, a reasonable jurist could disagree about the holding in this case, and a certificate of appealability is warranted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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