No.

IN THE

SUPREME COURT OF THE UNITED STATES

VICTOR DEWAYNE TAYLOR, PETITIONER

v.

SCOTT JORDAN, WARDEN, RESPONDENT

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

THIS IS A CAPITAL CASE

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December 21, 2021

QUESTIONS PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

Victor Taylor was tried in March, 1986, immediately prior to this Court's decision in *Batson v. Kentucky*, by a prosecutor from the same office that tried *Batson*. Taylor objected to the prosecutor's use of peremptory challenges to remove four of the six African-American jurors from the panel. In response to the objection, the prosecutor gave his reason for striking the African-American jurors: "In accordance with case law, the Commonwealth has no other rational reason -- if I strike all it then becomes objectionable under the cases from, as I understand it, coming from California."

Kentucky's highest court addressed Victor Taylor's *Batson v. Kentucky* claim two different times: in the direct appeal (*Taylor I*), and in the first post-conviction appeal (*Taylor II*). In *Taylor I*, the state-court summarily rejected Taylor's *Batson* claim in a single sentence. In *Taylor II*, the same court wrote a reasoned opinion and explained its rationale for rejecting the claim on direct appeal. Taylor later sought habeas relief in federal district court. The district court denied relief. On appeal, a slim majority of the *en banc* Sixth Circuit affirmed, but in doing so, the majority refused to "look through" to the Kentucky Supreme Court's actual rationale for denying the *Batson* claim. Instead, the majority looked to the summary denial of the *Batson* claim in *Taylor I*, and proceeded to speculate regarding what rationale "could" have supported its decision.

In *Wilson v. Sellers* this Court held that when a state court decision denies a prisoner's federal claim on the merits but does not give a reason for the denial, a federal court reviewing the claim in habeas corpus should "look through" the unexplained state court decision "to the last related state-court decision that does provide a relevant rationale." In *Wilson*, the last related state-court decision was an earlier decision by a lower Georgia state court. In the instant case, the last related state-court decision was the Kentucky Supreme Court's decision in *Taylor II*.

The Sixth Circuit Court of Appeals' treatment of Victor Taylor's Batson claim raises the following important questions:

1. Is a statement by the prosecutor that he believed he could discriminatorily remove African-American jurors from the panel as long as he left one African-American juror on the panel, a "race-neutral reason" as required by *Batson v. Kentucky* and the United States Constitution, particularly in this instance, when the prosecutor used a widely disparate number of his peremptory challenges to remove black jurors as opposed to white jurors and the prosecutor admitted he had "no other rational reason" than the race of the jurors for exercising his peremptory challenges?

2. Was the Sixth Circuit Court of Appeals required to "look through" the unexplained state court decision to the "last related state-court decision that does provide a relevant rationale," or was it at liberty to supplant its own speculative reasons without deference to the state court?

LIST OF PARTIES

1. Victor Dewayne Taylor, Inmate Number 083648, Kentucky State Penitentiary, 266 Water Street, Eddyville, Kentucky 42038; Represented by Dennis J. Burke, 2202 Commerce Pkwy., Suite D, LaGrange, Kentucky 40031, and Thomas M. Ransdell, Law Office, P. O. Box 1687, Frankfort, Kentucky 40602.

2. Commonwealth of Kentucky, Respondent. Represented by Hon. S. Chad Meredith, Assistant Attorney General, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601.

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The decision of the United States Court of Appeals for the Sixth Circuit sitting *en banc* is reported as Taylor v. Jordan, 10 F.4th 625 (2021) and attached at Appendix A. The panel decision vacated by the en banc Court's grant of rehearing is reported as *Taylor v. Simpson*, 972 F.3d 776 (6th Cir. 2020) and attached at Appendix B. The underlying federal habeas decision, *Taylor v. Simpson*, No. 5:06-181-DCR , 2014 WL 4928925 (E.D. Ky. September 30, 2014) is appended at Appendix C. The decision of the Supreme Court of Kentucky, *Taylor v. Commonwealth* (Taylor IV) is reported at *291 S.W.3.d 692 (Ky. 2009)* and attached at Appendix D. The Kentucky Supreme Court opinion *Taylor v. Commonwealth* (*Taylor III*) is reported at 175 S.W.3d 68 (Ky. 2005) and attached at Appendix E. The Kentucky Supreme Court opinion *Taylor v. Commonwealth* (*Taylor II*) is reported at 63 S.W.3d 151 (Ky. 2001) and attached at Appendix F. The Kentucky Supreme Court opinion *Taylor v. Commonwealth* (*Taylor I*) is reported at 821 S.W.2d 72 (Ky. 1990) and attached at Appendix G.

JURISDICTION

On August 23, 2021 the Sixth Circuit Court of Appeals affirmed the dismissal of Victor Taylor's Petition for Habeas Corpus *See* Appendix A. On June 21, 2018, Taylor's Application for Extension of Time to file an Application for Writ of Certiorari was granted pursuant to S. Ct. R. 13.5. That order extended the time for filing until December 21, 2021. This Petition is filed in compliance with this Court's order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the Eighth, and Fourteenth Amendment of the Constitution of the United States, and 28 U.S.C. 2254(d).

AMENDMENT VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The 14th Amendment to the United States Constitution provides, in pertinent part, as follows:

AMENDMENT 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.

This case also involves interpretation of **28 U.S.C. 2254(d)**, which provides:

> (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; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

On September 29, 1984, two Louisville teenagers, Scott Nelson and Richard Stevenson, left for a high school football game and apparently got lost on the way. Their bodies were found early the next morning in a vacant lot along a side street in the Smoketown neighborhood, southeast of downtown Louisville. The case garnered an extreme amount of local interest.

Four days later, George Wade was picked up for questioning. After being held for 11 hours during which he was repeatedly interrogated by the police, took and was told that he had failed a lie detector test, and after having been placed in a lineup was told he had been identified by a witness, Wade confessed that he had participated in the murders, kidnappings and robberies of Nelson and Stephenson. Wade shifted the primary responsibility for the crimes to Victor Taylor, who he claimed had been the actual shooter.

Both Taylor and Wade were indicted for the offenses of murder (2 counts), kidnapping (2 counts), Robbery in the first degree (2 counts), and Sodomy in the first degree (1 count). Because of intense publicity, the venue of the trial was moved to Lexington. The Jefferson County judge, Jefferson County prosecutors, and Jefferson County public defenders all remained with the case, however.

Wade was tried first. He was found guilty of all counts except Sodomy in the first degree. The jury recommended life imprisonment. Victor Taylor's jury selection began 12 days later. Originally, 154 persons were called for service. Thirty-five jurors were excused for cause prior to the commencement of voir dire. The pool from which

the petit jury was selected then comprised 119 persons. Thirty-eight people were eventually qualified for jury service.

The voir dire in Victor Taylor's trial began March 18, 1986, about four months after the arguments in the landmark Supreme Court Case *Batson v. Kentucky*, 476 U.S. 79 (1986), but prior to the actual decision in that case. All of the parties, including the judge and prosecutor, were from the same judicial circuit where the *Batson* case arose. At the end of voir dire, there were six jurors on the panel. The prosecutor exercised eight of his allotted nine peremptory challenges, and used four of the peremptories he exercised to remove jurors. Victor Taylor is African-American; the two victims in this case were Caucasian. The defense attorneys objected to the prosecutor using four challenges to remove two-thirds of the available jurors. The prosecutor responded with his reason for removing the jurors, "In accordance with case law, the Commonwealth has no other rational reason -- if I strike all it then becomes objectionable under the cases from, as I understand it, coming from California." The trial judge, in ruling on the defense motion, said, "The California case is not the law of the land. I'm not sure what the name of the Supreme Court case that's presently on certiorari. ... I believe the issue being addressed at this time as to whether it is permissible to exercise your peremptory strikes whichever way you wish to. I don't know, but the record is clear as to what has been done in this case." (*Batson* Hearing; DVD; File No. 65; p. 365-366). Taylor's trial concluded April 30, 1986, the same day that *Batson* was decided.

The *Batson* issue was raised before the Supreme Court of Kentucky. That

court summarily affirmed the error, stating, "We have carefully reviewed all of the issues presented by Taylor[.] ... Allegations of error which we consider to be without merit will not be addressed here." *Taylor I*, 821 S.W.2d at 74.

Taylor filed a state post-conviction motion pursuant to Ky.R.Crim.Proc. 11.42 in the trial court. In that motion, Taylor raised a *Swain*[1] issue and a related *Strickland*[2]ineffective assistance of counsel issue for failing to present available evidence that would have supported defense counsel's pre-*Batson* motion that was made during the trial. At an evidentiary hearing, Taylor presented other evidence supporting his prima facie case that the Jefferson County prosecutor purposefully discriminated in jury selection, including passages from the Kentucky Prosecutor's Handbook, instructing that jurors from a minority group with a possible grudge against law enforcement or sharing a racial or national background with the defendant were not "preferable" for the prosecution, and an affidavit from a Jefferson County judge observing that she discharged a jury panel in a particular case because the Commonwealth's Attorney used peremptory strikes to remove all African American jurors on the venire and because of her knowledge that the Commonwealth had utilized its strikes similarly in other cases.

In *Taylor II*, the appeal of the denial of Taylor's post-conviction motion, the Supreme Court of Kentucky characterized it, "The evidence presented by Taylor at the evidentiary hearing focused on the first part of his burden under *Swain*, i.e., whether the prosecutor's office had a systematic and intentional practice of excluding

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[1] *Swain v. Alabama*, 380 U.S. 202 (1965).
[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

blacks from juries in criminal trials. But he presented no evidence that this practice "continued unabated" at his trial." *Id.*, 63 S.W.3d at 157. The court then addressed petitioner's *Batson/Swain* issue:

> In addition to a prosecutor's exclusion of minority members from the venire via peremptory strikes, *Batson* also requires-to establish a prima facie case-a showing of "other relevant circumstances" that create an inference that the prosecutor struck the jurors on the basis of their race. *Commonwealth v. Hardy*, Ky., 775 S.W.2d 919, 920 (1989). In the case at bar, there was no showing of other relevant circumstances at the time defense counsel objected to the seating of the jury and no such argument on this point was made on direct appeal. Moreover, the trial court specifically noted that there was no evidence that African-Americans were systematically excluded from the venire. *Notice of Death Sentence Review* at 9, *Commonwealth v. Taylor*, 84-CR-1549 (Jefferson Circuit Court entered June 3, 1986). Therefore, since a prima facie case was not made under *Batson*, it certainly was not made under the much more restrictive holding of *Swain*.

Id. Following *Taylor II*, Taylor finished litigating a new trial motion that had been filed in the trial court prior to the conclusion of the Ky.R.Crim.Proc 11.42 proceeding, culminating in *Taylor III*, 175 S.W.3d 68 (Ky. 2005). In *Taylor III*, the Kentucky Supreme Court once again addressed a Confrontation Clause issue that had first been raised in Taylor's direct appeal, was addressed a second time by the court in *Taylor II*, which, in turn, was cited by this Court in *Crawford v. Washington*, 541 U.S. 36, 64 (2004), as an example of a court's admission of a "core testimonial statement[] that the Confrontation Clause plainly meant to exclude." In *Taylor III*, a slim 4-3 majority of the Kentucky Supreme Court for the first time held that the Confrontation Clause violation in Taylor's trial was "harmless."

Taylor then filed a federal habeas corpus petition in the United States District Court for the Eastern District of Kentucky, raising, among other things, both the *Batson* issue and *Strickland* ineffective assistance of counsel on the *Swain* issue. The district court denied Taylor's habeas petition and granted a certificate of appealability for Taylor's Confrontation Clause issue, while denying a COA on both the *Batson* issue and the *Strickland* issue.

On appeal to the Sixth Circuit the court expanded the certificate of appealability to include the *Batson* issue and the *Strickland* issue. In a 2-1 panel decision, the court affirmed the district court. The dissenting judge concluded that Taylor's case which arose from the same jurisdiction, with the same prosecutor's office, at around the same time, was "*Batson v. Kentucky* revisited," and that the Kentucky Supreme Court's decision on this issue in *Taylor II* was "'contrary to' clearly established Supreme Court precedent." *Taylor v. Simpson*, 972 F.3d 776, 798, 806 (6th Cir. 2020) (Griffin, J., dissenting).

After the divided Sixth Circuit panel issued its decision in this case, Mr. Taylor requested rehearing by the en banc court discussing only the *Batson* claim. The en banc court agreed rehearing was appropriate, vacated the panel's decision, and, after briefing and oral argument, issued a 9-8 decision affirming denial of the *E* claim, affirming the denial of Taylor's Confrontation Clause claim, and affirming the denial of the *Strickland* claim. This Petition follows the decision of the *en banc* court.

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

After the divided Sixth Circuit panel issued its decision in this case, Mr. Taylor requested rehearing by the *en banc* court discussing only the *Batson* claim. The *en banc* court agreed rehearing was appropriate, vacated the panel's decision, and, after briefing and oral argument, issued a 9-8 decision affirming denial of the *Batson* claim. This Petition follows the decision of the *en banc* court.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Sixth Circuit's insistence in the *Taylor* opinion that it must ignore what the state supreme court explicitly stated in the last related state-court decision was the *actual* rationale for summarily rejecting a state prisoner's federal constitutional claim, in favor of the federal court's *manufactured* reasons of what the state-supreme court could have considered, undermines Congress' intent of putting state court decisions at the center of § 2254(d) review and violates the logic of *Wilson v. Sellers*, *Ylst v. Nunnemaker*, and *Harrington v. Richter*

Victor Taylor raised his *Batson v. Kentucky* claim on direct appeal. *Taylor v. Commonwealth*, (*Taylor I*), 821 S.W. 2d 72, 74 (Ky. 1991). The Kentucky Supreme Court denied the claim on the merits, without comment, in the direct appeal opinion. *Taylor v. Commonwealth*, (*Taylor I*), 821 S.W. 2d 72, 74 (Ky. 1991) ("We have carefully reviewed all of the issues presented by Taylor. ... Allegations of error which we consider to be without merit will not be addressed here." *Id.* at 74. Then, the Kentucky Supreme Court explicitly addressed the merits of the *Batson* claim in a later opinion of this case, an appeal of denial of post-conviction relief under Kentucky

Rule of Criminal Procedure 11.42: *Taylor v. Commonwealth* (*Taylor II*), 63 S.W.3d 151 (Ky. 2001). In the Rule 11.42 appeal, Taylor asserted a claim under *Swain v. Alabama*, 380 U.S. 202 (1965), which was the applicable standard for challenging juror strikes on the basis of race at the time of Taylor's trial. Because Taylor raised the *Batson* claim in his direct appeal (*Taylor I*), the Kentucky Supreme Court affirmed the denial of his Rule 11.42 motion regarding his *Swain* claim, concluding it was "an attempt to get around [the] long-established rule" that a Rule 11.42 motion may not be utilized to "permit a convicted defendant to retry issues which ... were raised in the trial court and upon an appeal considered by this court." *Id.* at 157 (citation omitted). The Kentucky Supreme Court then proceeded to address the merits of both the *Batson* and *Swain* claims:

> The evidence presented by Taylor at the [post-conviction] evidentiary hearing focused on the first part of his burden under *Swain*, i.e., whether the prosecutor's office had a systematic and intentional practice of excluding blacks from juries in criminal trials. But he presented no evidence that this practice 'continued unabated' at his trial. In addition to a prosecutor's exclusion of minority members from the venire via peremptory strikes, *Batson* also requires—to establish a prima facie case—a showing of 'other relevant circumstances' that create an inference that the prosecutor struck the jurors on the basis of their race. *Commonwealth v. Hardy*, 775 S.W.2d 919, 920 (Ky. 1989). In the case at bar, there was no showing of other relevant circumstances at the time defense counsel objected to the seating of the jury and no such argument on this point was made on direct appeal. Moreover, the trial court specifically noted that there was no evidence that African–Americans were systematically excluded from the venire. Therefore, since a prima facie case was not made under *Batson*, it certainly was not made under the much more restrictive holding of *Swain*.

Taylor v. Commonwealth, (*Taylor II*), 63 S.W.3d 151 (Ky. 2001) (citation omitted).

Taylor I and *Taylor II* were both decided by the Kentucky Supreme Court.

Nevertheless, although Kentucky's highest court explained in *Taylor II* why it summarily rejected Taylor's *Batson* claim in *Taylor I*[3], the Sixth Circuit majority refused to look through to *Taylor II* because "Taylor is looking the wrong way as he makes his argument." *Taylor v. Jordan*, 10 F.4th 625, 634 (6th Cir. 2021). "The decision under review is *Taylor I*, in which the [Kentucky Supreme Court] obviously did not 'examine' the reasoning of *Taylor II*, eleven years later." *Id.*

A. Congress intended the state court adjudication to be the primary focus in federal habeas cases

When Congress adopted the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") its intent was clear: to place " 'primary responsibility with the state courts' " for adjudicating habeas petitions and grants the decisions of those state courts substantial deference. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002)). This deference is essential to the comity interests between federal and state courts because " '[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quoting *Calderon v. Thomas*, 523 U.S. 538, 555-56 (1998)). Review under 28 U.S.C. § 2254(d) "focuses on what a state court knew and did." *Pinholster*, 563 U.S. at 182.

B. Review under § 2254(d) is focused on what the "state court knew and did"

[3] The Commonwealth agreed with the characterization of *Taylor II* in the panel brief of the appeal in the Sixth Circuit: "[i]n the process of denying the [*Swain*] claim, the Court also reiterated that the original *Batson* claim was denied on direct appeal because no prima facie case had been shown (as would have been the case in a more onerous *Swain* claim)." See *Taylor*, 10 F.4th at 654.

Prior to AEDPA, this Court, in *Ylst v. Nunnemaker, 501 U.S. 797 (1991),* considered a case in which the state post-conviction courts had affirmed without explanation a state court's articulated direct-review denial of a petitioner's claim on grounds of a state procedural default. *Id.* at 800. The *Ylst* Court held federal courts should "look through the subsequent unexplained denials [of relief] to [the direct-review] opinion" and employ a presumption, rebuttable by "strong evidence" to the contrary, "that a later decision rejecting the claim did not silently disregard that [procedural] bar and consider the merits." *Id.* at 800-806. Since AEDPA, this Court's cases emphasize that under § 2254(d), review of whether a relevant state court decision "involved" an unreasonable application of federal law or "was based on" an unreasonable determination of fact, remains focused on "what a state court knew and did." P*inholster*, 563 U.S. at 182. With one narrow exception, this Court has always followed the "what a state court knew and did" approach. The exception was *Harrington v. Richter*, 559 U.S. 935 (2010).

In *Richter*, this Court decided how a federal habeas court should address a summary state disposition "unaccompanied by an explanation" and where no other state court had addressed the claim. The Court held that § 2254(d) applied. Therefore, because it is impossible in such cases to "determine what arguments or theories supported ... the state court's decision," *Richter* authorized federal courts to imagine for themselves what "could have supported" the decision, and to use the imagined rationale to inform an analysis "[u]nder §2254(d)." *Id.* at 102. However, *Wilson v. Sellers*, 138 S.Ct. 1188 (2018), confirmed the *Richter* exception is narrow. Addressing

the question of whether the *Ylst* "look through" approach applies under § 2254(d), this Court held "the federal court should 'look through' to the last related state-court decision that provides a relevant rationale," because "AEDPA directs us to do [so]." *Id.* at 1196. The federal court "should then presume that the unexplained decision adopted the same reasoning." *Id.* at 1192. If, however, the State disagrees, it may "rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds." Id. at 1196.

C. The majority's focus on "Taylor "looking the wrong way" created a rule that substitutes its own judgment for the state court's judgment - the very harm that AEDPA is meant to avoid

The Sixth Circuit majority refused to "look through" from the summary ruling to the state court's last reasoned decision that explained why it previously rejected the federal claim, because in *Wilson,* the summary ruling by the state court came *after* the reasoned decision by a lower court, while in *Taylor,* the Kentucky Supreme Court issued a summary denial of the federal claim on direct appeal (*Taylor I*) *before* it addressed and explained "the reason the *Batson* claim failed" in *Taylor II*:

> Taylor is looking the wrong way as he makes his argument here. The decision under review is *Taylor I*, in which the court obviously did not "examine" the reasoning of *Taylor II* eleven years later. *Id.* at 1194. One therefore cannot presume—much less "realistic[ally,]" id.—that *Taylor I* "adopted" the reasoning of *Taylor II*. Both the rule and the rationale of Wilson are thus wholly inapposite here.

Taylor, 10 4th at 634.

Whether the Kentucky Supreme Court issued the summary denial of the

Batson claim first, and the reasoned opinion second, or vice-versa, is a distinction that should not make any difference. What matters is that the federal court is required to focus on the actual rationale for the state court's decision, rather than substituting its own conjecture. This Court should grant Taylor's petition because by improperly creating a new rule limiting when the federal court must look through to the reasoned state court opinion, the Sixth Circuit majority subverts the purpose of AEDPA, ignores this Court's instruction in *Pinholster* that federal courts must "focus on what [not when] a state court knew and did," and flouts the holding in *Wilson* that "federal habeas law employs a 'look through' presumption," 138 S.Ct. at 1194.

There is no reason why a federal court should not permit a state supreme court to explain its own earlier summary decision, in particular when as occurred in this case, two of the five justices in the majority of the prior state court decision, including the author of that decision, are still sitting on the state supreme court. The state court is in a far better position to explain the rationale of its own decision, than is a federal appeals court some 30 years after the decision was made.

This Court should also grant Taylor's petition because this issue is bound to arise again, and it is squarely presented in this case. State courts have the right to explain their own decisions in cases that come before them a second time, and they will surely do so. This Court needs to give guidance to federal habeas courts that when this happens, they must presume the last reasoned decision of the state court is the final word on the state's reason for ruling the way it did, absent a reason rebutting that conclusion.

Finally, the Sixth Circuit majority's conclusion that it "cannot presume - much less realistically" that Taylor's *Batson* claim was denied in *Taylor I* for the actual reasons stated by the Kentucky Supreme Court in *Taylor II*[4] displays a profound disrespect for the state court.[5] There is no "presuming" to be done by the federal court in this instance because the Kentucky Supreme Court clearly explained its reasoning:

> Even if we were to hold that *Swain* and not *Batson* was controlling, Taylor's claim would still fail for the same reason his *Batson* claim failed on direct appeal.... In the case at bar, there was no showing of other relevant circumstances at the time defense counsel objected to the seating of the jury and no such argument on this point was made on direct appeal.

Taylor II, 63 S.W.3d at 157. As Judge Griffin wrote in dissent, "we need only take the Kentucky Supreme Court at its word. We should not "presume" anything or speculate regarding what rationale "could" have supported its decision." *Taylor*, 10 F.4th at 654 (Griffin J., dissenting) (citing *Wilson*, 138 S. Ct. at 1192).

This Court should grant Mr. Taylor's Petition in order to rectify an "extreme malfunction"[6] in the Sixth Circuit's analysis in his case.

II. By refusing to look through to the last related state court decision, the Sixth Circuit majority turned a blind eye to the Kentucky Supreme Court's application of a heightened standard of review to establish a prima facie showing of discrimination, contrary to clearly established federal law of this Court in *Batson v. Kentucky*.

The Kentucky Supreme Court decided Mr. Taylor failed to make out

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[4] *Taylor*, 10 F.4th at 634.
[5] AEDPA exists to ensure federal courts "afford state courts due respect." *Woods v. Donald*, 575 U.S. 312, 316 (2015).
[6] *Richter*, 562 U.S. at 102.

a prima facie case of discrimination by showing "the totality of relevant facts give rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 93-94. See *Taylor II*, 63 S.W.3d at 157.

To establish an inference of discriminatory purpose, a defendant first "must show that he is a member of a cognizable racial group." *Batson*, 476 U.S. at 96. Second, he must show "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race[7]." *Id.* "Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." *Id.*

In holding that because "there was no showing of other relevant circumstances at the time defense counsel objected to the seating of the jury and no such argument on this point was made on direct appeal... a prima facie case was not made under *Batson,*" the Kentucky Supreme Court misstated the law. See *Taylor II*, 63 S.W.3d at 157. First, this Court "spoke of the methods by which a prima facie case could be proved in permissive terms." *Johnson v. California*, 545 U.S. 162, 169 n. 5 (2005); *Batson*, 476 U.S. at 96: "In deciding whether the defendant has made the requisite showing, the trial court should consider *all* relevant circumstances." *Id.*

[7] There is no dispute that Mr. Taylor is African American, that he objected to the removal of African American jurors from the venire, or that the Kentucky Supreme Court correctly applied the first two elements of the prima facie requirement in *Taylor II*.

(emphasis added). Second, the Court gave as an example that "a pattern of strikes" without other relevant circumstances may establish an inference of discrimination. *Id.* at 96-97. Third, in *Batson* itself, timely objection by the defendant to strike "all black persons on the venire" without more was sufficient to establish a prima facie case of discrimination. *Id.*, 476 U.S. at 100.

The Kentucky Supreme Court decision requiring Taylor to satisfy a higher burden of proof than that established by the Supreme Court in *Batson*, satisfies the "contrary to" clause of §2254(d)(1). See *Williams v. Taylor*, 529 U.S. 362, 405 (2000) ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases."). The state court's adjudication of Taylor's *Batson* claim also satisfies the "unreasonable application" clause of §2254(d)(1) because the state court applied the wrong standard in determining that Taylor failed to make a prima facie showing of purposeful racial discrimination.

As Judge Moore observed in her dissent:

> Not one judge on this en banc court disputes that *Taylor II* impermissibly contradicted *Batson v. Kentucky*, in rejecting Taylor's claim. Yet the majority insists that we must pretend that *Taylor II* never happened and instead read tea leaves in *Taylor I*'s one-sentence denial. This topsy-turvy travesty violates the Supreme Court's interpretation of 28 U.S.C. § 2254(d), contravenes the Court's *Batson* caselaw, and undermines the Antiterrorism and Effective Death Penalty Act of 1996's (AEDPA's) bedrock principle of deference to state courts.

Taylor, 10 F.4th at 642 (Moore, J. dissenting) (citation omitted).

III. The prosecutor in Taylor's trial struck members of the jury venire for no "other rational reason" except for their race and admitted doing so. For this reason (and other reasons as outlined below), even if habeas review is limited to *Taylor I*, the state court unreasonably applied *Batson v. Kentucky*

Victor Taylor's sole burden at step one of *Batson* is to show "the totality of the relevant facts give rise to an inference of discriminatory purpose." *Johnson,* 545 U.S. at 169 (citing *Batson,* 476 U.S. at 94.) This step is not intended to be onerous. *Id.* at 170. An inference is not a "strong likelihood," nor is it a preponderance of the evidence or "more likely than not." *Johnson,* 545 U.S. at 168. The reviewing trial court[8] "should consider all relevant circumstances." *Batson,* 476 U.S. at 96. Relevant circumstances present during Taylor's trial included:

(1) The same prosecutor's office that prosecuted Victor Taylor also prosecuted James Batson, and Randall Griffith. This Court addressed Batson's case on direct appeal which resulted in *Batson v. Kentucky*. All three men were tried closely in time. Taylor's trial concluded on April 30, 1986, the same day that this Court decided *Batson*. Griffith, like Taylor was tried while Batson's case was pending on direct appeal.

[8] The trial court did not conduct a *Batson* hearing or make a finding regarding whether Taylor established a prima facie case of discrimination because *Batson* had yet to be decided.

(2) Prosecutors in the trials of all three Black men struck most or all prospective Black jurors. Batson and Griffith were tried by an all-white jury; a single Black person sat on Taylor's jury. See *Batson*, 476 U.S. at 83; *Griffith v. Kentucky*, 479 U.S. 314, 317 (1987); *Taylor*, 10 F.4th at 630.

(3) The prosecutor in Taylor's trial created a jury chart on which he listed the race of the prospective jurors. The chart is evidence tending to prove race was a factor in the prosecutor's jury selection. See *Foster v. Chapman*, 578 U.S. 488, 512-513 (2016), in which this Court considered a prosecutor's jury venire list and list of qualified jurors indicating the race of black prospective jurors as evidence of intentional discrimination.

(4) The prosecutor engaged in a pattern of strikes against black jurors. He used 50% of his peremptory strikes to remove 66.7% of the potential qualified black jurors from Taylor's jury, who made up just 16% of the remaining venire.

(5) The prosecutor admitted he "had no other rational reason" for striking the black jurors.--- if I strike all it then becomes objectionable under the cases from, as I understand it, coming from California." *Taylor*, 10 F.4th at 636 (citation omitted.)

A. The Sixth Circuit majority opinion trivializes two highly relevant facts giving rise to an inference of discrimination: the prosecutor's jury chart on which he noted the race of each potential juror during jury selection, and the trial prosecutor's admission that he struck four jurors on account of their race

1. The prosecutor's jury chart

The Taylor majority dismisses the significance of the prosecutor's jury chart noting the race of each possible juror because :

> That same chart also noted the education, employment status, occupation, and marital status of each qualified member of the venire.... And all those characteristics were relevant to the Sixth Amendment's requirement that the venire reflect "a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527... (1975). That requirement means that potential jurors cannot be excluded from the venire based on race, *Smith v. Texas*, 311 U.S. 128, 130 ... (1941)... The characteristics on the prosecutor's chart—including race—therefore bore directly on whether the venire's members reflected a fair cross-section of the community. Indeed that is precisely why the prosecutor offered to put the chart into the record, when the defense implied that the venire did not reflect such a cross-section. A jurist could therefore fairly conclude that the chart reflected the prosecutor's intent to comply with the Constitution, rather than violate it.

Taylor, 10F.4th at 635-636. The Sixth Circuit majority's reasoning is specious at best. Mr. Taylor's *Batson* issue decidedly does not depend upon whether the prosecutor was following the law as it stood or as he understood it at the time of his trial. As the majority was well aware, *Batson v. Kentucky* had not yet been decided at the time of jury selection in Victor Taylor's trial, but because it was decided before his case was final, *Batson* most certainly applied to the prosecutor's jury selection in his trial. As the majority was also well aware, that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial," did not prevent or prohibit every or for that matter many instances of race discrimination against prospective jurors[9]. If it did, then this Court would not have needed to revisit *Swain v.*

[9] See *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

Alabama, 380 U.S. 202 (1965) and decide *Batson v. Kentucky* in the first place. In the end, the Sixth Circuit majority's conclusion that "a jurist could therefore fairly conclude that the juror chart reflected the prosecutor's intent to comply with the Constitution rather than violate it" is a non sequitur. The relevant fact tending to prove race was a factor in the prosecutor's jury selection remains: the prosecutor noted the race of each and every prospective juror on his jury chart.

2. The prosecutor's response to the defense objection at trial

After Taylor's counsel objected to the trial prosecutor's use of his peremptory strikes, the prosecutor volunteered his reason for striking the four black jurors:

> In accordance with case law, the Commonwealth has *no other rational reason* -- if I strike *all it then becomes objectionable* under the cases from, as I understand it, coming from California.

Taylor, 10 F.4th at 636 (emphasis added). The prosecutor made this statement before *Batson* was decided, at a time when striking even a single juror on the basis of race had not yet been held unconstitutional. The *Taylor* majority refused to consider the prosecutor's statement, claiming "the reality is that what the prosecutor sought to convey here is anyone's guess." *I.d.* In fact, the prosecutor's "only rational reason" for striking Black jurors in Victor Taylor's trial, is all too clear.

The trial prosecutor made the statement in response to defense counsel's objection to the prosecutor striking four of six remaining Black jurors. It is not difficult to understand from his response that the prosecutor was acknowledging he had no other rational reason for striking the black jurors except for their race, but

as he "understands the law," he was allowed to strike Black jurors based upon their race, as long as he did not strike *all* of the Black jurors – because then it "becomes objectionable."

The law is clearly established: "a single instance of race discrimination by the prosecutor is impermissible." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). As Judge Cole noted in his dissenting opinion, the majority "does not even attempt to propose an alternative interpretation of the prosecutor's statement that he had 'no other rational reasons' for striking the Black members of the venire. Indeed, it is impossible to see what the prosecutor could have meant if we do not take his statement as an admission to striking jurors on the basis of race." *Id.* at 646. The Sixth Circuit majority's refusal to consider the prosecutor's statement, an extremely "relevant fact giving rise to an inference of discriminatory purpose" is itself contrary to this Court's holding in *Batson*, 476 U.S. at 96.

The Sixth Circuit majority, like the Kentucky Supreme Court, also subjects Taylor to an unconstitutionally high burden of proof. The majority dismisses the prosecutor's statement as inconsequential because: "what matters for our purposes - is that a fairminded juris would hardly be compelled to think that this remark amounted to a confession in open court that the prosecutor had invidiously discriminated against Black members of the venire." *Id.* at 636. While Mr. Taylor disagrees, he need only show that no reasonable jurist would disagree that "the totality of the relevant facts give rise to an inference of discriminatory purpose." *Johnson*, 545 U.S. at 169. The prosecutor's statement is but one relevant fact among

several, and an inference is not a "strong likelihood," nor is it a preponderance of the evidence or "more likely than not." *Id.* at 168. Alternatively, as Judge Griffin concluded in his dissent, the prosecutor was allowed to offer a race-neutral reason for his peremptory strikes. He took the opportunity to respond but failed to satisfy his burden at step two. While the record here does not show the normal course of a *Batson* challenge, it tracks a specific situation the Supreme Court described in *Batson*: a prima facie case coupled with a prosecutor's failure to "come forward with a neutral explanation for his action" requires reversal. 476 U.S. at 100." *Taylor*, 10 F.4th at 661.

"The heart of *Batson's* holding is that a prosecutor cannot strike jurors on account of their race. Here, the prosecutor admitted to doing just that. A determination that the prosecutor's actions did not violate *Batson* can be nothing other than a patently unreasonable application of *Batson* itself." *Taylor*, 10 F.4th at 62 (Cole, J. dissenting).

B. The Sixth Circuit majority's interpretation of *Batson* implying that Taylor cannot establish a prima facie case of discrimination unless he shows the prosecutor intended to exclude every Black member of the jury is contrary to clearly established federal law

Many aspects of the majority opinion are deeply troubling, but none more so than its conclusion that when the prosecutor "affirmatively *objected*" (emphasis in original) efforts to Taylor's attempt to strike three Black venire members for cause, it created an "immovable obstacle to Taylor's *Batson* claim – especially on habeas review." *Taylor*, 10 F. 4th at 635. According to the majority, a "fairminded jurist

could conclude—we think would likely conclude—that a prosecutor who aimed to purge the jury of African-Americans would not object to the defense's attempt to remove three of them from the venire. Nor, such a jurist might conclude, would a prosecutor with that aim leave one of his peremptory strikes unused while two African-Americans remained on the venire—which again is what the prosecutor did here." *Id.*

As Judge White astutely observes, "this analysis incorrectly implies that a *Batson* violation can only be shown where there is evidence that the prosecutor intended to categorically exclude every black member of the jury.... The *Batson* Court was unequivocal in its holding that 'the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors.'" *Id.* at 662.... (citing *Batson*, 476 U.S. at 88). The majority's interpretation of *Batson* as it was applied to Victor Taylor turned the actual holding on its head.

CONCLUSION

Over the last thirty-five years, Mr. Taylor has waited as first the Kentucky Supreme Court, followed by the federal district court, then a panel of the Sixth Circuit Court of Appeals and finally the *en banc* Sixth Circuit turned a blind eye to a clear, structural, constitutional violation. Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process. This Court should grant the Petition for Certiorari to provide Victor Taylor with the remedy that *Batson v. Kentucky* requires and to impose consistency on the decisions of the Sixth Circuit Court of Appeals and its sister circuits in their adjudication of claims

in federal habeas corpus proceedings.

Respectfully Submitted,

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