Case No. 21-6747

In the Supreme Court of the United States

VICTOR DEWAYNE TAYLOR

Petitioner,

v.

SCOTT JORDAN, Warden

Respondent,

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit
*****CAPITAL CASE*****

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the Sixth Circuit correctly apply the deferential standard of the Antiterrorism and Effective Death Penalty Act to conclude that a fairminded jurist could have adopted an argument or theory that supported the Supreme Court of Kentucky's decision in 1990 rejecting Petitioner's claim under *Batson v. Kentucky*, 476 U.S. 79 (1986).

II. When a state's highest court summarily rejects a criminal defendant's claim on the merits and there is no lower court opinion to look to for guidance as to why, should a federal habeas court simply apply *Harrington v. Richter*, 562 U.S. 86 (2011), as this Court has instructed?

PARTIES TO THE PROCEEDING

The parties to the proceeding include Petitioner Victor Dewayne Taylor and Respondent Scott Jordan, the Warden at the prison where Taylor is confined.

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STATEMENT

A jury convicted Petitioner of murdering two 17-year-old students almost forty years ago. He raped one of the boys, stole their belongings, and then executed them both after worrying that they might identify him later. The trial court sentenced him to death, and the Supreme Court of Kentucky upheld his conviction and sentence after multiple appeals.

In one of those appeals, Petitioner raised a *Batson* challenge. But he spent less than a single page of his 145-page brief developing that claim, and the Supreme Court of Kentucky summarily rejected it. Petitioner then came to federal court seeking a writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act. The district court denied his petition, and a panel of the Sixth Circuit affirmed. The court below then heard the case en banc—but it again denied Petitioner relief after applying the ordinary, deferential standard required under 28 U.S.C. § 2254(d). All told, dozens of judges in state and federal courts have denied Petitioner's claim, either directly or under AEDPA. He now asks this Court for one more shot.

But "[a] petition for a writ of certiorari will be granted only for compelling reasons," S. Ct. R. 10, and there are none present here. There is no circuit split over either of the questions presented. Nor do the issues raised here have any kind of national significance. Instead, this case involves an ordinary application of the AEDPA standards this Court has already laid out. In fact, the only novel issue raised in the petition is a convoluted look-through theory of AEDPA that not a single court of appeals has adopted. Even if Petitioner "raise[d] a serious argument" about how to

apply AEDPA in a case like this, the "legal question . . . would benefit from further percolation in the lower courts prior to this Court granting review." *Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (Sotomayor, J., respecting the denial of certiorari). In short, nothing about this case "meet[s] the Court's traditional criteria for granting certiorari." *Id.* This Court should thus deny the petition.

A. The Crimes

Scott Nelson and Richard Stephenson, two 17-year-old students, were on their way to a football game one night nearly forty years ago. *Taylor v. Jordan*, 10 F.4th 625, 628 (6th Cir. 2021) (en banc). They got lost and stopped outside a restaurant to ask for directions. *Id*. That is when they met Petitioner and George Wade. *Taylor v. Commonwealth* (*Taylor III*), 175 S.W.3d 68, 70 (Ky. 2005) (*Taylor III*). After a brief exchange, Petitioner drew a gun from his waistband, and, along with Wade, forced his way into the back seat of Nelson and Stephenson's car. *Jordan*, 10 F.4th at 628. Petitioner then ordered Nelson and Stephenson to drive down an alley to an abandoned lot, where he made them get out of the car. *Jordan*, 10 F.4th at 628.

Petitioner and Wade stole cash out of the boys' wallets, stripped the pants off Nelson and Stephenson, tied the boys' hands behind their backs, and gagged them. *Id*. Petitioner then anally raped Nelson. *Id*. Petitioner worried that the two boys could identify him because Wade used his name. He told Wade that Petitioner "was going to have to take them out." *Id.* (alteration removed). And that is what he did. One of the boys "tried begging, talking them out of hurting them, that they'd done enough to

them already." *Id.* Petitioner did not listen. *Id.* He shot both boys in the head with a Winchester-Western hollow-point round from a .357 Magnum. *Id.*

The prosecution proved Petitioner's guilt with overwhelming evidence. Physical evidence at the scene of the crimes linked Petitioner to them. *Taylor III*, 175 S.W.3d at 73. Two individuals witnessed the abduction and identified Petitioner as the kidnapper. *Id.* at 70. One of Petitioner's cousins saw Petitioner and Wade in the car with the two victims. *Id.* at 72. Petitioner also confessed to the crime to his sister later that night within earshot of a group of extended family members. *Jordan*, 10 F.4th at 628–29. When the investigation first led to Wade, he confessed to his role in the kidnapping but pointed to Petitioner as the one who shot and killed the two boys. *Id.* at 629; *see also Taylor v. Commonwealth (Taylor I)*, 821 S.W.2d 72, 74 (Ky. 1990), *overruled on other grounds by St. Clair v. Roark*, 10 S.W.3d 482, 487 (Ky. 1999). That led law enforcement to search the home of Petitioner's mother, where they found clothes and other belongings of the two victims. *Jordan*, 10 F.4th at 629. Another witness saw Petitioner wearing a jacket that belonged to one victim, and another witness told police that Petitioner had offered to sell her a jacket that one of the victims had been wearing. *Id.* That last witness also heard Petitioner "boast about killing the two boys" on "three separate occasions." *Id.* After Petitioner was arrested, he confided in Jeffrey Brown, the "jailhouse lawyer." *Taylor III*, 175 S.W.3d at 72. Petitioner admitted to the shooting in his conversation with Brown, telling Brown that he had to do it after Wade said Petitioner's name while Petitioner raped Nelson. *Id.*

B. Jury Selection

Petitioner's habeas claim is based on *Batson v. Kentucky*, 476 U.S. 79 (1986). Petitioner is African American, and both victims were white. His jury ultimately included only one black juror, after the prosecutor—who is also African American—and defense counsel together struck five of the six African American members of the venire using their peremptory strikes.

The venire started with 119 potential jurors. *Taylor v. Simpson*, No. 5:06-cv-181-DCR, 2014 WL 4928925, at *33 (E.D. Ky. Sept. 30, 2014). The prosecutor questioned each potential juror with the same questions regardless of the potential juror's race. *Jordan*, 10 F.4th at 629. During voir dire, Petitioner's counsel moved to strike three black jurors for cause. *Id.* The prosecutor opposed Petitioner's motion, which led to all three remaining on the venire. *Id.*

At the end of voir dire, 38 potential jurors remained on the venire, six of whom were African American—*three* of whom Petitioner had tried to exclude for cause. *Id.* Petitioner then moved to transfer the case to a different venue because of the coverage the case had garnered and because only 32 percent of the original 119-person panel remained. *Id.* The prosecutor argued against transfer, specifically noting that the remaining 38 jurors "are in effect a cross section of the community." *Id.* at 629–30. To bolster that assertion, the prosecutor submitted into the record a chart he prepared

listing the name, race, marital status, education level, employment status, and occupation of each of the 38 persons remaining on the venire. *Id.* at 630. The trial court denied Petitioner's motion to transfer. *Id.*

The parties then simultaneously exercised their peremptory strikes. *Id.* The prosecution was allotted nine strikes but used only eight. It struck four white and four African American members of the venire. *Id.* Petitioner did not object to any of the Commonwealth's strikes. *Simpson*, 2014 WL 4928925, at *34. Petitioner, on the other hand, exercised all of his allotted 14 strikes. He struck one of the two remaining African American members. *Jordan*, 10 F.4th at 630. The final jury panel of 12 jurors included one African-American woman, whom Petitioner's counsel "had earlier sought to strike for cause." *Id.*

Although Petitioner did not object to any of the peremptory strikes at the time, *five days later* Petitioner objected to the makeup of the jury. *Id.* He argued that it was "not representative of a cross-section of the community," that "the jury that we have now contains only one minority member," and that the prosecution had used "half of their strikes to exclude two-thirds of minority members left on the panel." *Id.* This led to an exchange between defense counsel and the prosecutor, in which defense counsel pointed out that the prosecutor used half of his strikes to remove "minority members," while the prosecutor pointed out that defense counsel himself struck a minority member. *Id.*

The prosecutor and the trial court briefly discussed the applicable case law—which, at the time, was relatively unclear. *Id.* The prosecutor then made the following

statement: "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." *Id.* In response, the trial court referred to *Batson*, which, at that time, was "presently up on certiorari."[1] *Id.* In the end, the trial judge noted that regardless of what it decided here, the issue and record were preserved for appeal: "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's clear as to what has been done in this case." *Id.*

The trial court denied Petitioner's motion, and the parties proceeded to trial, whereby Petitioner was convicted of murder, kidnap, robbery, and sodomy, and received a sentence of death. *Taylor III*, 175 S.W.3d at 70. In complying with its duty under Kentucky law to complete a post-trial report when imposing the death penalty, the trial-court judge—who, like the prosecutor was African American—noted that "members of [Petitioner]'s race [were] represented on the jury." *Taylor v. Simpson*, 972 F.3d 776, 792 n.13 (6th Cir. 2020) (citing 6thCir.Dkt. 42-5 at 49), *vacated by* 980 F.3d 1117 (6th Cir. 2020).[2] The trial court also found "there was no evidence that African-Americans were systematically excluded from the venire." *Taylor III*, 63 S.W.3d at 157; *see also Simpson*, 972 F.3d at 792, n.13 (citing 6thCir.Dkt. 42-5 at 49).

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[1] *Batson* applies to Petitioner's jury-selection claim because Petitioner's criminal case was still pending at the time *Batson* was decided. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

[2] Although *Simpson* was vacated by operation of Sixth Circuit Rule 35(b) when the court granted rehearing en banc, the en banc court ultimately reached the same conclusion as the panel majority and affirmed the district court's decision.

The trial court issued that report 27 days after *Batson* was decided. *Jordan*, 10 F.4th at 636.

C. Appeals in State Court

1. Petitioner appealed the trial court's judgment directly to the Kentucky Supreme Court. *Jordan*, 10 F. 4th at 631. He raised 44 different claims on appeal. *Id.* One of those claims was a *Batson* argument that spanned less than a page and was predicated *only* on the fact that "the prosecutor directed 4 of his peremptory strikes toward black members of the jury panel and never offered any explanation for the exercise of those peremptory challenges." *Id.* Petitioner never argued that the prosecutor's above-quoted statement was evidence of racial discrimination. Nor did he mention the prosecutor's chart detailing the demographic information of the jurors. Petitioner's only basis for claiming that the prosecutor used his peremptory challenges in a discriminatory manner was the fact that he struck four African American members of the venire. *Id.*

In response, the Commonwealth argued that the "resolution of th[e *Batson*] issue in no way depends upon a mathematical formula." *Simpson*, 972 F.3d at 787 (citing 6thCir.Dkt. 42-2 at 68–69). And in reply to the Commonwealth's response, Petitioner argued that "'[a]ll relevant circumstances' must be considered in determining 'whether the defendant has made the requisite showing.'" *Id.* at 788 (citing 6thCir.Dkt. at 19–20). Yet in outlining these relevant circumstances, Petitioner still did not point to the prosecutor's statement or the prosecutor's chart as evidence of discrimination. Instead, Petitioner argued that the race of the victims, the publicity

of the crime, and the "community outrage" were enough to create an inference of discrimination under the first step of *Batson*. *Id*.

The Supreme Court of Kentucky summarily rejected Petitioner's *Batson* argument on the merits without providing any reasoning. *Taylor I*, 821 S.W.2d at 74. ("We have carefully reviewed all of the issues presented by [Petitioner] . . . . Allegations of error which we consider to be without merit will not be addressed here."). Petitioner then sought certiorari, which this Court denied. *Kentucky v. Taylor*, 502 U.S. 1121 (1992).

2. Petitioner's trip through the state-court appellate system did not stop there. Seven years later, Petitioner filed a post-conviction collateral attack on his judgment under Kentucky Rule of Criminal Procedure 11.42. *Jordan*, 10 F.4th at 631. Because Rule 11.42 bars defendants from presenting claims already adjudicated on direct review, Petitioner re-characterized his *Batson* claim as a claim under *Swain v. Alabama*, 380 U.S. 202 (1965), the relevant pre-*Batson* case on racial discrimination in jury selection.[3] *Jordan*, 10 F.4th at 631. To prove that claim, Petitioner brought new evidence that he believed showed "that the prosecutor's office that brought his case

[3] *Batson* made clear that defendants no longer need to meet *Swain*'s requirement that "proof of repeated striking of blacks over a number of cases was necessary to establish a[n] Equal Protection Clause violation." *Batson*, 476 U.S. at 92.

had [generally in other cases] systematically discriminated against black venirepersons." *Id.*; Pet. Cert. 5. But the trial court denied Petitioner's 11.42 motion. *Jordan*, 10 F.4th at 631.

Petitioner appealed that decision to the Supreme Court of Kentucky. *Taylor v. Commonwealth (Taylor II)*, 63 S.W.3d 151, 156–57 (Ky. 2001). But the Supreme Court of Kentucky held that Petitioner was procedurally barred from raising his *Batson*-in-disguise *Swain* claim under Rule 11.42. *Id.* at 157. That claim had already been rejected on direct review, and so Petitioner could not raise it again in a collateral challenge.

Then, having already rejected Petitioner's claim as procedurally improper, the Supreme Court of Kentucky added that Petitioner could not have established a *Swain* claim on the merits even if he was not procedurally barred from doing so. *Id.* The Supreme Court of Kentucky stated that because Petitioner could not meet his burden under *Batson*, he assuredly could not meet his burden under the "much more restrictive holding of *Swain*." *Id.* In making this observation, the Supreme Court of Kentucky, in dicta, also offered its own gloss on the possible reasoning behind the court's decision from more than a decade ago, explaining that Taylor had failed to make a prima facie claim under *Batson* because there was "no evidence that African-Americans were systematically excluded from the venire" and "there was no showing of other relevant circumstances" that would give rise to an inference of discrimination. *Id.*

Petitioner again petitioned this Court for certiorari, which was denied. *Taylor v. Kentucky*, 536 U.S. 945 (2002). He also tried to collaterally attack his original judgment two other times, but the Supreme Court of Kentucky rejected both attempts. *Taylor III*, 175 S.W.3d at 77; *Taylor v. Commonwealth*, 291 S.W.3d 692, 693 (Ky. 2009) (*Taylor IV*). Neither state-court collateral attack involved the *Batson* challenge relevant here.

D. Petitioner's Habeas Petition

1. After failing to obtain relief in state court four times, Petitioner filed his habeas petition under 28 U.S.C. § 2254, raising fifty-four claims of relief, his *Batson* claim included. *Simpson*, 2014 WL 4928925, at *2. Because the state court rejected this claim on the merits in Petitioner's direct appeal, the district court applied AEDPA's deferential standard to determine whether the state-court judgment was "contrary to, or involved an unreasonable application of" this Court's precedent. 28 U.S.C. § 2254(d); *Simpson*, 2014 WL 4928925, at *37. Upon finding a "record . . . replete with information establishing race-neutral reasons for the prosecutor's use of peremptory challenges," the district court rejected Petitioner's *Batson* claim. *Id.* at *36. More specifically, the district court pointed out that "[t]here is nothing in the prosecutor's questions or remarks to indicate any racial bias." *Id.* at *35. The district court also pointed out that the prosecutor struck jurors based on race-neutral reasons. *Id.* at *36.

2. A panel of the Sixth Circuit affirmed. *Simpson*, 972 F.3d at 789. In doing so, the majority framed the issue before it in the context of AEDPA's high standard of

review: "the question is whether [the Supreme Court of Kentucky's] particular application [of *Batson*] . . . was so wrong that it was *objectively unreasonable*, meaning that it 'was so lacking in justification that [the] error [was] well understood and comprehended in existing law [so as to be] beyond any possibility for fairminded disagreement.'" *Id.* at 786 (citation omitted).

In answering that question in the negative, the majority first pointed out that on direct appeal of the state-court judgment, Petitioner argued only that the particular statistics behind the prosecutor's use of strikes in this case evidenced a discriminatory intent. *Id.* at 787. In other words, Petitioner did not point to any of the other circumstances on which he now relies. And the majority pointed out that in response the Commonwealth argued that "[t]he resolution of this issue in no way depends upon a mathematical formula" and, instead, requires an evaluation of the totality of the circumstances surrounding jury selection. *Id.* In considering the totality of circumstances, the majority simply could not conclude that the Supreme Court of Kentucky's refusal to find that such circumstances did not raise "an inference of discrimination" was "beyond any possibility for fairminded disagreement." *Id.* at 788–89 (citation omitted).

The majority also rejected Petitioner's novel argument that the court should rely on the dicta of *Taylor II* to analyze the reasoning behind the *Taylor I* Court's summary denial of the *Batson* claim 11 years earlier. *Id.* at 795. As he does here, Petitioner argued that the Supreme Court of Kentucky misstated the *Batson* stand-

ard when it speculated in dicta about the reasoning behind the court's summary denial from more than a decade before. He argued, as he does here, that, because *Taylor I* was a summary denial, the federal habeas court must base its analysis under § 2254(d) on the dicta from *Taylor II* describing the earlier decision. The panel majority rejected that argument.

The panel majority explained that whatever the *Taylor II* court said about the *Taylor I* court's reasoning for rejecting Petitioner's *Batson* claim was "dicta," and "federal courts decide § 2254 petitions by comparing a state court judgment to Supreme Court precedent and, in doing so, . . . are to consider only the holdings and not the dicta on the precedent side of that comparison." *Id.* at 793. So it would be "odd, and unprecedented[,] . . . that [a federal court] would be obliged to—or that it would be proper . . . to—consider dicta on the state-court-judgment side of the comparison." *Id.* The panel majority also explained how unworkable it would be to consider the *Taylor II* court's commentary on the *Taylor I* court's resolution of the *Batson* issue. *Id.* at 793–95. Allowing a federal habeas court to examine what later state-court cases say about the holding of an earlier case would raise more questions than it answers. *Id.*

But even if it were proper to look to the *Taylor II* court's dicta, the panel majority still found no "'contrary to' or 'an unreasonable application of' *Batson* as it was understood when the Kentucky Supreme Court decided *Taylor I*." *Id.* at 795. After thoroughly examining *Batson* and the Supreme Court of Kentucky's recitation of *Batson*'s rules in *Taylor II*, *id.* at 795–97, the majority concluded that "[b]y its plain terms, the *Taylor II* passage presents a reasonable recitation of *Batson*." *Id.* at 797.

As for *Taylor II*'s application of *Batson*, "federal courts of appeals were setting forth and applying *Batson* similarly," and if the *Taylor II* Court's recitation of the *Batson* rules "would have found support in the precedent at the time of *Taylor I*," there is obviously "fair minded disagreement" about the propriety of the Supreme Court of Kentucky's application of *Batson*. *Id*. at 797–98.

3. The Sixth Circuit en banc court affirmed. *Jordan*, 10 F.4th at 628.

Writing for the majority, Judge Kethledge described Petitioner's "look through" theory—in which a federal court must consider what a later state court opinion said about an earlier judgment—as being "as convoluted as it sounds." *Id*. at 632. Judge Kethledge explained that it does not make sense to apply the look-through rule established in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), in the way Petitioner wants—using *Taylor II* to explain *Taylor I*. *Jordan*, 10 F.4th at 633–34. "*Wilson* established (or perhaps reiterated) . . . a presumption: that, '[w]here there has been one reasoned state judgment rejecting a federal claim, *later unexplained* orders upholding that judgment or rejecting the same claim rest upon the same ground.'" *Id*. at 633 (citation omitted). As Judge Kethledge explained, "this presumption [i]s 'realistic' because 'state higher courts often (but certainly not always) write "denied" or "affirmed" or "dismissed" when they have examined the lower court's reasoning and found nothing significant with which they disagree.'" *Id*. at 633. So unlike how Petitioner wants to apply *Wilson*, "*Wilson* [instead] addressed cases where a higher state court (typically the state supreme court) summarily affirms a lower court's *earlier* reasoned de-

nial of a federal claim—in which case one can typically presume that 'the state supreme court adopted the same reasoning.'" *Id.* (citation omitted). But, the en banc court held, that reasoning obviously does not apply here, where the *Taylor I* court could not be presumed to have adopted the reasoning of a decision that came 11 years later. *Id.* at 634.[4]

So after rejecting Petitioner's novel "look through" theory, the en banc court was left with an ordinary AEDPA case under § 2254(d) in which the state court provided no reasoning for its summary denial. That meant the en banc majority needed only to "ask whether any fairminded jurist could have adopted any argument or theory that supported the Kentucky Supreme Court's rejection of [Petitioner]'s *Batson* claim in *Taylor I*." *Id.* The en banc majority answered that question in the affirmative. *Id.* at 635.

The majority en banc opinion first pointed out that Petitioner's direct-appeal brief relied on Petitioner's case-specific numbers alone. *Id.* But, relying on case law, the majority en banc opinion found that whether such statistics establish a prima facie *Batson* claim "is a matter on which fairminded jurists could disagree." *Id.* (citation omitted). Moreover, the majority en banc opinion pointed out that Petitioner's attempt to remove three black jurors from the venire as "an immovable obstacle" to the argument that the prosecutor "aimed to purge the jury of African Americans"—at least under the AEPDA standard in which the court's inquiry is limited only to

[4] Indeed, one of the dissenting judges "agree[d] with the majority's rejection of [Petitioner]'s invitation to 'look-through' the decision in *Taylor I* to the later decision in *Taylor II*." *Jordan*, 10 F.4th at 645 (Cole, J., dissenting).

whether any fairminded jurist could conclude that Petitioner failed to establish an inference of discrimination. *Id*.

In rejecting Petitioner's arguments otherwise, the majority en banc opinion first rejected Petitioner's reliance on the chart submitted into the record by the prosecutor that listed the race of each juror. *Id*. at 635–36. The majority concluded, "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.'" *Id*. (citation omitted) So "[a] jurist could . . . fairly conclude that the chart reflected the prosecutor's intent to comply with the Constitution, rather than violate it." *Id*. at 636.

Next, the majority en banc opinion rejected Petitioner's reliance on the prosecutor's "fragment[ed]" statement. *Id*. at 636. The majority viewed that statement as simply the prosecutor attempting to convey to the trial court the relevant rules from precedent on the issue. *Id*. At bottom though, the majority recognized "that what the prosecutor sought to convey here is anyone's guess. What is clear enough, however—and what matters for our purposes—is that a fairminded jurist 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*.

Finally, the majority en banc opinion rejected Petitioner's reliance on the trial judge's statement. *Id*. The majority recognized that the trial judge's comment "by its terms was a comment about the adequacy of the record in [Petitioner]'s case—not

about any particular conclusion to draw from the record." *Id*. This interpretation was bolstered by the fact that "this same judge—who had obviously followed *Batson* at the Supreme Court—specifically found in his judgment, 27 days after *Batson* was decided, that 'the Defendant was afforded a fair trial, with his constitutional safeguards fully protected.'" *Id*.

The dissenting judges split into four different opinions. Judge Cole agreed with the majority that applying *Wilson*'s "look through" theory to a case that came *after* the state-court judgment is inconsistent with AEDPA and this Court's many decisions applying it. *Jordan*, 10 F.4th at 645 (Cole, J., dissenting). Nevertheless, Judge Cole concluded that "[n]o fair-minded jurist could conclude that [Petitioner] failed to raise at least an inference of discrimination." *Id.*

Each of the remaining dissents agreed with Petitioner that the federal court must decide whether *Taylor I* was contrary to or an unreasonable application of federal law by examining the language of *Taylor II* from eleven years later. *Id.* at 644 (Moore, J., dissenting); *id.* at 654 (Griffin, J., dissenting); *id.* at 662 (White, J., dissenting). Judge Griffin concluded that the dicta in *Taylor II* was contrary to *Batson*, and so he reviewed the claim de novo and found that Petitioner was entitled to relief. *Id.* at 658–59 (Griffin, J., dissenting). Judge White joined parts of both Judge Cole and Judge's Griffin's dissents, but wrote separately to address the majority's application of the AEDPA deference to the *Batson* claim. *Id.* at 662 (White, J., dissenting).

Petitioner now asks this Court to review the propriety of the majority en banc court's conclusions about his *Batson* claim.

ARGUMENT

Instead of focusing on why this case satisfies any of the ordinary criteria for certiorari, Petitioner asks this Court to review the decision below because he believes it was wrongly decided. He does not point to any relevant circuit split. And he offers no reason to believe that the issues decided below are significant enough to merit this Court's review. There is a reason for that: After rejecting Petitioner's novel "look through" theory of AEDPA that no other court has adopted, the decision below was a routine application of the highly deferential standard required under § 2254(d). There are no "compelling reasons" to grant certiorari here. *See* S. Ct. R. 10.

I. AEDPA makes this case a poor vehicle to review the Petitioner's *Batson* claim.

Because the state court resolved the Petitioner's *Batson* claim on the merits in a summary reversal, the Sixth Circuit was limited to reviewing the issue under AEDPA's "highly deferential standard for evaluating state-court rulings." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation omitted). That means the Sixth Circuit had to deny relief if it concluded that "any fairminded jurist could have adopted any argument or theory that supported the Kentucky Supreme Court's rejection of [Petitioner's] *Batson* claim." *Jordan*, 10 F.4th at 634 (citing *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). Not only is that an exceedingly difficult standard to satisfy, it means that the Sixth Circuit did not even directly resolve the *Batson* issue raised in the first question presented. Instead, it decided only whether the Supreme Court of

Kentucky's decision was a reasonable application of *Batson* at the time the opinion was issued and based on the record before it.

For the same reason, AEDPA makes this a poor vehicle for resolving the *Batson* question raised in the petition because it prevents the Court from addressing the issue on the merits. Instead of asking whether the prosecutor violated *Batson* when exercising his peremptory strikes, the Court will be limited to reviewing whether there is any reasonable ground for a fairminded jurist to have agreed with the Supreme Court of Kentucky's decision at the time it issued its decision. *See Cullen v. Pinholster*, 563 U.S. 170, 182–83 (2011). Not only would this Court analyze the question under such a highly deferential standard, it would have to do so based only on the clearly established rules from its decisions from more than thirty years ago—just after *Batson* was decided. *See id.* Given that limited kind of review, this case presents no opportunity for this Court to meaningfully discuss—much less resolve—the merits of Petitioner's *Batson* claim.

Consider just a couple of specific problems the Court would face trying to resolve the *Batson* issue Petitioner raises. The Petitioner identifies five "[r]elevant circumstances" that he believes help draw an inference of racial discrimination under the first step of *Batson*. Pet. 17–18. But of those five circumstances, *only one* was presented to the Supreme Court of the Kentucky when the Court denied his *Batson* challenge on the merits. The Petitioner's *Batson* argument before the state court "ran less than a page" and "argued only that 'the prosecutor directed 4 of his peremptory strikes toward black members of the jury panel and never offered any explanation for

the exercise of those peremptory challenges.'" *Jordan*, 10 F.4th at 631. The Petitioner did not rely on evidence of prior discrimination by the same office in other cases. He did not rely on his claim that the prosecutor's chart listing demographic information was "evidence tending to prove race was a factor." Pet. 18 (citing precedent that came 25 years after the state-court judgment). He did not argue that the prosecutor "admitted" he had no reason other than race for striking the jurors. *Id.* That means that, under AEDPA, this Court would be deciding not whether any of these circumstances created an inference of discrimination under *Batson*, but instead whether it was wholly unreasonable for the Supreme Court to conclude otherwise when almost none of these arguments had been presented. *See Pinholster*, 563 U.S. at 182–83.

AEDPA means any decision of this Court would be nothing more than error correction. Petitioner asks the Court to correct the Sixth Circuit's alleged misapplication of AEDPA—an ordinary legal question that should "not prompt this Court's review." *See Vermont v. Brillon*, 556 U.S. 81, 91 (2009). What's more, this woud-be error correction offers little in the way of continued upside for future lower courts. The Supreme Court of Kentucky rejected the Petitioner's claim in 1990. Because AEDPA asks whether the state court unreasonably applied this Court's precedent at the time of the decision, the only relevant precedent was *Batson* itself—"a paradigmatic 'general standard'" that requires state courts to "rely on their own judgment and experience" to apply. *Carmichael v. Chappius*, 848 F.3d 536, 547 (2d Cir. 2017). This Court has, of course, provided further insight into how *Batson* applies since 1990, but those decisions are irrelevant to applying AEDPA here. *Pinholster*, 563 U.S.

at 182–83. That means that even if this Court took the unusual step of granting review to error-correct the Sixth Circuit's AEDPA decision, it would provide almost no benefit to the next Court applying AEDPA to a *Batson* claim that must account for later decisions from this Court.

II. The second question presented does not merit review.

The second question presented does not merit review, either. In his second question, Petitioner raises a novel interpretation of 28 U.S.C. § 2254 that no other federal court of appeals has considered, much less adopted. He argues that when a federal court reviews a summary denial under AEDPA, it must not only "look through" to any earlier decisions that the state court might have implicitly adopted, but the court must also "look through" to any later decisions in which the court might have explained what happened in the prior case—even when that later explanation was dicta. As Judge Kethledge put it, that argument "is as convoluted as it sounds." *Jordan*, 10 F.4th at 632. And it failed to garner even unanimous support among the dissenting judges. *See id.* at 645 (Cole, J., dissenting) (rejecting the petitioner's novel "look through" argument because "federal courts conducting habeas review may consider only those materials that were in the state court record at the time it made its decision").

For present purposes, it is enough that the Petitioner's convoluted theory of AEDPA has not been adopted by any court of appeals. This Court rarely grants review to resolve issues that have not had an opportunity for "percolation in the lower courts." *Calvert*, 141 S. Ct. at 1606 (Sotomayor, J., respecting the denial of certiorari);

cf. Wilson, 138 S. Ct. at 1193 ("Because the Eleventh Circuit's opinion creates a split among the Circuits, we granted the petition."). There is no circuit split on this issue, and Petitioner has failed to show that any other court has even considered this question. So even if the second question presented is a significant issue of federal law, which it is not, "further percolation [will] assist [this Court's] review of this issue of first impression." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring).

III. The Sixth Circuit's decision below is correct.

Even if the petitioner raised issues that merit this Court's attention, the Court should still deny certiorari because the Sixth Circuit's decision below is correct. Petitioner is entitled to relief only if he can show that a state court's decision rejecting his claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In the end, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Woods v. Etherton*, 578 U.S. 113, 116–17 (2016) (per curiam) (citations omitted). "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

A. No theory of AEDPA supports relying on dicta in a decision from a decade later to overturn a state-court conviction.

The Sixth Circuit correctly rejected Petitioner's novel "look through" theory of AEDPA as being "as convoluted as it sounds." *Jordan*, 10 F.4th at 633. Petitioner's

argument has no basis in the law or common sense, and—if adopted—would undermine the entire point of AEDPA's deferential standards.

When a federal habeas court analyzes an unexplained state-court decision on the merits (here, *Taylor I*), the federal court must proceed through one of two routes. The federal habeas court must first "look through the silent state higher court opinion to the reasoned opinion of a lower court in order to determine the reasons for the higher court's decision." *Wilson*, 138 S. Ct. at 1195 (quotation marks omitted). If such a lower-court opinion exists, the federal court starts with a presumption that the high court adopted its reasoning. But if there is no lower court opinion to rely on, then a federal "habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter*, 562 U.S. at 102. This is a highly deferential standard that operates on the assumption that state courts will ordinarily follow federal law and apply it in a reasonable manner. *See id.* at 102–03.

Petitioner wants to extend the *Wilson* rule to include not only prior lower court decisions that a state court higher court might have implicitly adopted, but also *future* state high court decisions in which the state high court might remark on the reasoning of a prior decision. But the rationale that supports *Wilson*'s "look through" rule does not support Petitioner's "reverse look through" rule. As explained in *Wilson*, "the 'look through' presumption is often realistic, for state higher courts often . . . write

'denied' or 'affirmed' or 'dismissed' when they have examined the lower court's reasoning and found nothing significant with which they disagree." *Wilson*, 138 S. Ct. at 1194. But that reasoning does not extend to Petitioner's novel approach. To state the obvious, it is impossible to presume that a state court reviewed a future decision and "found nothing significant with which [it] disagrees." *Id.* So there is no justification for extending *Wilson* to the circumstances here.[5]

Even still, Petitioner's reverse-look-through rule is completely unworkable. Take this case as an example. Petitioner has never refuted the fact that the language from *Taylor I* on which he relies is "dicta" because the *Taylor II* court held that his claim was procedurally barred. *Jordan*, 10 F.4th at 631. And that dicta has no more or less weight than the dissent's point in *Taylor II* that "[t]he majority opinion's assertion that [Petitioner]'s *Batson* claim was rejected on direct appeal because he failed to establish a prima facie case is pure speculation." *Taylor II*, 63 S.W.3d at 171–72 (Stumbo, J., dissenting). So who are we to believe? More importantly, *why* would we believe one over the other? As the majority panel opinion reasoned:

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[5] Even stranger is how the dissenting judges below used *Wilson*'s look-through rule to apply de novo review to Petitioner's *Batson* claim after finding that the dicta in *Taylor II* was "contrary to" clearly established law. *See Jordan*, 10 F.4th at 652, 658–59 (Griffin, J., dissenting). *Wilson* itself limited the look-through rule to the unreasonable-application prong of § 2254(d)(1), not the "contrary to" clause. *See Wilson*, 138 S. Ct. at 1191–92. That makes sense given that the look-through rule is only a "presumption" that depends on factors such as whether the earlier state-court decision is particularly unreasonable. *Id.* at 1196. If the earlier (or in this case later) state-court decision applied a rule that was "contrary to" this Court's precedent, it is unclear why a federal court should presume that the court actually deciding the case adopted that same reasoning.

> [S]uppose the *Taylor II* dissent had been more explicit in its renunciation of the *Taylor II* majority's dicta, and had offered a competing description of the *Taylor I* majority's probable analysis that was a perfect recitation of *Batson*. How would we treat these competing versions of events? Would such a dissent negate the majority's dicta; would we ignore the dissent and nonetheless accept the majority's dicta; would we choose between them based on a substantive evaluation? Or suppose the *Taylor II* majority had stopped writing after denying the *Batson* and *Swain* claims procedurally, adding no dicta, and instead the paragraph describing *Taylor I*'s presumptive unstated analysis was included in only the *Taylor II* dissent—would we transplant the reasons from the *Taylor II* dissent in the same way as we would from the majority's dicta?

Simpson, 972 F.3d at 793–94. The majority panel opinion correctly pointed out many more problems with Petitioner's reverse-look-through rule. *Id*. at 794. And although Petitioner argues that the *Taylor II* court had some sort of special insight into the reasoning of the *Taylor I* court for denying Petitioner's *Batson* claim a decade earlier because the *Taylor II* court possessed two of the same justices as the *Taylor I* court (including its author), "the reality is that these were separate opinions by two different groups of people, considering different issues, under different circumstances." *Id*. at 793 n.14. At bottom, the majority en banc opinion appropriately termed what a federal habeas court would have to engage in here under Petitioner's proposed rule as "judicial forensics." *Jordan*, 10 F.4th at 634.

B. The state court's dicta in *Taylor II* is a reasonable recitation of the *Batson* standard.

Even if a federal habeas court should limit its review under § 2254(d) to dicta from a later state-court decision, the language Petitioner relies on from *Taylor II* is a reasonable characterization of the *Batson* standard.

Petitioner reads *Taylor II* as applying a heightened standard of proof, in which numbers alone can never raise an inference of purposeful racial discrimination. But *Taylor II* does not say that. The court recited the three-part *Batson* test with language that reasonably captures its holding. *Taylor II*, 63 S.W.3d at 156. And after that reasonable recitation, the Supreme Court of Kentucky noted that: (1) there was "no evidence" that the prosecutor's office's alleged practice of systematically excluding African Americans from juries occurred at Petitioner's trial; (2) the trial court itself concluded that there was no evidence that African Americans were systematically excluded from the venire at Petitioner's trial; and (3) Petitioner himself pointed to no other argument besides a numbers argument. *Id*. at 157. That looks exactly like a "totality of the relevant facts" test, which Petitioner agrees is the correct analysis. Pet. Cert. 15 ("In deciding whether the defendant has made the requisite showing, the trial court should consider *all* relevant circumstances." (quoting *Batson*, 476 U.S. at 96)). The Supreme Court of Kentucky was not incorrect to reject Petitioner's solely-based-on-numbers *Batson* argument.[6]

[6] *See, e.g., United States v. Sangineto-Miranda*, 859 F.2d 1501, 1521 (6th Cir. 1988) ("We reject [the defendants'] underlying premise that an inference of intentional discrimination will *always* arise if, without more, there is a showing that the prosecution used all of its peremptory challenges to exclude blacks."); *United States v. Grandison*, 885 F.2d 143 (4th Cir. 1989) ("[The defendants] contend that statistical analysis supports an inference of purposeful discrimination. . . . Such statistical comparisons are, however, a poor way to resolve a *Batson* challenge."); *see also Flowers v. Mississippi*, 139 S. Ct. 2228, 2244–50 (2019) (relying on more evidence to find an inference of discrimination than simply the fact that the prosecutor struck five of six African-American jurors); *Carmichael*, 848 F.3d at 548 ("Whether the 75 percent exclusion rate at issue here" established a prima facie *Batson* claim "is a matter on which fair-minded jurists could disagree.").

The only way to conclude otherwise is to apply an overly technical and uncharitable reading of *Taylor II*. But AEDPA requires the opposite. This Court has made clear that a "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Doing so "is also incompatible with § 2254(d)'s 'highly deferential standard for evaluating state-court rulings,' which demands that state-court decisions be given the benefit of the doubt." *Id.* (citations omitted)). So even if the *Taylor II* court's recitation of the *Batson* test were marginally ambiguous, the benefit of the doubt goes to the state court that otherwise considered all of the right kinds of evidence and issues in explaining its reasoning.

C. The "totality of the relevant facts" does not give rise to an inference of discrimination.

Every court that has reviewed Petitioner's case has found that it is at least reasonable to conclude that the totality of circumstances does not give rise to an inference of racial discrimination in the jury selection at Petitioner's trial. *See Batson*, 476 U.S. at 96 ("In deciding whether the defendant has made the requisite [prima facie] showing, the trial court should consider all relevant circumstances."). There is no question that fairminded jurists can reasonably disagree as to whether an inference of racial discrimination exists here.[7] And that is dispositive under AEDPA.

[7] Although Petitioner points out that "[t]he trial court did not conduct a *Batson* hearing or make a finding regarding whether [Petitioner] established a prima facie case of discrimination because *Batson* had yet to be decided," Pet. Cert. 17 n.8, Petitioner never asked the Supreme Court of Kentucky to remand that issue back to the trial court on that basis. *See Simpson*, 972 F.3d at 786 n.10 (quotation marks omitted).

Petitioner points to four specific facts that purport to show that the prosecutor struck jurors from the venire based on race. Pet. Cert. 17–18. Keep in mind that most of those reasons were never presented to the Supreme Court of Kentucky. *See Pinholster*, 563 U.S. at 182–83. Even still, they are unavailing.

1. First, Petitioner points to the fact that the same prosecutor's office that prosecuted Petitioner also prosecuted the defendants in *Batson* and *Griffith*, two cases in which this Court made pronouncements about racial discrimination in jury selection. Pet. Cert. 17–18. This argument was never raised to the Supreme Court of Kentucky, and so it was not part of the totality of the circumstances the court had before it. Yet, even still (and as the trial court concluded), there was no evidence that members of Petitioner's race were systematically excluded from the jury. *Simpson*, 972 F.3d at 792 n.13. Indeed, as the majority en banc opinion correctly pointed out, it seems counterintuitive for "a prosecutor who aimed to purge the jury of African-Americans [to] object to the *defense*'s attempt to remove three of them from the venire." *Jordan*, 10 F.4th at 635. Recall that the prosecutor in Petitioner's case successfully objected to Petitioner's attempt to remove three African Americans from the venire. *Id*. It is at least reasonable for a fairminded jurist to have concluded that this evidence tends to disprove racial discrimination in this case.[8]

[8] The Petitioner asserts that it is possible for a prosecutor to racially discriminate against one juror at the same time that he or she does not racially discriminate against another. Pet. Cert. 22–23. But that has never been Petitioner's claim. He did not object to any specific peremptory challenge, but has instead always argued that there was systematic racial discrimination across the board. Even still, the point here is that under AEDPA it is certainly *reasonable* to reject an inference of discrimination

2. Second, Petitioner points to the prosecutor's jury chart. Pet. Cert. 18–20. Petitioner argues that the prosecutor's listing of the race of each juror evidences an intent to remove jurors based on race. Petitioner did not rely on this chart when making his *Batson* challenge before the Supreme Court of Kentucky.[9] Even still, and as Judge Kethledge explained, "that same chart also noted the education, employment status, occupation, and marital status of each qualified member of the venire," and those characteristics "bore directly on whether the venire's members reflected a fair cross-section of the community." *Jordan*, 10 F.4th at 635. "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." *Id.* at 636. So "[a] jurist could therefore fairly conclude that the chart reflected the prosecutor's intent to comply with the Constitution, rather than violate it." *Id.* That is particularly true given that it was the prosecutor who submitted the chart into evidence in response to Petitioner's objection.

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lodged against a prosecutor who successfully defeated defense counsel's effort to strike three African-American jurors.

[9] Not only did Petitioner not rely on the chart when making this claim before the Supreme Court of Kentucky, but the case he relies on in his petition—*Foster v. Chapman*, 578 U.S. 488 (2016), would not be decided until twenty-five years later. This only further highlights why the posture of this case—an AEDPA challenge on a *Batson* issue from decades ago—makes this case such a poor candidate for certiorari. Even still, the prosecutor's file in *Foster* is in no way comparable to a simple chart of demographic information at issue here. *See Foster*, 578 U.S. at 493–96 (outlining the multitude of references to race, and only race, in the prosecutor's file, and noting that "[t]he sheer number of references to race in that file is arresting").

3. Third, just like he did in his direct appeal, Petitioner points to the numbers. Pet. Cert. 18. But there is more to the numbers than Petitioner admits. Recall that the prosecutor did not use all of his peremptory strikes, and he could have removed one more African American juror without striking them all. *Jordan*, 10 F.4th at 630. Again, it seems counterintuitive for a prosecutor who is intending to systematically remove as many minority members from the jury as possible to leave peremptory strikes on the table and at least two African American jurors on the venire.

On top of that, the ratios here are, at the very least, "matter[s] on which fair-minded jurists could disagree." *Carmichael*, 848 F.3d at 547–48 (quotation marks omitted). That is what the Second Circuit concluded in a unanimous opinion just five years ago—after decades of precedent applying *Batson* that the Supreme Court of Kentucky did not have in *Taylor I*. In *Carmichael*, the court concluded that "[w]hether [a] 75 percent exclusion rate" establishes a prima facie *Batson* claim "is a matter on which fairminded jurists could disagree." *Id.* It is hard to see how fairminded jurists could not disagree on the 67% rate that the Supreme Court of Kentucky had before it in *Taylor I*.

4. Finally, Petitioner points to the prosecutor's ambiguous statement that "[i]n accordance with the 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." Pet. Cert. 18, 20–22. Again, Petitioner did not present this as proof of discrimination to the Supreme Court of Kentucky when it decided *Taylor I*.

But as the majority en banc opinion correctly points out, the meaning of the prosecutor's statement "is anyone's guess." *Jordan*, 10 F.4th at 636. Petitioner's theory—that the prosecutor is admitting he struck the jurors because they are African American—would be strange indeed. Given that the prosecutor did not even articulate a complete thought, it is reasonable for a fairminded jurist to conclude that this incoherent statement, which was never presented to the state court as evidence of discrimination, is not enough to establish a prima facie case under *Batson*.

Consider just one possibility as to how the prosecutor might have intended his thought to finish: "[i]n accordance with the case law, the Commonwealth has no other rationale reason" *other than education, employment status, or views on capital punishment to strike these jurors*. Indeed, the majority panel opinion and the district court both noted that these easily could have been the justifications for the prosecutor's use of peremptory strikes on each of the African-American jurors the prosecutor struck. *Simpson*, 972 F.3d at 787; *Simpson*, 2014 WL 4928925, at *36. And the prosecutor's "California law" point seems to suggest that he believed any follow-up inquiry on his reasoning for using peremptory strikes should not arise unless all minority members have been excluded from the venire. If that is what he meant (and it is impossible to know), that is not an admission that his reasons are discriminatory; it is an objection to disclosing his legal strategy for peremptory strikes unless he is legally required to do so.

In any event, "what matters for our purposes[] is that a fairminded jurist 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." *Jordan*, 10 F.4th at 636. Indeed, if the opposite were true, one would think that Petitioner would have presented that evidence to the Supreme Court of Kentucky, instead of waiting until his federal habeas petition to do so. *See Simpson*, 972 F.3d at 787–88.

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In the end, Petitioner's argument is nothing more than a de novo challenge to the state court's *Batson* decision. That is "fundamentally inconsistent with AEDPA." *Shinn v. Kayer*, 141 S. Ct. 517, 423 (2020). Based on all the facts and relevant circumstances, at the very least, fairminded jurists could disagree as to whether Petitioner raised an inference of racial discrimination during jury selection at his trial, evidenced by the fact that his position has been consistently rejected by every court to have considered it.

CONCLUSION

For these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted by,

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