
No. 21-6747

IN THE
SUPREME COURT OF THE UNITED STATES

VICTOR DEWAYNE TAYLOR, PETITIONER

v.

SCOTT JORDAN, WARDEN, RESPONDENT

**PETITIONER' REPLY TO RESPONDENT'S
BRIEF IN OPPOSITION**

THIS IS A CAPITAL CASE

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ARGUMENT IN REPLY

Respondent's Brief in Opposition (BIO) advances three main arguments aimed at avoiding scrutiny by this Court of the split, *en banc* Sixth Circuit decision. First, federal habeas law, including §2254 (d) and this Court's precedent, does not require federal courts to give appropriate deference to the legal and factual reasons provided by a state court in the last related decision explaining its rationale for summarily rejecting a prisoner's federal claim in an earlier decision; second, the Sixth Circuit majority was correct when it declared a categorical bar of habeas relief under the "unreasonable application" clause of §2254(d)(1) on a step one *Batson v. Kentucky*, 476 U.S. 79 (1986) claim unless the defendant makes out a *prima facie* case that the prosecutor intended to strike *all* Black jurors on the basis of race; and three, Victor Taylor failed to establish a *prima facie* case of discrimination under *Batson* despite evidence in the state court record that the prosecutor considered race when selecting jurors, disproportionally struck Black jurors compared to white jurors, and admitted to striking Black jurors based on their race. Respondent is wrong as a matter of law on all three arguments¹.

¹ Respondent urges that that the Sixth Circuit decision is a "poor vehicle" for review because AEDPA "prevents the Court from addressing the [*Batson*] claim on the merits. See BIO, 17-20. However, this Court prefers to grant review of arguably meritorious federal constitutional claims at the federal habeas stage rather than the state post-conviction stage of the proceedings. *Lawrence v. Florida*, 549 U.S. 327, 335 (2007) (citing *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J. concurring)). This Court has accepted review of more than a hundred cases in the federal habeas stage since the AEDPA was enacted in 1986.

I. The Sixth Circuit majority’s refusal to consider the last reasoned state court opinion that provided a rationale for the same court’s summary denial of Taylor’s *Batson* claim inexcusably fails to serve the comity interests that prompted Congress to adopt the deference provisions in the AEDPA and is in conflict with this Court’s precedent including *Wilson v. Sellers*, 138 S.Ct. (2018)

Respondent argues unconvincingly that when a relevant state court decision on the merits does not come accompanied with reasons for its decision, a federal habeas court is *not* required to focus upon the last related state-court decision that did provide a relevant rationale for its decision – if the last related decision was rendered *after* the unexplained state-court decision was rendered. According to Respondent, although the subsequent opinion was by the *same* court and in the *same* case, granting the subsequent state-court opinion substantial deference “has no basis in law and would undermine the entire point of AEDPA’s requirement that federal courts apply a deferential standard of review.” BIO 22-24.

As Mr. Taylor explained in his petition for certiorari, the Sixth Circuit *en banc* majority’s insistence 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 its own 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*, 138 S.Ct. 1188 (2018), *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) and *Harrington v. Richter*, 562 U.S. 86 (2011). See

Pet. 8-14. The Antiterrorism and Effective Death Penalty Act (AEDPA) places “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)). Thus, the AEDPA is intended to ensure federal courts “afford state courts due respect.” See *Woods v. Donald*, 575 U.S. 312, 316 (2015).

A. Respondent greatly exaggerates the supposed difficulty of requiring federal courts to pay deference to a state court’s rationale for the same court’s previous summary denial of a federal constitutional claim

Respondent claims that federal courts should ignore the last reasoned decision in which a state court explains its rationale for previously denying a constitutional claim without comment because “it is impossible to presume that a state court reviewed a future decision and “found nothing significant with which [it] disagrees. BIO 23 (citing *Wilson v. Sellers*, 138 S.Ct. at 1194.). Respondent’s argument is specious. Under the circumstances of this case in which the highest state court provided the rationale for its own previous unexplained ruling in a previous related decision, federal courts do not have to “presume” anything regarding what the state court reviewed from any “future” state court opinion that has yet to be decided. Rather, the federal habeas court needs to focus upon the subsequent opinion from the *same court*

in the *same case* articulating why it rejected” the federal constitutional claim. See *Taylor v. Jordan*, 10 F.4th 625, 654 (2021) (Griffin J., dissenting) (emphasis in original). As the *Taylor* dissent observed, “[w]e need only take the Kentucky Supreme Court at its word.” *Id.* at 654.

Respondent’s argument that the federal court should disregard the state court’s explanation for its previous ruling because one Justice in *Taylor v Commonwealth*, 63 S.W.3d 151 (Ky. 2001) (hereinafter *Taylor II*) disagreed with the rest of the Kentucky Supreme Court regarding the courts stated reason for summarily denying Taylor’s *Batson* claim is equally specious. See Respondent’s BIO 23 (“So who are we to believe? More importantly, why would we believe one over the other?”). This Court set forth a rebuttable “presumption and not an absolute rule” that the court that issued the unexplained decision relied upon the same rationale as the court that provided a rationale for its decision. In *Wilson v. Sellers*, 138 S.Ct. 1188, 1196 (2018). If anything, the rebuttable presumption that the Kentucky Supreme Court was correct when it explained the rationale for its own prior decision should be greater than the presumption in *Wilson* that the higher state court adopted the rationale of a different court when the former denied the claim without explanation. In any event, Respondent’s confusion about “who are we to believe? and more importantly why would we believe one over the other?,” BIO 23, is a recent development. In the appeal brief to the Sixth Circuit, Respondent agreed that “[i]n the process of denying the [*Swain*] claim, the *Taylor II* 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).” *Taylor*, 10 F.4th at 654.

B. The Sixth Circuit should have focused upon *Taylor II* in which the Kentucky Supreme Court addressed and explained “the reason Taylor’s *Batson* claim failed on direct appeal,” whether the *Taylor II* decision on the merits is construed as dicta, or not

Respondent claims the federal habeas court need not focus upon the passage in *Taylor II* in which the Kentucky Supreme Court explained the actual reason it denied Taylor’s *Batson* claim in *Taylor v. Commonwealth*, 821 S.W.2d 72 (Ky. 1990) (hereinafter *Taylor I*), because “the *Taylor II* passage on which he relies is dicta.” BIO 23. Regardless of whether or not the *Taylor II* analysis is construed as dicta, focus upon what the Kentucky Supreme actually stated in “the last related state-court decision that does provide a relevant rationale,” *Wilson*, 138 S. Ct. at 1192, is much more consistent with the AEDPA and this Court’s holdings which require federal habeas courts to remain focused on “what a state court knew and did.” *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). The approach of the majority of the Sixth Circuit of substituting its own speculation of what it thinks the Kentucky Supreme court could have considered instead of taking the state court at its word for why it denied Mr. Taylor’s *Batson* claim is the antithesis of granting state court decisions substantial deference. See *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Consistent with the obligation of federal court’s to focus on state court

decisions, it bears noting that although the Kentucky Supreme Court affirmed the denial of his state post-conviction claim brought under *Swain v. Alabama*, 380 U.S. 202 (1965) on state procedural grounds, *Taylor II*, 63 S.W.3d at 156-157, the court did not clearly and expressly rest its judgment upon procedural grounds. See *Harris v. Reed*, 489 U.S. 255 (1989) (“a procedural default does not bar consideration of a federal claim on habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar.”). Therefore, federal court consideration of the *Batson* analysis in *Taylor II* is appropriate. As for Respondent’s dicta argument, the *Taylor II* passage explaining why it rejected Taylor’s *Batson* claim on direct appeal is not dicta. The Kentucky Supreme Court rested its judgment in the post-conviction *Swain/Batson* claim on two distinct grounds: procedural default² and a decision on the merits³. As this Court

² “Taylor claims error under *Swain* and its “crippling burden of proof” rather than *Batson* because he alleged a *Batson* violation on direct appeal. The issue was decided against Taylor on direct appeal and, therefore, cannot be raised in his RCr 11.42 motion. “It is not the purpose of RCr 11.42 to permit a convicted defendant to retry issues which could and should have been raised in the original proceeding, nor those that were raised in the trial court and upon an appeal considered by this court.” The *Swain* claim is an attempt to get around this long-established rule.” *Taylor II*, 63 S.W.3d at 157. (Citation omitted.).

³ “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. 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 blacks from juries in criminal trials. 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 II*, 63 S.W.3d at 157. (Citation omitted.).

has long held, “where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.” *Woods v. Interstate Realty Co.*, 337 U.S. 535 537 (1949).

Respectfully, this Court should grant review of the Sixth Circuit’s *en banc Taylor* opinion. By refusing to consider the state court’s actual rationale for rejecting Taylor’s *Batson* claim, a majority of the court answered an important question of federal law regarding the respect and deference due to state courts in habeas proceedings in a way that conflicts with relevant decisions of this Court including *Wilson v. Sellers*, 138 S.Ct. 1188 (2018). See S. Ct. R. 10 (c); Pet. at 8-14.

Regardless of whether this decision is in conflict with a decision of another United States court of appeals, the Sixth Circuit’s (mis)understanding that the principles articulated in *Wilson v Sellers* are limited to the exact sequence of events that occurred in that decision, is troublesome. Given that the AEDPA is central to the determination of all §2254 cases, the Sixth Circuit’s basic misunderstanding of the need for federal court deference to state court decisions is likely to impact many more habeas cases within the circuit.

II. A basic equitable protection point: In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many.

***Flowers v. Mississippi*, 139 S.Ct. 2228, 2241 (2019)**

Respondent adopts the Sixth Circuit majority's mistaken belief that the *Batson v. Kentucky* decision requires Victor Taylor to prove the prosecutor at his trial intended to exclude *all* prospective Black jurors because of race, or as the majority stated it, "purge the jury of African-Americans." *Taylor*, 10 F. 4th at 635. Relying heavily upon the majority opinion, Respondent argues:

Yet, even still (and as the trial court concluded), there was no evidence that members of Petitioner's race were systematically excluded⁴ from the jury. 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." 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.

BIO 27 (*citing Taylor*, 10 F.4th at 635).

It is hardly surprising that a prosecutor who thought he was allowed under the law to intentionally strike Black jurors as long as he did not strike "all" of them⁵, would be willing to accept Black jurors so strongly prosecution-oriented that defense

⁴ Respondent inexplicably argues that Taylor is asserting an equal protection violation for the first time in his petition for certiorari to this Court. BIO 27, FN 8.

⁵ The trial prosecutor's response to Taylor's objection to the prosecutor striking four of six jurors remaining in the venire was: "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).

counsel tried to strike them for cause⁶. Furthermore, rather than tending “to disprove racial discrimination,” the prosecutor’s objections to the defendant’s striking of Black jurors for cause may be more likely an “attempt to obscure the otherwise consistent opposition to seating Black jurors” *Flowers v. Mississippi*, 139 S.Ct. at 2246 (quoting *Miller-El v. Dretke*, 545 U.S. 231, 250 (2005)).

In any event, the question to be answered by the Sixth Circuit, at least regarding the “unreasonable application” clause of § 2254 (d) (1), is whether no fair-minded jurist could conclude Taylor failed to raise “at least an inference of discriminatory purpose.” See *Batson*, 476 U.S. at 94⁷. A prima facie case of discrimination can be made out by offering “a wide variety of evidence so long as the sum of the proffered facts “gives rise to an inference of discriminatory purpose.” *Johnson v. California*, 545 U.S. 162, 169 (2005) (citing *Batson*, 476 U.S. at 94). Establishing a prima facie case of discrimination is not onerous - an inference is less

⁶ Respondent argues it would be “strange indeed” for the prosecutor to admit to intentionally striking Black jurors based solely on race, BIO 30, but *Batson* was not decided until after Taylor was convicted and sentenced to death. Therefore, as far as the trial prosecutor knew, the law allowed him to intentionally discriminate in jury selection - but “*if I strike all it then becomes objectionable.*” *Taylor*, 10 F.4th at 636 (emphasis added). A violation of the equal protection under *Batson* does not require animosity and can be committed by a person of any race, regardless of their knowledge of the law, if that person purposefully strikes a prospective juror because of race.

⁷ The “contrary to” and “unreasonable application” clauses of § 2254 (d)(1) have independent meaning. *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000). Federal court consideration of *Taylor II*, which as explained previously is required under AEDPA, reveals that the *Taylor II* court held Mr. Taylor to a standard of review different from the law set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986), contrary to clearly established federal law. See Pet. 14-17.

than a preponderance and can be made by offering “a wide variety of evidence.” *Id.* at 168-69. Even assuming a prosecutor’s decision to object to the defendant’s striking of Black prospective jurors for cause somehow “tends to disprove racial discrimination,” it would certainly not create “an immovable obstacle to Taylor or any other defendant from making out a prima facie case of discrimination. That is necessarily so because “one racially discriminatory peremptory strike is one too many.” *Flowers v. Mississippi*, 139 S.Ct. 2228, 2241 (2019). Therefore, regardless of the deference owed to the state court decision, the prosecutor’s objection to the defense striking of three Black jurors for cause does not create “an immovable obstacle to Taylor’s [step one] *Batson* claim” *Taylor*, 10 F. 4th at 635. Regardless of whether the prosecutor objected to the striking for cause of three or three hundred Black jurors, Taylor may, and in fact, did, establish a prima facie case under *Batson*⁸. See Pet. 17-22; *Taylor*, 10 F. 4th at 646 (Judges Cole, Griffin, and White in separate opinions, joined by Clay, Stranch, Donald, and Gibbons, dissenting).

⁸ Respondent’s reference in the BIO to the race of the prosecutor, BIO 4, 6 and judge, BIO 6, is improper. “*Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants.” *Flowers*, 139 S.Ct. 2242. Just as “the core guarantees of equal protection ensuring citizens that their State will not discriminate on account of race would be meaningless were [this Court] to approve the exclusion of jurors on the basis of assumptions which arise solely from the jurors’ race,” so too would the guarantees be meaningless if this Court were to assume prosecutors are less likely to discriminate in the exclusion of jurors, or judges more likely to prevent such discrimination, based solely on the prosecutors’ and judges’ race. See *Batson*, 476 U.S. at 98-99.

III. Respondent's efforts to attribute to the trial prosecutor arguments he did not make in order to camouflage the overtly racist reason the prosecutor actually provided for removing Black persons from Taylor's trial conflicts with *Batson v. Kentucky*

Included within the variety of facts and circumstances⁹ before the Kentucky Supreme Court in *Taylor I* and *Taylor II*, is the prosecutor's statement in response to Taylor's objection, in which he acknowledged he struck four prospective jurors because of race: "[i]n accordance with case law, the Commonwealth has no other rational reason -- if I strike all (of the Black jurors) it then becomes objectionable under the cases from, as I understand it, coming from California." Respondent attempts to explain away the prosecutor's statement by offering "just one possibility" as to what the trial prosecutor may have meant to say:

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

⁹ Respondent's repeated reliance upon the holding in *Cullen v. Pinholster*, 563 U.S. 170 (2011) in support of his argument that this case is a "poor vehicle" for review is unavailing as well. See BIO 18-19, 27-30. In *Pinholster*, this court held that habeas review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. 563 U.S. at 181. In Mr. Taylor's case, all five relevant facts and circumstances giving rise to an inference of discrimination were before the Kentucky Supreme Court including the prosecutor's jury chart listing the race of the prospective jurors, and the transcript of the exchange between defense counsel and the prosecutor leading to the unconstitutional removal of the Black jurors.

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. BIO, 30.

Notwithstanding the absurd notion that the prosecution’s statement was really “an objection,” BIO 30, Respondent’s post-hoc argument is improper. A *Batson* analysis is not a “mere exercise in thinking of a rational basis” for a prosecutor’s decision to strike a juror. Instead, the *Batson* procedure is “designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.” *Johnson*, 545 U.S. at 172. Citation to the district court opinion and the majority panel opinion as support is equally unavailing. A court’s “substitution of a reason” does not satisfy the “prosecutor’s burden of stating a racially neutral explanation for their actions.” *Miller El v. Dretke*, 545 U.S. 231, 252 (2005).

Conclusion

Wherefore, for these additional reasons, this Court should grant certiorari.

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