No. _____

In the Supreme Court of the United States

GEORGE STEPHENSON, WARDEN, PETITIONER

v.

LAFAYETTE DESHAWN UPSHAW

EMERGENCY MOTION SEEKING TO RECALL AND STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PENDING THE STATE OF MICHIGAN'S PETITION FOR A WRIT OF CERTIORARI

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit

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TABLE OF CONTENTS

MOTION TO STAY MANDATE
APPENDIX TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Rules

INTRODUCTION

Respondent Lafayette Upshaw committed a violent armed robbery. Were it not for bullet-proof glass, he would have killed Tina Williams, who was working as a gas-station cashier. A Michigan jury found Upshaw guilty, and the Michigan Court of Appeals affirmed that conviction. Although the state court fully considered all of Upshaw's claims in a logical and sensible manner, a federal district court stepped in and granted habeas relief on not just one, but *two*, bases. Neither was appropriate under the strict limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2254(d)(1).

The Sixth Circuit affirmed one of those bases after bypassing AEDPA by pointing to a single statement made in a four-Justice plurality decision from this Court. But that statement was not a "holding" under the framework announced in *Marks* v. *United States*, 430 U.S. 188, 193 (1977), and therefore cannot be "clearly established Federal law" for purposes of § 2254(d)(1). It is important for this Court to make that obvious notion explicit, else federal courts may continue to upend valid and final state convictions merely because they disagree with a state court's application of this Court's precedents.

The Sixth Circuit also affirmed the habeas grant because it believed that counsel was ineffective for failing to raise an alibi defense. But such a claim requires proof that there is a reasonable probability of a different result had the defense been presented at trial—*i.e.*, prejudice. *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). Both the state court and the Sixth Circuit analyzed that requirement, and they came

to different results. Such differences may occur between jurists when they analyze claims in the first instance, but the Sixth Circuit, under § 2254(d)(1), was supposed to defer to the state court's opinion. It did not even purport to do so here. With respect to this claim, it is important for this Court to remind the Sixth Circuit that the statutory limitations on federal habeas review are not optional.

Because this case presents two important questions for review, the State should be given an opportunity to at least file a petition for a writ of certiorari in this Court. But the Sixth Circuit undermined that opportunity when it rejected the State's request to stay the mandate. Without a stay, the State will be forced to either retry or release Upshaw before this Court makes its decision on whether to grant the petition for a writ of certiorari. The State should not have to retry Upshaw—which could moot the petition—and it should not have to take unnecessary steps to even prepare for retrial while the petition is still pending. Nor should it have to instead release Upshaw and potentially endanger the public.

Given the important questions, the reasonable probability that this Court will grant the petition, and the likelihood of irreparable harm to the State without a stay, this Court should recall and stay the mandate while the petition is pending.

OPINIONS BELOW

On May 19, 2016, the Michigan Court of Appeals affirmed Upshaw's state convictions in an unpublished per curiam opinion. (Mot. App'x 1a–11a.) The Michigan Supreme Court denied leave to appeal on April 4, 2017. (Mot. App'x 12a.) On July 14, 2022, the United States District Court for the Eastern District of Michigan granted habeas relief, ordering that the State release or retry Upshaw "within 120 days."

(Mot. App'x 13a–68a.) The district court stayed that order pending the State's appeal to the United States Court of Appeals for the Sixth Circuit. (Mot. App'x 69a–71a.) On March 28, 2024, the Sixth Circuit affirmed the district court's judgment granting habeas relief. (Mot. App'x 72a–89a.) Thereafter, on April 23, 2024, the Sixth Circuit denied the State's motion to stay the mandate. (Mot. App'x 90a–91a.) That court then issued the mandate on May 1, 2024. (Mot. App'x 92a.) Following that, on May 6, 2024, the district court lifted its stay and ordered that the State release or retry Upshaw "within 120 days" from the date of its order. (Mot. App'x 93a–94a.)

JURISDICTION

This Court has jurisdiction to review the Sixth Circuit's order denying a stay under Supreme Court Rule 23 and 28 U.S.C. § 2101(f).

STATEMENT OF THE CASE

Around 3:30 a.m. on May 28, 2014, a man entered a gas station in Detroit. (Mot. App'x 1a–2a.) The man asked the cashier about the coffee machine, but he did not get any coffee and stood silently by the machine. (Mot. App'x 2a.) Shortly thereafter, another man—armed with a gun—entered, robbed a customer, then demanded money from the cashier. (Mot. App'x 2a.) The cashier refused, so the man fired his weapon at her six times. (Mot. App'x 2a.) The shots did not hit their target because the cashier was standing behind bullet-proof glass. (Mot. App'x 2a.) The armed assailant then tried to break into the cashier's work station, but he was unsuccessful and eventually fled the scene. (Mot. App'x 2a.) During the altercation, the suspiciously acting first man remained by the coffee machine, then he fled in the same

direction as the armed assailant. (Mot. App'x 2a.) Surveillance footage at the gas station captured the robbery. (Mot. App'x 2a.)

A few hours later, Respondent Lafayette Upshaw was arrested as he was exiting a window of a house while committing a home invasion. (Mot. App'x 2a.) The police also apprehended Darrell Walker, who was exiting a different window of the same house. (Mot. App'x 2a.) After the police identified Walker on the gas station surveillance footage as the first man and discovered that he had been arrested with Upshaw hours later, the police sought to set up a live lineup, but Upshaw refused to participate. (Mot. App'x 6a.) The cashier later identified both men in separate photographic lineups—Upshaw, she said, was the shooter. (Mot. App'x 2a.)

The two men were tried together. (Mot. App'x 2a.) During jury selection, the prosecutor exercised six of her first eight peremptory challenges against Black jurors. (Mot. App'x 8a.) The defense raised an equal-protection challenge under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). (*Id.*) Without ruling on whether Upshaw had made a prima facie showing of discriminatory intent, the state trial court asked the prosecutor for a response and ultimately rejected the defense's challenge. (Mot. App'x 8a–9a.)

Upshaw repeated his *Batson* challenge on appeal to the Michigan Court of Appeals. (Mot. App'x 8a.) In a lengthy analysis, the state appellate court described the three steps that a trial court must engage in when faced with a *Batson* challenge, noting first that "the opponent of the peremptory challenge must make a prima facie showing of discrimination." (Mot. App'x 8a (internal quotation omitted).) The court described the trial court's ruling on that step as "unclear and muddled." (Mot. App'x

9a.) But "[a]ssuming that the trial court found that defendants had made a prima facie case of discrimination," the court said that was an erroneous ruling. (Mot. App'x 10a.) The court noted that the defense had failed to make a record or argument as to the circumstances surrounding the prosecution's peremptory challenges, such as "the percentage of jurors of a particular race or ethnicity struck and the percentage of their representation on the venire, whether members of the relevant racial group served unchallenged on the jury, and whether the prosecutor used all or nearly all of his or her challenges to strike venire members of a particular race." (Mot. App'x 10a. (internal quotation omitted).) And because the court was unable to determine those circumstances from the record, it held that Upshaw had not made a prima facie case of discrimination. (Mot. App'x 10a.) Given this analysis, the court further held that the remaining two steps were moot. (Mot. App'x 10a.)

Upshaw also argued on appeal that his trial counsel was constitutionally ineffective for failing to investigate and present an alibi defense. (Mot. App'x 7a.) He produced a letter from his grandmother in which she claimed that on the day of the robbery she had fallen asleep and was awoken by Upshaw knocking on the door. (Mot. App'x 12a.) His grandmother specified that this occurred "between 3:20 and 3:30 [a.m.]" and that she knew this because she looked at the time on the television cable box when she heard the knock on the door. (Mot. App'x 12a.) She further wrote that "he left at around 7:45 [a.m.]" and that she knew this because she "was still upset, sitting on [her] front porch." (Mot. App'x 12a.)

The Michigan Court of Appeals rejected Upshaw's ineffective-assistance claim. (Mot. App'x 7a–8a.) The court reasoned that Green's letter "implied or suggested that Upshaw remained at the home for several hours, but it did not expressly provide so, nor did [she] state that she observed him at the exact time of the robbery." (Mot. App'x 8a.) The court also noted the evidence against him, including the cashier's identification, the jury's ability to observe the surveillance footage, and Upshaw's arrest with Walker a few hours later. (Mot. App'x 6a.) Accordingly, the court held that Upshaw could not show that he was prejudiced by counsel's allegedly deficient performance. (Mot. App'x 8a.) Upshaw appealed that decision to the Michigan Supreme Court, which denied leave. (Mot. App'x 12a.) This Court also denied a petition for a writ of certiorari. *Upshaw* v. *Michigan*, 583 U.S. 965 (2017).

After filing collateral motions in the state courts raising claims not relevant here, Upshaw filed a petition for a writ of habeas corpus in the district court. He again raised his *Batson* and ineffective-assistance claims. With respect to the *Batson* claim, the district court pointed to *Hernandez* v. *New York*, 500 U.S. 352, 359 (1991), in which four members of this Court, in a plurality opinion, stated that the prima facie step of a *Batson* analysis becomes moot once the trial court has ruled on the ultimate question of intentional discrimination. (Mot. App'x 51a–53a.) The Michigan Court of Appeals' decision to rest its analysis on the prima facie step, the district court held, was an unreasonable application of *Batson* and *Hernandez*. (Mot. App'x 51a–53a.) Accordingly, the district court reviewed the claim without the deference required under § 2254(d) and found that the state trial court erred when applying *Batson*'s second

and third steps. (Mot. App'x 53a–63a.) Specifically, the court noted, the prosecutor offered race-neutral reasons for only three out of its six peremptory challenges. (Mot. App'x 57a–58a, 62a–63a.) And as to those three, the trial court did not sufficiently determine whether the prosecutor's race-neutral reasons were pretextual. (Mot. App'x 59a–60a.) Holding that a constitutional violation occurred, the district court determined that a new trial was the only appropriate remedy. (Mot. App'x 63a–66a.)

The district court also granted relief on Upshaw's ineffective-assistance claim. In assessing prejudice, the district court noted that the only evidence of Upshaw's guilt presented at trial was identification testimony from a victim along with undisputed testimony that Upshaw was arrested mere hours after the robbery committing a home invasion with Walker. (Mot. App'x 45a–46a.) The court found that evidence lacking, saying that the victim's ability to identify the robber was hampered by several factors. (Mot. App'x 45a–46a.) As far as Upshaw's later arrest, the court simply noted that the Sixth Circuit had "found prejudice in the face of far more damning evidence" in two other cases, citing those cases but providing no further comparative analysis. (Mot. App'x C, 46a–47a (citing *Matthews* v. *Abramajtys*, 319 F.3d 780, 783–84, 789–90 (6th Cir. 2003) and *Stewart* v. *Wolfenbarger*, 468 F.3d 338, 343–44, 357–59 (6th Cir. 2006).)

The court therefore ordered the State to vacate Upshaw's convictions unless it granted him a new trial within 120 days. (Mot. App'x 68a.) It stayed its order while the State appealed to the Sixth Circuit. (Mot. App'x 71a.)

The Sixth Circuit affirmed. (Mot. App'x 73a.) In evaluating the *Batson* claim, the court first addressed the State's argument that the Michigan Court of Appeals' decision was not an unreasonable application of *Hernandez* because that opinion was not clearly established. (Mot. App'x 84a–86a.) According to the court, the plurality opinion's mootness ruling was the narrowest grounds supporting the judgment and therefore sets forth the controlling, and clearly established, law. (Mot. App'x 85a.) Therefore, the prima facie inquiry in this case was moot on that basis, and it ruled that the Michigan Court of Appeals unreasonably applied *Hernandez* when it nevertheless denied the *Batson* claim based on the prima facie step. (Mot. App'x 86a.) And, according to this reasoning, because the state trial court failed to properly apply steps two and three of the *Batson* framework, the district court correctly granted habeas relief on the claim. (Mot. App'x 86a–88a.)

The Sixth Circuit also addressed Upshaw's ineffective-assistance claim. (Mot. App'x 78a–84a.) After determining that counsel's performance was objectively unreasonable because he failed to investigate and present Upshaw's grandmother as an alibi witness (Mot. App'x 80a–81a), the court looked to the prejudice prong (Mot. App'x 82a–84a). It primarily focused on the purported weakness of the cashier's eyewitness-identification testimony, noting its belief that "[e]yewitness testimony is notoriously unreliable." (Mot. App'x 82a.) In support of this proposition, the court cited several Sixth Circuit opinions, along with "[e]mpirical studies" showing the supposed prevalence of mistaken eyewitness identification. (Mot. App'x 82a.) The court then described the State's case as "not overwhelming" because, other than the eyewitness-

identification testimony, "the State's only evidence against Upshaw was that he had been arrested for home invasion with Walker several hours after the gas station was robbed." (Mot. App'x 83a (internal quotations omitted).) Without explaining anything more about the circumstances of Upshaw's arrest, the Court concluded that his grandmother's testimony that he was with her near the time of the robbery likely would have made a difference in the trial's outcome. (Mot. App'x 83a.) The court thus affirmed the district court's decision that habeas relief was warranted for this claim. (Mot. App'x 84a.)

After the Sixth Circuit issued its opinion, the State moved the court to stay the mandate. That motion was denied because, in the Sixth Circuit's view, the State did not demonstrate that it would suffer irreparable harm absent a stay. (Mot. App'x 91a.) It rejected the State's contention that beginning retrial proceedings would result in an unnecessary use of prosecutorial resources, but it did not address the State's argument that a complete retrial would moot the State's petition. (Mot. App'x 91a.) The court also rejected—without any reasoned analysis—the State's assertion that releasing Upshaw would pose a threat to the public. (Mot. App'x 91a.) The mandate was issued on May 1, 2024 (Mot. App'x 92a), and, on May 6, 2024, the district court lifted its stay and ordered that the State release or retry Upshaw "within 120 days" from the date of its order, *i.e.*, by September 3, 2024. (Mot. App'x 94a).

STANDARDS FOR GRANTING RELIEF

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id*.

THIS COURT SHOULD IMMEDIATELY GRANT THE STATE'S MOTION TO STAY THE MANDATE

I. The Sixth Circuit resolved two important federal questions in ways that conflict with AEDPA and this Court's decisions.

The Sixth Circuit affirmed the district court's habeas grant on two bases. Although both involve a fundamental misunderstanding of this Court's habeas jurisprudence, the reason why each is important differs. The first deals with the interpretation of a statute in a manner that conflicts with its plain language, this Court's decisions, and at least one other circuit court's decision. The second involves a clear refusal to perform a specific legal analysis that this Court has repeatedly and consistently required. There is thus a reasonable probability that this Court will take this case and a fair prospect that it will reverse.

A. The Sixth Circuit's decision that the *Hernandez* plurality opinion is clearly established law is contrary to AEDPA, this Court's decisions, and the Eleventh Circuit.

The Michigan Court of Appeals rejected Upshaw's *Batson* claim in a practical and sound manner: there was no evidence of any relevant circumstances surrounding

the prosecutor's strikes—such as the race of the other potential jurors, the race of others struck, or the race of those who served—so Upshaw could not possibly show that the circumstances raised an inference that the prosecutor struck the jurors based on race—*i.e.*, a prima facie showing. Neither the district court nor the Sixth Circuit questioned the rationality of that holding. Instead, both courts merely pointed to the *Hernandez* plurality decision, in which four justices opined that, after the trial court moves on to steps two and three in the *Batson* inquiry, "the preliminary issue of whether the defendant had made a prima facie showing becomes moot." 500 U.S. at 359. Because the state court did not adhere to the plurality's mootness proclamation, the lower federal courts felt free to evaluate the claim without the statutory restrictions imposed on habeas review. That decision is contrary to the plain language of AEDPA, as well as this Court's precedent.

In 28 U.S.C. § 2254(d)(1), Congress set forth restrictions on the availability of habeas relief: the writ "shall not be granted" unless the state court's adjudication of the particular claim at issue "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." "[T]he phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the *holdings*, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000) (emphasis added).

So what is a holding? When it comes to a plurality decision, this Court gave that answer almost a half century ago. "When a fragmented Court decides a case and

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

The plurality opinion in *Hernandez* did not employ the "narrowest grounds," at least with respect to its mootness rule. The *Hernandez* case addressed a challenge to a prosecutor's discriminatory use of peremptory strikes under *Batson*. 500 U.S. at 355 (plurality opinion). The plurality opinion—written by Justice Kennedy and joined by three other justices—reviewed each step of the three-step process for evaluating *Batson* claims. *Id*. at 358–70. It began by discussing the first step, which requires a defendant to "make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race." *Id*. at 358. According to the plurality, "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Id*. at 359. Analyzing step two, the plurality stated that a prosecutor's strikes could be unconstitutional if they were intended to cause a disparate impact on a certain race or ethnicity, but it determined that there was no evidence that the

prosecutor in the case at bar had such an intent and, therefore, the prosecutor's reasons were race neutral. *Id*. at 362. Reviewing step three, the plurality held that the trial court's decision to believe those race-neutral reasons should be reviewed for clear error and that the trial court's decision was not clearly erroneous. *Id*. at 359–70.

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

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

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

What are the "narrowest grounds" here? That answer is tricky. This Court has not given a clear answer on what the phrase means. E.g., *Hughes* v. *United States*, 584 U.S. 675, 679–80 (2018) (declining to address the implication the *Marks* rule has on 4—1—4 decisions). But there have been two approaches. First, "one opinion can

be meaningfully regarded as 'narrower' than another[ ]only when one opinion is a logical subset of other, broader opinions." *United States* v. *Davis*, 825 F.3d 1014, 1020 (9th Cir. 2016) (quoting *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (Silberman, J.); see also *Animal Legal Defense Fund* v. *Reynolds*, 8 F.4th 781, 785 (8th Cir. 2021) ("[W]here a concurring opinion is not a logical subset of the plurality's rationale, or vice-versa, it is not possible to discern a holding in the case."). "In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *Davis*, 825 F.3d at 1020. "The second approach looks to results rather than reasoning. It defines the narrowest ground as the rule that would necessarily produce results with which a majority of the Justices from the controlling case would agree." *Id.* at 1021 (internal quotation marks omitted).

The problem with *Hernandez* is that the concurring opinion did not address the prima facie step in its analysis. But that necessarily means, then, that the plurality's mootness holding was not a "logical subset" of the concurrence's analysis, at least with respect to that particular issue. And under the results approach, we simply do not know whether the concurring justices from *Hernandez* would have agreed with the mootness rule. The concurrence's lack of a discussion about the prima facie step did not mean that those Justices agreed with the plurality. Indeed, quite the opposite—had they agreed, the concurrence would have expressly said so, just like it did with regard to the plurality's clear-error determinations. Nor is agreement implied. The concurrence could have found, for instance, that the first step was not moot but

that the petitioner had made out a prima-facie showing of intentional discrimination. Without an explanation, it is not possible to ascertain how the concurring Justices viewed the issue. So under either approach, the plurality's opinion—at least with regards to its mootness rule—cannot be controlling.[1] It therefore cannot be the "holding" under *Marks*. Not being a holding, it could not set forth "clearly established Federal law" under § 2254(d)(1). The Sixth Circuit's conclusory decision otherwise directly conflicts with the statute and this Court's precedents. See Supreme Court Rule 10(c).

It also conflicts with at least one other United States court of appeals. See Supreme Court Rule 10(a). Although not in a habeas action, the Eleventh Circuit has held that the mootness language in *Hernandez* is not binding because it is contained in a plurality opinion. *United States* v. *Stewart*, 65 F.3d 918, 924 (11th Cir. 1995) ("[U]nless it concludes that a prima facie showing was made, an appellate court should neither reverse a trial court's action refusing to disallow challenged strikes, nor should it affirm a trial court's action disallowing strikes. No decision of the Supreme Court or of this Court is inconsistent with that principle. . . ."); see also *United*

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[1] Even if the mootness rule had been handed down in a majority opinion, it still would not be binding. Courts must adhere to the "result" of an opinion from this Court, as well as "those portions of the opinion necessary to that result." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 66–67 (1996). The *Hernandez* plurality rejected the petitioner's *Batson* claim because the prosecutor offered race-neutral reasons for his strikes and the trial court did not commit clear error in choosing to believe those reasons. 500 U.S. at 372. It was not necessary for the opinion to make its mootness ruling under *Batson*'s first step to deny the claim under steps two and three. The mootness rule, even if contained in a majority opinion, was mere obiter dicum. Thus, it was not clearly established federal law under § 2254(d)(1).

States v. *Saylor*, 626 F. App'x 802, 808 (11th Cir. 2015) (citing *Stewart* and declining to apply the *Hernandez* mootness rule, in part because it was not binding because it was contained within a plurality opinion); *Central Alabama Fair Housing Center*, *Inc.* v. *Lowder Realty Co.*, *Inc.*, 236 F.3d 629, 636 (11th Cir. 2000) ("[T]he threshold task in considering a *Batson* challenge, for a district court *as well as this Court*, is to determine whether a *prima facie* case was established." (emphasis added)).

Because the Sixth Circuit's decision conflicts with § 2254(d)(1), with this Court's precedents, and with the Eleventh Circuit, and because the State's petition presents an important question of federal law, there is a reasonable probability that this Court will grant the petition and a fair prospect that it will reverse.

B. The Sixth Circuit's refusal to apply deference to a state court's prejudice finding disregards this Court's repeated warnings.

This Court has been emphatic that a federal court must apply AEDPA when reviewing a state court's decision. The Sixth Circuit has a mixed record in accepting that command, as demonstrated by the numerous reversals over the last 20 years. See *Shoop* v. *Cassano*, 142 S. Ct. 2051, 2057 (2022) (Thomas, J., dissenting) ("Over the last two decades, we have reversed the Sixth Circuit almost two dozen times for failing to apply AEDPA properly.") Likewise here, this Sixth Circuit panel has failed to honor the federalism-inspired decree that Congress mandated nearly three decades ago.

In state court, Upshaw argued that his counsel was ineffective for failing to raise an alibi defense, specifically by failing to call his grandmother who would have testified that he was at home near the time of the gas station robbery. The Michigan Court of Appeals rejected the claim, in part by finding that Upshaw could not show prejudice. (Mot. App'x 7a–8a.) On top of Upshaw's refusal to participate in a live lineup, the court explained that the gas station cashier identified Upshaw in a photo lineup, the jury saw the surveillance video of the robbery, and Upshaw was arrested committing another crime just hours later with his co-defendant, who was undisputedly at the scene of the gas station robbery. (Mot. App'x 6a.)[2]

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

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[2] Although it is true that, within its analysis of the ineffective-assistance claim, the Michigan Court of Appeals merely determined that Upshaw had "not established the requisite prejudice" (Mot. App'x 8a), the court had just finished a full prejudice analysis with respect to a different claim, in which it set forth all the evidence that demonstrated the strength of the prosecutor's case, mentioned above (Mot. App'x 6a).

The Sixth Circuit did not faithfully apply that standard in this case. In fact, within its four paragraphs dedicated to a prejudice discussion, it never once cited the Michigan Court of Appeals or explained how the state court made its determination that no prejudice occurred. (Mot. App'x 82a–84a.) Instead of discussing whether rational jurists could agree with the state court's decision, the court conducted its own independent review of prejudice. For example, it spent much of its analysis questioning the reliability of the cashier's identification by citing social-science studies on eyewitness identification that appear nowhere in the state court record. (Mot. App'x 82a–83a.) It also relied on its own precedents to show that a prejudice finding is appropriate when the evidence against a petitioner includes eyewitness testimony. (*Id.*) And the court concluded by stating that "[t]he evidence presented at trial was not, as the Warden contends, 'extremely damning' " (Mot. App'x 84a)—a declaration that proclaims only the court's own view of the evidence and says nothing about the state court's view of the evidence.

The Sixth Circuit did not even "purport to hold that the Michigan state courts had acted contrary to or unreasonably applied a decision of this Court." *Brown* v. *Davenport*, 596 U.S. 118, 136 (2022). That's "not just wrong," but it is also a "fundamental error[ ] that this Court has repeatedly admonished courts to avoid." *Sexton* v. *Beaudreaux*, 585 U.S. 961, 967 (2018). Like before, see *Shoop*, 142 S. Ct. at 2057 (2022) (Thomas, J., dissenting), the Sixth Court's decision here on Upshaw's ineffective-assistance claim warrants this Court's review.

II. The State will be irreparably harmed absent a stay.

With little reasoning, the Sixth Circuit denied a stay of the mandate. But without a stay, the State will be put in an untenable procedural position.

The deadline for the State to file its petition is June 26, 2024. See Supreme Court Rule 13. Upshaw would then have 30 days within which to file a brief in opposition, see Supreme Court Rule 15.3, creating a deadline of July 26, 2026. If Upshaw files a brief on that date, the case will be distributed and "placed on the next relevant conference list that is at least 14 days after the filing date for the brief in opposition." (Supreme Court Jan. 2023 Memo. Concerning the Deadlines for Cert Stage Pleadings and the Scheduling of Cases for Conference at 4(c).) Thus, the pleadings would not be distributed until at least August 9 and considered at conference sometime later in the month. And that is only the earliest *possible* time that the petition could be decided, not the earliest *likely* time. Should Upshaw seek a 30-day extension to file a brief in opposition, a request that is "generally grant[ed]," (Jan. 2023 Memo. at 1), his brief would not be due until August 25, 2024. That would place the distribution and consideration of the pleadings well into September.

By that time, the State's deadline would have passed. The district court lifted its stay on May 6, 2024, and ordered that the State release or retry Upshaw "within 120 days" from the date of its order. (Mot. App'x 94a.) That period expires on September 3, 2024. Without a stay, the State will have to already begin retrial proceedings or release Upshaw from custody before this Court rules on the petition. Either option would irreparably harm the State.

If retrial to a new verdict occurs, no controversy would remain because Upshaw would no longer be held under the supposedly unconstitutional judgment. See *St. Pierre* v. *United States*, 319 U.S. 41, 42 (1943) ("A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it."). Even beginning retrial proceedings would result in a massive use of prosecutorial resources that might not be necessary. Witnesses (who may have moved out of the area) will have to be found, assuming they can be. Pretrial hearings and motions will have to be held. And open days on which to hold a jury trial must be found on the trial court's busy schedule. All that will be for naught if this Court grants certiorari and reverses the Sixth Circuit's decision.

The State could alternatively hold Upshaw as a pretrial detainee awaiting trial, see *Eddleman* v. *McKee*, 586 F.3d 409, 413 (6th Cir. 2009) (noting that when "a state fails to retry him by the deadline set in a conditional writ, the state is not precluded from rearresting petitioner and retrying him under the same indictment") (cleaned up), and thus delay the necessity of performing some of those prosecutorial functions until after this Court rules, but doing so would require the State to first vacate Upshaw's convictions. And vacating his convictions would obviate the disputed constitutional violation, meaning there would be no controversy for this Court to adjudicate and the petition would be moot. See *Brown* v. *Vanihel*, 7 F.4th 666, 669–72 (7th Cir. 2021) (holding that the State's decision to vacate the underlying conviction divested the federal court of habeas jurisdiction and rendered the case moot).

Instead, the State could release Upshaw within the allotted period, but doing so will endanger the public. Not only did he rob a customer at gunpoint, but he also tried to kill another woman, firing six shots at an innocent cashier who was saved only by the bullet-proof glass that enclosed her. And more, his actions gave him no pause; he committed another serious crime just hours later—a crime that he was validly convicted of and does not dispute. On top of those contemporaneous acts, Upshaw was convicted as a juvenile of two counts of carjacking and two counts of felony-firearm (see MDOC Presentence Investigation Report, R. 6-16, Page ID #1281), demonstrating that he has no qualms about committing violent offenses. And although he has remained free from other felony convictions as an adult (which was not a long period as he has been incarcerated since he was 23), he nevertheless has four misdemeanor convictions on his record (see *id.*, Page ID # 1281–82), demonstrating an unwillingness to conform his conduct to the law.

Additionally, Upshaw stands convicted of a violent crime that easily could have resulted in serious injury or death. He must spend at least another 10 years—and potentially up to another *32 years*—in prison. If he is released, he has strong incentive to flee rather than spend the same amount of time behind bars as he has been alive. Even if the State's petition is not successful, Upshaw would face retrial for armed robbery and felony-firearm. He is also likely to be convicted again. Given the identification evidence along with the circumstances in which Upshaw was arrested, no reasonable juror would vote to acquit him even if Upshaw presents a weak alibi defense. And given that armed robbery is a life offense, see Mich. Comp. Laws § 750.529,

Upshaw will likely remain in prison for a substantial portion of his life. Thus, he has every incentive to flee rather than face retrial. In short, releasing Upshaw will endanger the people of the State of Michigan.

All told, without a stay, either the State's petition for a writ of certiorari presenting important issues will become moot, or the public will be put at risk. Either way, the State will be irreparably harmed. This Court should do what the district court did, and what the Sixth Circuit refused to do—give the State an opportunity to pursue all available remedies under the law before implementing the "extraordinary remedy" of habeas relief. *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993).

CONCLUSION

For these reasons, this Court should recall the Sixth Circuit's mandate and stay the district court's order that Upshaw be released or retried by September 3, 2024.

Respectfully submitted,

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