No. 23A1056

IN THE

Supreme Court of the United States

GEORGE STEPHENSON, WARDEN,

Applicant,

vs.

LAFAYETTE DESHAWN UPSHAW

RESPONSE IN OPPOSITION TO THE EMERGENCY APPLICATION TO RECALL AND STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Daniel S. Harawa
Counsel of Record
NEW YORK UNIVERSITY SCHOOL OF LAW
Federal Appellate Clinic
245 Sullivan Street, Fifth Floor
New York, NY 10012
(212) 998-6420
daniel.harawa@nyu.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

Lafayette Upshaw was sentenced to spend up to forty years in prison for an armed robbery he has always maintained he did not commit. The lower courts found that his conviction was indeed wrongful, unanimously holding Mr. Upshaw is entitled to habeas relief on both a *Batson* claim *and* an ineffective assistance of counsel claim.

The day before the Sixth Circuit's mandate was set to issue, the State asked the court of appeals for a stay. The Sixth Circuit panel unanimously rejected the request, holding that the State had not established the good cause necessary to warrant this rare relief. More than a month after that ruling, the State filed an "emergency" application with this Court, asking it to take the extraordinary step of recalling and staying the Sixth Circuit's mandate. The application should be denied.

Because Mr. Upshaw was granted habeas relief on two independent grounds, to obtain the extraordinary relief of a stay, the State must show that this Court is likely to grant certiorari on *both* grounds, that this Court is likely rule in its favor on *both* grounds, *and* that the State would be irreparably harmed absent a stay. The State's application falters at every step.

First, this Court is unlikely to grant certiorari and rule in the State's favor on Mr. Upshaw's *Batson* claim. In *Hernandez v. New York*, this Court held the following: "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 show-

ing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion). The State argues that because this holding was in a plurality opinion, it cannot be clearly established federal law. Contrary to what the State claims, the settled status of *Hernandez* is not an open question. *No* Justice in *Hernandez* disagreed with this holding, and the plurality's resolution of *Batson* step one was a logical subset of both the concurrence's *and* the dissent's positions. Consistently, every federal court of appeals (including the Eleventh Circuit) has treated the *Hernandez* mootness holding as binding. The Michigan Supreme Court has treated the *Hernandez* mootness holding as binding. In fact, the State of Michigan has conceded before this Court that the *Hernandez* mootness holding is binding. While in the abstract there may be "tricky" questions about how to determine what constitutes clearly established federal law when faced with fractured opinions, this case does not present them.

Second, this Court is unlikely to grant certiorari and rule in the State's favor on Mr. Upshaw's ineffective assistance of counsel claim. The lower courts held that trial counsel rendered deficient performance when he failed to investigate three known alibi witnesses. The State does not challenge this aspect of the lower courts' decisions. Instead, the State claims that the lower courts got the prejudice inquiry wrong because they failed to defer to the Michigan Court of Appeals' prejudice ruling. This claim involves pure error correction, making it improbable that this Court will grant review. More importantly, the purported error identified by the State was never raised below and is not error at all. The Michigan Court of Appeals did *not* conduct a prejudice inquiry when resolving Mr. Upshaw's IAC claim. Thus, under this Court's

precedents, the federal courts were left to carefully conduct that inquiry in the first instance, which they did. Now, for the first time, the State argues that the federal courts needed to defer to the prejudice inquiry that the Michigan Court of Appeals conducted when resolving a totally different claim. Yet the State does not point to a single case that supports this novel theory of review. There is no error for this Court to correct.

Third, the State cannot show irreparable harm absent a stay. The State claims that without a stay, it will have to begin the retrial process or release Mr. Upshaw from custody. That's incorrect. Mr. Upshaw is now being held on a separate, unrelated charge. While he is eligible for parole on that charge once this conviction is fully vacated, the State represented below that it will not consider Mr. Upshaw for release until these habeas proceedings are complete. And even if the State must begin the retrial process (and a retrial is not guaranteed), this Court has rejected the burden of litigation as a reason for a stay.

This Court's emergency intervention is wholly unnecessary. The State's application should be denied.

STATEMENT

A. Factual Background

At around 9:30 p.m. on May 27, 2014, Mr. Upshaw began his shift as a barback at Tony's Bar and Grill. Trial Tr., ECF No. 6-10, PageID # 680–681. Because he did not have a car or bike, Mr. Upshaw relied on rides and public transit to get around.

Stay App. 27a.[1] Mr. Upshaw's shift ended at around 3:00 a.m., after which his manager drove him home. Stay App. 73a. Mr. Upshaw's manager dropped him off at around 3:15 or 3:20 a.m. *Id.* Throughout their ride, they discussed the tan Timberland boots Mr. Upshaw was wearing. *Id.*

Upon arriving home, Mr. Upshaw realized that he had forgotten his key, so he knocked on the door for someone to let him in. *Id.* His grandmother (Joanne Green), aunt (Crystal Holloway), and then-girlfriend (Diamond Woods), were all home at the time. *Id.*; *see also* Stay App. 28a. His aunt, who suffers from insomnia, came downstairs to let him in. *Id.* Meanwhile his grandmother, who had fallen asleep on the couch, was upset that Mr. Upshaw had woken her up with his knocking. Stay App. 28a. She "cuss[ed]" Mr. Upshaw out for a few minutes before allowing him to head upstairs to tend to his daughter, who had been woken up by the commotion. *Id.* Mr. Upshaw finally got to bed at around 4:00 a.m. Stay App. 73a.

At around 3:35 a.m., a man robbed a Mobil gas station 3.5 miles away from Mr. Upshaw's house. *Id.* The man was wearing a hoodie, had a t-shirt pulled over his mouth, and was wearing distinctive purple or blue gym shoes. *Id.* The man first robbed an unknown patron and then turned his attention to the register located within a "bullet-proof glass 'cage.'" *Id.* The cashier, Tina Williams, who was behind the bulletproof glass, refused to give the man any money. *Id.* Another man in the store, Darrell Walker, implored Ms. Williams to give up the cash. Stay App. 73a–74a.

[1] Citations to "Stay App." are to the appendix filed by the State with its application. Citations to "Opp'n App." are to the appendix filed with this opposition.

She refused. *Id.* The man then fired six shots at the bulletproof enclosure, knocked over a display, and fled the store. *Id.* Around thirty seconds after the man left, Mr. Walker left, too. Trial Tr., ECF No. 6-8, PageID # 518. The robber was in the store for less than two minutes. *See* Trial Tr., ECF No. R.6-8, PageID # 517.

A little after 8:00 a.m. on May 28, Mr. Upshaw and Mr. Walker were arrested committing a home invasion. Opp'n App. 2a. At the time of the arrest, Mr. Upshaw did not have a gun, was wearing a different color hoodie than the one the gas station robber was wearing, was not wearing a t-shirt, and was not wearing purple gym shoes like the gas station robber, but was instead wearing the boots that his manager had seen him in earlier. Trial Tr., ECF No. 6-8, PageID # 477; Trial Tr., ECF No. 6-9, PageID # 636–37. An officer investigating the gas station robbery identified Mr. Walker from surveillance footage and "put two and two together" to conclude that Mr. Upshaw could be the armed man from the gas station (the armed man could not be identified from the footage). Trial Tr., ECF No. 6-9, PageID # 647–48. Police showed Ms. Williams a photo array five days later, from which she identified Mr. Upshaw as the robber. Stay App. 74a. Based on Ms. Williams's identification, the State indicted Mr. Upshaw and Mr. Walker for the gas station robbery. *Id.* Mr. Upshaw pleaded guilty to the home invasion charge and was sentenced to 1 to 15 years in prison. Stay App. 22a. He maintained that he did not rob the gas station, however, and so proceeded to trial.

B. Trial Proceedings

Mr. Upshaw's first trial counsel, Anthony Paige, missed four court hearings, including Mr. Upshaw's initial appearance. Stay App. 74a. Mr. Upshaw informed Paige of his three alibi witnesses, but Paige never investigated them. *Id.* Paige's representation was so deficient that Mr. Upshaw's mother wrote to the Michigan's Attorney Grievance Commission complaining that Paige "failed to appear at four required court hearings on four different days." *Id.* (quotation marks omitted). Mr. Upshaw was forced to fire Paige two weeks before trial was set to start. *Id.*

Mr. Upshaw then retained Wright Blake to represent him. In their first meeting, Mr. Upshaw told Blake about his three alibi witnesses and asked Blake to request an adjournment to ensure he had enough time to prepare his defense. *See* Stay App. 29a–30a. Blake did not investigate the alibi witnesses. Stay App. 74a. And at a pretrial hearing, Blake refused to request an adjournment, prompting Mr. Upshaw to request one himself. Opp'n App. 5a. Blake overrode Mr. Upshaw's wishes, however, telling the trial court that he would "bring himself up to speed." Stay App. 74a (brackets omitted). Trial proceeded as scheduled. *Id.*

During jury selection, the State used six of its first eight peremptory challenges to strike Black jurors. Stay App. 75a. After Blake raised a *Batson* challenge, the trial judge immediately asked the State to justify its strikes without explicitly ruling that Blake made a prima facie showing of discrimination. *Id.* The State provided justifications for three of its strikes, the trial court interjected and itself justified a fourth strike, and the remaining two strikes went unaccounted for. *Id.* When Blake pointed

out that the State did not justify all of its strikes, and argued that the justifications that the State did provide were pretextual, the trial judge cut off the inquiry and denied the *Batson* motion. *Id.*

At trial, the State's case hinged on Ms. Williams, who repeated her identification of Mr. Upshaw as the robber. Stay App. 75a. Besides Ms. Williams's identification, the only evidence connecting Mr. Upshaw to the gas station robbery was the fact he was arrested alongside Mr. Walker hours later. *See* Stay App. 46a. No physical or forensic evidence linked Mr. Upshaw to the crime. He could not be identified from the gas station surveillance footage. And even though there were multiple other people at the gas station, *see, e.g.*, Trial, Tr. ECF No. 6-8, PageID ## 506, 507, 512, 525, the State did not call any of them to testify.

The defense theory at trial was mistaken identification—Mr. Upshaw was not the robber. In support of this defense, Blake called Mr. Upshaw's manager, who testified that he had dropped Mr. Upshaw off at home that night and that he and Mr. Upshaw discussed the boots Mr. Upshaw was wearing. Stay App. 75a. But Blake himself conceded that the manager's testimony did not provide Mr. Upshaw with a full alibi. Trial Tr., ECF No. 6-9, PageID # 670. And without a full alibi, the State effectively exploited the gap in time between when Mr. Upshaw's manager dropped him off and when the gas station was robbed. *See* Trial Tr., ECF No. 6-10, PageID # 715 (prosecutor's closing arguments). The jury convicted Mr. Upshaw of armed robbery. Stay App. 75a. He was sentenced to 18 to 40 years in prison. Stay App. 1a.

Since trial, Mr. Walker has executed an affidavit swearing that Mr. Upshaw was not at the gas station that day. Stay App. 23a.

C. State Post-Trial Proceedings

On appeal, Mr. Upshaw argued Blake was ineffective for failing to investigate his alibi witnesses and that the State violated his constitutional rights when it used its peremptory challenges to discriminate against Black jurors. Stay App. 76a.

The Michigan Court of Appeals rejected Mr. Upshaw's *Batson* claim, but for different reasons than the trial court. The Court of Appeals criticized the trial court for "fail[ing] to expressly indicate whether it found that [Mr. Upshaw] had made a prima facie case of discrimination," while noting that "such a finding might be implied because the court asked the prosecutor to articulate explanations for why veniremembers were stricken." Stay App. 9a. The court then thought that because the trial court's "ruling [was] ultimately unclear and muddled on the matter," it was free to reassess whether Mr. Upshaw made a prima facie showing. *Id.* Relying on an admittedly "not binding" Eleventh Circuit case, the Court of Appeals held that Mr. Upshaw failed to make a "prima facie showing or case of racial discrimination" because there was nothing in the record about the "surrounding circumstances" of the State's strikes. Stay App. 9a–10a. The Court of Appeals did not cite or discuss this Court's decision in *Hernandez*.

The Michigan Court of Appeals also rejected Mr. Upshaw's ineffective assistance of counsel claim. To develop a factual record to support this claim, Mr. Upshaw twice moved to remand for an evidentiary hearing as allowed by Michigan law. Stay

App. 22a–24a. In support of the first remand motion, Mr. Upshaw offered affidavits from himself and Mr. Walker. Stay App. 22a–23a. The Michigan Court of Appeals summarily denied this motion. Stay App. 23a. In support of his second request for an evidentiary hearing, Mr. Upshaw submitted two signed, notarized statements from his grandmother and aunt that confirmed they were alibi witnesses. Stay App. 23a–24a. He also provided a second affidavit of his own, swearing his "[t]rial counsel had the information about the potential alibi witnesses prior to trial, but did not investigate the witnesses." Aff., ECF No. 6-14, PageID # 879. *Id.* A divided Court of Appeals denied this second motion. Stay App. 24a & n.3.

On the merits, the Michigan Court of Appeals also rejected the IAC claim. The court first criticized the statements Mr. Upshaw submitted from his aunt and grandmother because they did "not meet the requirements of an affidavit" under Michigan law. Stay App. 7a. The court then continued that even if it could consider these "flawed documents," it held that they did not provide an alibi because they did not state that they "observed [Mr. Upshaw] at the exact time of the robbery." Stay App. 8a. The Court of Appeals therefore concluded that Mr. Upshaw "simply failed to show that counsel's performance fell below an objective standard of reasonableness relative to alibi witnesses . . . and he has not established requisite prejudice." *Id.*

The Michigan Supreme Court denied Mr. Upshaw leave to appeal, and this Court denied certiorari. Stay App. 75a. Mr. Upshaw then filed a pro se motion for state post-conviction relief, which the trial court denied. Stay App. 76a. The Michigan

Court of Appeals and Michigan Supreme Court denied Mr. Upshaw leave to appeal. *Id.*

D. Federal Habeas Proceedings

i. The District Court Decision

After exhausting his state court remedies, Mr. Upshaw petitioned for habeas corpus in the Eastern District of Michigan, again raising his *Batson* and ineffective assistance of counsel claims. Stay App. 76a. Over the course of two lengthy opinions,[2] the district court held that Mr. Upshaw was entitled to relief on both claims.

Starting with the *Batson* claim, the district court held that the Michigan Court of Appeals' decision was an unreasonable application of clearly established federal law because the court "failed to adhere to the Supreme Court's admonition that '[o]nce 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.'" Stay App. 52a (quoting *Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion)). The district court rejected the State's argument that "*Hernandez* is not clearly established law for purposes of AEDPA because it was a plurality opinion" for two reasons. Stay App. 40a n.12. One, the Sixth Circuit had already

[2] Rather than relying on affidavits alone, the district court held an evidentiary hearing to determine the credibility of Mr. Upshaw's alibi witnesses and to see if Blake had any reason for not investigating them. Stay App. 76a. The district court explained, however, that "even without the evidence from the . . . evidentiary hearing, and [b]ased on the record before the Michigan courts," it would have granted relief. Stay App. 80a. The evidentiary hearing confirmed habeas relief was warranted.

rejected it. *Id.* Two, *Hernandez*'s mootness holding was binding under a *Marks* analysis given that the concurring Justices "agreed with the plurality's analysis of the discriminatory intent issue, a necessary subset of which was its preliminary mootness determination." *Id.* (brackets and quotation marks omitted). The district court then held that Mr. Upshaw was entitled to relief on his *Batson* claim. Stay App. 76a.

Turning to the IAC claim, the district court held that "the State court's factual determination that the witness's statement did not" present an alibi was "objectively unreasonable because the statement *did* contain that information." Stay App. 17a. The court emphasized that the "State court's *reading of the witness's statement*" was an "objectively unreasonable determination" of the facts. *Id.* (citing 28 U.S.C. § 2254(d)(2)). As the district court explained, the Court of Appeals' decision "defied common-sense," as there was no way Mr. Upshaw could have been home at 3:30 a.m., as his alibis would have testified, and then at the gas station 3.5 miles away at 3:35 a.m., especially given that he did not have a car. Opp'n App. 20a. The district court then held that counsel rendered deficient performance by failing "to undertake *any* investigation" of Mr. Upshaw's alibi witnesses. Stay App. 37.

As for prejudice, the district court explained that the Michigan Court Appeals erroneously "collapsed *Strickland*'s two-prong inquiry into one single question focused on the strength of Upshaw's alibi testimony." Opp'n App. 25a. And because the Court of Appeals erroneously thought the witnesses did not provide an alibi, it "concluded that counsel's failure to introduce the two women as alibi witnesses was reasonable" and thus Mr. Upshaw did not suffer any prejudice. *Id.* The district court

therefore conducted the prejudice inquiry lacking in the Michigan Court of Appeals' decision. Noting that this was a one-witness, stranger identification case in which the witness could not even see the robber's full face, the district court held that had trial counsel called one alibi witness, let alone three, who if credited, provided "a complete defense to the crime," "there is a substantial likelihood that the trial would have turned out differently." Stay App. 45a–47a (quotation marks omitted).

The district court gave the State 120 days to release or retry Mr. Upshaw, but stayed its ruling at the State's request so that it could pursue an appeal. Stay App. 69a. When granting the stay, the district court emphasized that it "strongly disagree[d] with [the State]'s assertion that [it] is likely to succeed on appeal." Stay App. 70a. Mr. Upshaw then requested bond pending appeal, which the district court denied. Opp'n App. 42a. The district court again noted the State "is not likely to succeed on appeal," but opined that Mr. Upshaw "will not be irreparably injured if his motion for bond is denied because he will remain incarcerated on a separate sentence for a home invasion conviction." Opp'n App. 40a. The district court explained that even though Mr. "Upshaw might be otherwise eligible for parole" on that charge, the court "ha[d] been informed through pretrial services that the State will not consider his release while the convictions at issue in these habeas proceedings remain outstanding." Opp'n App. 40a–41a.

ii. The Sixth Circuit Decision

A unanimous Sixth Circuit panel affirmed the district court's decision. As for the *Batson* claim, the State again pressed the argument that the *Hernandez* mootness

holding is not clearly established federal law. Stay App. 85a. Like the district court, the Sixth Circuit held that, applying *Marks*, "the plurality opinion, which included the mootness holding at the prima facie step, sets forth clearly established federal law." *Id.* The Sixth Circuit then confirmed that "[p]recedent reflects this reality," as this "Court has subsequently relied upon the *Hernandez* plurality opinion in a number of cases," and the Sixth Circuit had "previously applied *Hernandez*'s mootness holding as clearly established law." *Id.* (quotation marks omitted). After rejecting this argument, the Sixth Circuit affirmed the district court's decision. Stay App. 89a.

Moving to the IAC claim, the State first asserted that because the letters from Mr. Upshaw's alibi witnesses were not "sworn testimony," they could not provide the basis for an IAC claim. Stay App. 81a (quotation marks omitted). The Sixth Circuit rejected this argument because the State "provide[d] no precedent" to support it. *Id.* As for prejudice, the Sixth Circuit agreed with the district court that the Michigan Court of Appeals' ruling "impermissibly collapsed *Strickland*'s two-prong inquiry into a single question focused on the strength of Upshaw's alibi." Stay App. 80a (quotation marks omitted). The Sixth Circuit then, after conducting an independent prejudice analysis, concluded that there is a substantial likelihood that the outcome of trial would have been different had trial counsel called the available alibi witnesses in a weak government case that hinged on a single eyewitness identification. Stay App. 82a–84a. The Sixth Circuit therefore affirmed the district court's decision.

The State did not petition for rehearing or rehearing en banc. Instead, the day before the mandate was set to issue, the State asked the Sixth Circuit to stay its

mandate. *See* Stay App. 90a. The Sixth Circuit panel unanimously rejected that request, holding that the State "fail[ed] to demonstrate that [it] will suffer irreparable harm if the stay were denied." Stay App. 91a.

STANDARD OF REVIEW

In general, "[a] stay is an 'intrusion into the ordinary processes of administration and judicial review' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result to the [applicant].'" *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted). "Denial of such in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citation omitted).

"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). "The burden of persuasion" on every element "rests on the applicant." *Beame v. Friends of the Earth*, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers). This burden is "heavy." *Whalen v. Roe,* 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers).[3]

[3] Additionally, the Sixth Circuit's decision denying a stay "is entitled to great weight." *Breswick & Co. v. United States*, 75 S. Ct. 912, 915 (1955) (Harlan, J., in chambers).

ARGUMENT

I. The Court is Unlikely to Grant Certiorari and Reverse the *Batson* Claim.

The State first asserts that this Court is substantially likely to grant certiorari and reverse the Sixth Circuit's holding that the *Hernandez* plurality opinion is clearly established federal law. Stay Application 10–16. The State has failed to carry its heavy burden on this claim for at least five reasons.

One, as the lower courts held below, the *Hernandez* plurality's decision on step one is binding. Because *Batson* provides a burden-shifting framework, it is necessary to resolve step one before a court can move on to steps two and three. *See Batson v. Kentucky*, 476 U.S. 79, 93–94 (1986). In *Hernandez*, the trial court did not rule on whether the "petitioner had or had not made a prima facie showing." *Hernandez*, 500 U.S. at 359. *Hernandez* therefore had to decide as a threshold matter whether it could proceed past step one given the "departure from the normal course." *Id.* The plurality was not "concern[ed]" with the lack of a prima facie finding, however, as it held "that [o]nce 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.* Proceeding to step two, the plurality held that the prosecutor gave a race-neutral reason for the strikes. *Id.* at 361. And at step three, the plurality held that the defendant failed to carry his burden of proving that the government's race-neutral reason was pretextual. *Id.* at 371–72.

The concurrence "agree[d] with the plurality's analysis of" the issue of discriminatory intent, and "agree[d] also that the finding of no discriminatory intent was not clearly erroneous." *Id.* at 372 (O'Connor, J., concurring). Justice O'Connor (joined by Justice Scalia) "wr[o]te separately because [she] believe[d] that the plurality opinion [went] further than it need[ed] in addressing the constitutionality of the prosecutor's asserted justification for his peremptory strikes." *Id.* The State now claims that "[n]owhere in her opinion did [Justice O'Connor] express agreement or disagreement with the plurality's discussion about the prima facie step." Stay Application 13. But when Justice O'Connor "agree[d]" with the plurality's "analysis" of discriminatory intent, she necessarily agreed with the plurality's application of the *Batson* framework. As this Court has explained, the "*Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson v. California*, 545 U.S. 162, 172 (2005). Thus, any analysis of "discriminatory intent" under *Batson* subsumes an analysis of *Batson*'s step one. It would make little sense for Justices O'Connor and Scalia to disagree with the plurality's resolution of step one and silently find *in the first instance* that the defendant satisfied a prima facie showing, but write separately to address their belief that the plurality went too far when discussing step three.

The *Hernandez* dissent also took no issue with the plurality's resolution of step one. *See United States v. Jacobsen*, 466 U.S. 109, 115–17 (1984) (analyzing the dissenting opinion when applying a *Marks* analysis). Instead, the dissenting Justices' point of departure came at step two, as they disagreed with the plurality's conclusion

that the prosecution provided a "legitimate, race-neutral reason." *Hernandez*, 500 U.S. at 376–78 (Stevens, J., dissenting); *see id.* at 375 (Blackmun, J., dissenting) (agreeing with Justice Stevens).

As such, under any reasonable reading of *Hernandez*, the plurality's mootness holding is binding, no matter what formulation of the *Marks* inquiry one applies. The plurality opinion resolving *Batson* step one is a "logical subset" of all the opinions. *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). You cannot get to steps two or three of *Batson*, or determine whether there was intentional discrimination, without first resolving step one. And the plurality opinion's resolution of step one was the "common ground" shared by all the Justices. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992). No one disagreed with the plurality's step-one handiwork. Thus, the plurality opinion's resolution of step one, including the mootness holding, is binding, clearly established federal law.[4]

[4] The *Hernandez* mootness holding also makes perfect sense, as this case proves. Here, after the State used six of its first eight peremptory challenges to strike Black jurors, Mr. Upshaw objected. Stay App. 55a. The trial judge, who witnessed the strikes and could see the general composition of the venire, turned to the State and asked it to justify the strikes. *Id.* The fact that the Michigan Court of Appeals rejected Mr. Upshaw's *Batson* claim at step one because he failed to make a record of the "surrounding circumstances" of the State's strikes when he was never asked to, is perverse. *See* Stay App. 10a. Not to mention that some of the "surrounding circumstances" that the Michigan Court of Appeals faulted Mr. Upshaw for not making a record of—for example, the ultimate composition of the jury—would have been "impossible for [Mr. Upshaw] to know" at the time the *Batson* objection was raised. *Johnson*, 545 U.S. at 170. The State using six of its first eight peremptory strikes to remove Black jurors was "sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id.*

Two, this Court treats the *Hernandez* plurality opinion as binding. For example, in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the Court cited the *Hernandez* plurality opinion as a decision "reaffirm[ing]" *Batson* and then followed the opinion's application of the *Batson* framework. *Id.* at 338. The Court relied on the *Hernandez* plurality opinion's articulation of the *Batson* framework in *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995). In *Snyder v. Louisiana*, 552 U.S. 472 (2008), the Court extensively relied on the *Hernandez* plurality opinion when resolving a *Batson* claim. *Id.* at 477. In fact, in almost every single *Batson* case decided after *Hernandez*, the plurality opinion has been relied on, and no Justice has questioned its binding force or quarreled with its mootness holding.[5]

Three, every federal court of appeals has treated *Hernandez*'s mootness holding as binding. At least four circuits have applied the *Hernandez* mootness holding on habeas review. *See Galarza v. Keane*, 252 F.3d 630, 639 (2d Cir. 2001) (Sotomayor, J.); *Hardcastle v. Horn*, 368 F.3d 246, 256 (3d Cir. 2004); *Matthews v. Evatt*, 105 F.3d 907, 918 (4th Cir. 1997); *Devoil-El v. Groose*, 160 F.3d 1184, 1186 (8th Cir. 1998). And every circuit, including the Eleventh Circuit, has followed *Hernandez*'s mootness holding on direct review. *See, e.g.*, *United States v. Perez*, 35 F.3d 632, 635 (1st Cir.

---

[5] In a footnote, the State argues that *Hernandez*'s mootness holding is dictum. (Stay Application 15 n.1). That's wrong. This Court had to resolve step one before it could render a ruling on step two or step three. Thus, the resolution of step one—the mootness holding, was "necessary to [*Hernandez*'s] result." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66–67 (1996); *see also County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 668 (1989) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law") (Kennedy, J., concurring and dissenting).

1994); *United States v. Franklyn*, 157 F.3d 90, 97 (2d Cir. 1998); *United States v. Uwaezhoke*, 995 F.2d 388, 392 (3d Cir. 1993); *United* States *v. Stevens*, 189 F. App'x 281, 283 (4th Cir. 2006); *United States v. Petras*, 879 F.3d 155, 161 (5th Cir. 2018); *United States v. Hill*, 146 F.3d 337, 341 (6th Cir. 1998); *United States v. Nieto*, 29 F.4th 859, 866 (7th Cir. 2022); *United States v. Brooks*, 2 F.3d 838, 840 (8th Cir. 1993);*United States v. Espgarza-Gonzalez*, 422 F.3d 897, 906–07 (9th Cir. 2005); *United States v. Vann*, 776 F.3d 746, 751 (10th Cir. 2015) (joined by Gorsuch, J.); *United States v. Edouard*, 485 F.3d 1324, 1342–1343 (11th Cir. 2007); *United States v. Gooch*, 665 F.3d 1318, 1327 (D.C. Cir. 2012). That the circuits uniformly treat *Hernandez*'s mootness holding as binding undercuts any notion that this Court's review is necessary, or that this Court will reverse.

True, as the State notes, *see* Stay Application 15–16, the Eleventh Circuit refused to follow *Hernandez* soon after it was decided. *See United States v. Stewart*, 65 F.3d 918, 924 (11th Cir. 1995).[6] But *Stewart* was poorly reasoned. There, the Eleventh Circuit did not follow *Hernandez* under the logic that the "language from *Hernandez* is from a plurality opinion, and plurality opinions do not bind this Court" without conducting a *Marks* analysis. *Stewart*, 65 F.3d at 924. As discussed, applying *Marks*, the plurality opinion *is* binding. Moreover, that the State cites only one published case from the past thirty-plus years that has resisted *Hernandez*'s mootness holding

[6] The State also cites *United States v. Saylor*, 626 F. App'x 802, 808 (11th Cir. 2015), which followed *Stewar*t. *See* Stay Application 15–16. There, the "district court . . . explicitly ruled that Mr. Saylor had not made a prima facie case," *Saylor*, 626 F. App'x at 808, making that case much different.

is proof that this issue is not so exceptionally important or unsettled that this Court must intervene. That's all the more true given that many of the Eleventh Circuit's cases *do* apply the *Hernandez* mootness holding. *See, e.g.*, *United States v. Williamson*, No. 19-14523, 2022 WL 68623, at *1 (11th Cir. Jan. 7, 2022); *United States v. Maxime*, 484 F. App'x 439, 445 (11th Cir. 2012); *United States v. Gamory*, 635 F.3d 480, 495 (11th Cir. 2011); *Edouard*, 485 F.3d at 1342–43. While the Eleventh Circuit might need to clean up its case law, there is no real circuit split for this Court to resolve.

Four, since 2005, long before Mr. Upshaw's trial, the Michigan Supreme Court has relied on *Hernandez*'s mootness holding as binding precedent. *See People v. Knight*, 701 N.W.2d 715, 724 (Mich. 2005) ("It must be noted, however, that if the proponent of the challenge offers a race-neutral explanation and the trial court rules on the ultimate question of purposeful discrimination, the first *Batson* step (whether the opponent of the challenge made a prima facie showing) becomes moot." (citing *Hernandez*)); *see also People v. Bell*, 702 N.W.2d 128, 140 (Mich. 2005). For close to two decades, then, *Hernandez* has been the law in Michigan. There was no excuse for the Court of Appeals' failure to apply (or even acknowledge) *Hernandez* in this case.

Five, in a prior case, the State conceded before this Court that *Hernandez*'s mootness holding is clearly established federal law. Over twenty years ago, in *Lancaster v. Adams*, 324 F.3d 423 (6th Cir. 2003), the Sixth Circuit affirmed the district court's conditional grant of habeas relief based on the Michigan Court of Appeals' failure to follow *Hernandez*. *Id.* at 427. As the State conceded in its petition for a writ

of certiorari in that case: "[B]ecause the trial court here had glossed over the prima facie step of the *Batson* analysis and reached the issue of actual intent, the Michigan Court of Appeals was forbidden by this Court's precedent from resolving Petitioner's claim on that basis. *Hernandez v. New York*, 500 U.S. 352 (1991)." Petition for a Writ of Certiorari, *Adams v. Lancaster*, 124 S. Ct. 535 (2003) (No. 03-356), 2003 WL 22428954, at *11.[7] The State admitted that the Court of Appeals' failure to apply *Hernandez*'s mootness holding "r[an] contrary to clearly established federal law." *Id.* at i. This prior concession undermines the State's newfound position that *Hernandez* is not binding.

While a future case may present "tricky" questions over how to determine what is clearly established federal law when this Court's decisions are fractured, Stay Application at 13, there is no real confusion here. A wall of unanimity confirms what the decision itself makes clear: *Hernandez*'s resolution of *Batson* step one, which includes its mootness holding, is binding, clearly established federal law.

The State has failed to carry its heavy burden of showing that this Court is substantially likely to both grant certiorari and reverse the Sixth Circuit's decision on the *Batson* claim.

[7] This Court denied certiorari. *Adams v. Lancaster*, 540 U.S. 1004 (2003). Ten years after *Lancaster*, the Sixth Circuit again affirmed a grant of habeas relief to a defendant based on the Michigan Court of Appeals' failure to apply the *Hernandez* mootness holding. *See Drain v. Woods*, 595 F. App'x 558, 570 (6th Cir. 2014). The State did not petition for certiorari in that case.

II. The Court is Unlikely to Grant Certiorari and Reverse the Ineffective Assistance of Counsel Claim.

The State also asserts that this Court is substantially likely to grant certiorari and reverse the Sixth Circuit's holding that Mr. Upshaw received ineffective assistance of counsel when trial counsel failed to investigate three known alibi witnesses. *See* Stay Application 16–18. The State has failed to carry its heavy burden on this claim, too.

To start, the State is asking this Court to engage in pure error correction, "and error correction is a disfavored basis for granting review, particularly in noncapital cases." *Gonzalez v. Crosby*, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., dissenting); *Trevino v. Davis*, 138 S. Ct. 1793, 1794 (2018) (Sotomayor, J., dissenting) (noting that the "Court is not usually in the business of error correction"). This Court's rules make clear that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Beyond that, the error that the State asks this Court to correct was not raised below and is not error at all.

The State claims that the lower courts failed to follow the dictates of AEDPA because they did not "cite" or "explain how the state court made its determination that no prejudice occurred." Stay Application 18. But the State concedes that "within its analysis of the ineffective-assistance claim, the Michigan Court of Appeals merely determined that Upshaw had not established the requisite prejudice" without any further analysis. Stay Application 17 n.2 (quotation marks omitted). In other words,

the Court of Appeals did *not* conduct a prejudice analysis when analyzing Mr. Upshaw's IAC claim, which both the lower courts noted when they explained that the Michigan Court of Appeals "collapsed" the two prongs of the *Strickland* inquiry. *See* Stay App. 80a.

The courts below were right. When ruling on Mr. Upshaw's IAC claim, the Michigan Court of Appeals specifically held that Mr. Upshaw "simply failed to show that counsel's performance fell below an objective standard of reasonableness relative to alibi witnesses." Stay App. 8a. And that holding was based on the fact that the statements that Mr. Upshaw submitted from his alibi witnesses "implied or suggested that Upshaw remained at the home for several hours, but [ ] did not expressly provide so," and did not state that they "observed him at the exact time of the robbery." *Id.* Because the Court of Appeals discounted Mr. Upshaw's alibi witnesses and found that trial counsel did not render deficient performance, the court summarily concluded that "he ha[d] not established prejudice." *Id.*

The State does not defend this prejudice ruling. Rather, the State claims that the lower courts erroneously overlooked the prejudice inquiry that the Michigan Court of Appeals conducted "with respect to a *different* claim." Stay Application 17 n.2 (emphasis added); *see also id.* at 17 (discussing the portion of the Court of Appeals' opinion analyzing Mr. Upshaw's claim that he "was denied a fair trial when the trial court allowed the admission of testimony that Upshaw had refused to participate in a live lineup," Stay App. 6a).

But below, the State never argued that the courts had to defer to the prejudice inquiry that the Michigan Court of Appeals conducted when resolving a completely separate claim. Thus, while this Court is highly unlikely to grant certiorari to conduct error correction, it is even less likely to grant certiorari to correct an error based on an argument that was never raised below. *See Clingman v. Beaver*, 544 U.S. 581, 598 (2005) ("We ordinarily do not consider claims neither raised nor decided below.").

More to the point, conceptually, it's unclear how transposing the prejudice inquiry from one claim to another would work. Prejudice is not free-floating. A prejudice analysis necessarily has to be tied to a particular assertion of error. It makes sense, then, that the State cites no precedent suggesting that a federal court must discuss and defer to the prejudice ruling that a state court rendered when resolving a separate, independent claim. Such an approach would flout this Court's precedents holding that on habeas review, a federal court has to review the state court's "last reasoned opinion *on the claim*." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) (emphasis added). This Court "requires the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims." *Wilson v. Sellers*, 584 U.S. 122, 125 (2018) (quotation marks omitted). The lower courts followed this Court's instructions verbatim.

Because the Michigan Court of Appeals did *not* conduct any prejudice inquiry when reviewing Mr. Upshaw's IAC claim, the lower courts had to conduct that inquiry in the first instance. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005) ("Because the

state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo*." (citation omitted)). Their rulings were correct. As the courts below explained, the State's case hinged entirely on a stranger, eyewitness identification, where the robber's face was covered and the stress of events was high. *See, e.g.*, Stay App. 82a. Close to sixty years ago, this Court observed that "the vagaries of eyewitness identification are well-known." *United States v. Wade*, 388 U.S. 218, 228 (1967). They are even better known now, as "[t]he empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country." *Perry v. New Hampshire*, 565 U.S. 228, 263 (2012) (Sotomayor, J., dissenting) (quotation marks omitted). No one would call the State's case overwhelming under these circumstances.

The only other evidence connecting Mr. Upshaw to the robbery was that he was arrested with Mr. Walker hours later during a home invasion. Stay App. 83a. But the Sixth Circuit cogently explained why this circumstantial evidence was not the "extremely damning" evidence that the State makes it seem. *See* Stay App. 83–84a; *id.* at 45a–47a. Mr. Upshaw was not wearing the same clothes as the robber, *was not carrying a gun*, and did not smell like gun powder, which all strongly supports Mr. Upshaw's claim of misidentification. *Id.* The lower courts correctly held that, under these circumstances, "there is a substantial likelihood that the trial would have

turned out differently if counsel had called even one alibi witness." App. 47a; App. 83a.[8]

The State has failed to carry its heavy burden of showing that this Court is substantially likely to both grant certiorari and reverse the Sixth Circuit's decision on the IAC claim.

III. The State Cannot Prove Irreparable Harm Absent a Stay.

The State finally argues it will be irreparably harmed without a stay because it "will be put in an untenable procedural position": "[B]egin retrial proceedings or release Upshaw from custody before the Court rules on the [yet-to-be-filed] petition." Stay Application 19. The State's irreparable harm argument is wrong as a matter of fact and is unfounded in law.

It is not true that the State will have to release Mr. Upshaw if it does not retry him within 120 days of the district court's May 6 order. *See id.* Mr. Upshaw is currently being held on the home invasion charge. And while he is eligible for parole on that charge, the State of Michigan represented below that it will not consider Mr. Upshaw for release until these habeas proceedings are complete. *See* Opp'n App. 40–41a. So as a factual matter, even though Mr. Upshaw was granted habeas relief close to two years ago, he has to wait until these proceedings are complete before he has any chance of release. The State's claim of being in an "untenable position" is untethered from the reality of this case.

[8] It's worth noting that the district court heard Mr. Upshaw and one of Mr. Upshaw's alibi witnesses testify and found them to be "very credible." Stay App. 35a n.6.

If Mr. Upshaw is "released" on these charges, given that he will still be incarcerated, practically speaking, the State will suffer no harm. The State argues that even if it can hold Mr. Upshaw, beginning the retrial process "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." Stay Application 20. Not so. As this Court said not too long ago: "[N]either the losing party's failure to obtain a stay preventing the mandate of the Court of Appeals from issuing nor the trial court's action in light of that mandate makes [a] case moot." *Kernan v. Cuero*, 583 U.S. 1, 6 (2017). Even when "the writ has been granted and the prisoner released[,] . . . [r]eversal undoes what the habeas corpus court did and makes lawful a resumption of the custody." *Eagles v. U.S. ex rel. Samuels*, 329 U.S. 304, 307 (1946). Accordingly, were this Court to deny a stay, the State's "obedience to the mandate of the Court of Appeals and the judgment of the District Court [would] not moot this case." *Mancusi v. Stubbs*, 408 U.S. 204, 206 (1972). And in the improbable event that this Court grants certiorari and reverses, that "would simply undo what the *habeas corpus* court did," putting the State in the same position it was in before habeas relief was granted. *Kernan*, 583 U.S. at 6 (brackets and quotation marks omitted). The State's application for an emergency stay is based on a misapprehension of the law.

The State's worry about wasting "prosecutorial resources" is also no reason for a stay. Stay Application 20. This Court could not have been clearer: "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the

absence of a stay, are not enough" to prove irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *see also, e.g.*, *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."). The State does not point to any specific harm that would result from having to begin the retrial process. Yet the harm to Mr. Upshaw from the State's continued delay is obvious, as he has been laboring under convictions that violate the Constitution for close to two years, for a crime he has always maintained he did not commit. *See generally McCleskey v. Zant*, 499 U.S. 467, 494 (1991) ("These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice.").

Finally, the State's actions belie any claim of emergency. It did not petition for rehearing or rehearing en banc. It waited until the last second to request a stay from the Sixth Circuit. After the stay was denied, it waited for over a month to request a stay from this Court. And although the Sixth Circuit's decision affirming the district court's grant of habeas relief was issued over two months ago, the State has yet to petition for a writ of certiorari. The lack of urgency on the State's part is further proof that this Court's emergency intervention is unnecessary. *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1318 (1983) (Blackmun, J., in chambers) ("While certainly not dispositive, the [Petitioner]'s failure to act with greater dispatch tends to blunt his claim of urgency and counsels against the grant of a stay.").

CONCLUSION

For all these reasons, the State's emergency application to recall and stay the Sixth Circuit's mandate should be denied.

Respectfully submitted,

Daniel S. Harawa
Counsel of Record
NEW YORK UNIVERSITY SCHOOL OF LAW
Federal Appellate Clinic
245 Sullivan Street, Fifth Floor
New York, NY 10012
(212) 998-6420
daniel.harawa@nyu.edu

June 5, 2024