No. ________

In the Supreme Court of the United States

JEFF WHITE, WARDEN, PETITIONER

v.

GREGORY RICE

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

PETITION FOR A WRIT OF CERTIORARI

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Joel D. McGormley
Appellate Division Chief

John S. Pallas
Assistant Attorney General

Attorneys for Petitioner

QUESTIONS PRESENTED

This is a habeas appeal from the Sixth Circuit involving an alleged violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986). The Michigan Supreme Court examined the record and reasonably concluded that the state trial court never found the prosecutor in violation of *Batson* for using race-based peremptory strikes. The Sixth Circuit undertook its own record review and disagreed, adopting the factual findings of the Michigan Supreme Court dissent. There are two questions presented, both involving the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the second involving the issue granted review but ultimately not decided in *Wood* v. *Allen*, 130 S. Ct. 841 (2010):

1. Whether a state court's selection of one reasonable reading of the record over another can constitute an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2).

2. How 28 U.S.C. § 2254(e)(1)'s command that a habeas petitioner must overcome the presumption of correctness of a state factual determination with clear and convincing evidence fits with 28 U.S.C. § 2254(d)(2)'s bar of federal habeas relief on a state court merits adjudication unless the decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Jeff White, Warden of a Michigan correctional facility. The Respondent is Gregory Rice, an inmate.

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The opinion of the Sixth Circuit is reported at 660 F. 3d 242. Pet. App. 1a–39a. The order of the United States District Court is unpublished. Pet. App. 40a–97a. The Michigan Supreme Court opinion affirming Rice's conviction is reported and is found at 702 N.W.2d 715. Pet. App. 98a–153a. The second Michigan Court of Appeals opinion affirming Rice's conviction is unpublished. Pet. App. 158a–163a. The first Michigan Court of Appeals opinion affirming Rice's conviction is unpublished. Pet. App. 164a–172a.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2011. A petition for rehearing was denied on January 20, 2012, Pet. App. 173a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

INTRODUCTION

During jury selection in a criminal trial, a Michigan trial court expressed reservations about a possible *Batson* violation but never said conclusively whether a *Batson* violation actually occurred. On appeal, four Michigan Supreme Court Justices reviewed the record and reasonably concluded that the trial court never found a violation; three dissenting Justices reached the opposite conclusion. Under AEDPA that should have been the end of the matter. 28 U.S.C. § 2254(d) (habeas shall not be granted unless the state-court decision "was based on an unreasonable determination of the facts"). Instead, a Sixth Circuit panel granted relief, holding that the dissenters' finding was the "only" one that could be fairly drawn from the record. Pet. App. 28a.

The Sixth Circuit's decision creates a direct conflict with this Court's recent decisions reiterating AEDPA's deferential nature. E.g., *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011); *Bobby* v. *Dixon*, 132 S. Ct. 26, 27 (2011). A state court's factual determination, selecting one of two possible readings of a trial court record, does not render the state court decision an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2).

The Sixth Circuit's decision also raises a jurisprudentially significant issue regarding the interplay of 28 U.S.C. §§ 2254(d)(2) and (e)(1), the question that this Court declined to resolve in *Wood* v. *Allen*, 130 S. Ct. 841 (2010). This interplay has split the federal circuits. And if these sections are interpreted so as to give each its proper role in the

review process—with (e)(1) applying to a state court's predicate factual findings and (d)(2) to the ultimate factual determination by the state court—the Sixth Circuit should not have found the State Supreme Court's decision unreasonable.[1]

The petition for certiorari should be granted.

STATEMENT OF THE CASE

A. Rice murders Yahnika Hall.

Respondent Gregory Rice shot 21-year Yahnika Hall multiple times as she drove to work on November 24, 1998. The gunshots caused massive internal bleeding to her chest area, and Hall died from her injuries.

Trial testimony revealed that the crime was a murder-for-hire initiated by Hall's ex-boyfriend, codefendant Jerome Knight, who bailed Rice out of jail in exchange for Rice killing Hall. The prosecutor charged Rice and Knight with first degree premeditated murder. The prosecutor also charged Rice for possessing a firearm while committing a felony. The defendants were tried together in Wayne County Circuit Court

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[1] The Sixth Circuit declined to resolve this interplay here, indicating that "under either section, the analysis herein would be unchanged." It also ignored the interplay of these sections in *Walker* v. *McQuiggan*, 656 F.3d 311 (6th Cir. 2011), much to the dismay of the dissenting judge, where the interplay, properly construed, is also outcome determinative. That petition is pending before this Court in case number 11-1011. The State suggests that, because both cases raise similar claims and relief, this Court consider granting a writ of certiorari in both cases and consider them jointly or, in the alternative, hold one of the cases in abeyance while the other is addressed on the merits.

before a single jury. Pet. App. 176a–234a. Trial began on July 26, 1999, with jury selection.

B. The prosecutor's peremptory challenges to two of the jury venire.

By the third day of jury selection, there were no further jurors remaining in the venire.[2] As such, the trial judge ordered that a new venire be brought to the courtroom so that jury selection could continue. Pet. App. 177a.

Prior to the trial court recessing for lunch, Knight's counsel objected to the prosecutor's earlier use of a peremptory challenge to a venire member (Juror #9). He stated "[t]he prosecution has exercised a number of peremtory [sic] challenges, some of which were clear and understandable. . . . I do have a problem, however, with the other exercise that she's had because there was no apparent reason why on the record one would exclude them, other than they were not satisfied that they were black persons." Pet. App. 178a–180a. He added: "I noticed this pattern since day one of the jury trial. That's why seventy-five percent of the exclusions have been black." Pet. App. 180a. Rice's counsel concurred in these comments. Pet. App. 180a.

After the prosecutor responded, the trial judge stated: "There have been four whites excluded,

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[2] The State uses the phrase "jury venire" here to refer to panels of prospective jurors, from which the "petit jury," the jury members ultimately seated to render a verdict in this case, were chosen. The State uses the phrase "venire member" to a member of the jury venire, who may or may not have been ultimately seated on the petit jury.

exempted by the prosecution and three blacks. So just based on that I don't see a Batson problem." Pet. App. 183a. She added "I do not see a pattern of the prosecution improperly excluding African American males, because they've only excluded one, or African American females where two have been excluded. I think the reasons are acceptable. So I don't see a problem there." Pet. App. 183a–184a. After expressing some concern that the venire was "largely white," the trial judge denied "the motion that prosecution has improperly [been] excluding minorities from the jury panel." Pet. App. 184a.

Jury selection continued, and the prosecutor used peremptory challenges to dismiss two additional venire members, Ruby Jones and Christina Johnson, both African-American females. Neither defendant objected when the prosecutor used a peremptory challenge to excuse Johnson, Pet. App. 204a–205a, but both raised a *Batson* challenge as to the dismissal of Ruby Jones, Pet. App. 216a–217a.

Before the trial judge could determine whether a *prima facie* case of purposeful discrimination had been established, the prosecutor offered her rationale for excusing Ruby Jones, Christine Johnson, and a third African-American. Pet. App. 217a–219a. The following colloquy then occurred:

> THE COURT: Just before we recessed for lunch, I thought it was very clear that we didn't have a problem here. But now I think we are getting very close to a sensitive issue, I didn't see a problem with –

MR. HOARE [counsel for co-defendant Knight]: Miss Johnson, your Honor.

THE COURT: – Christine Johnson. She was very forthright and honest. And I understand Miss Bonner, I didn't see any problems with that. But I was very surprised about Miss Johnson. So, I didn't object.

The same thing with Miss Jones. I do not see a reason other than – I mean, it seems to me for the prosecution to say, she has a daughter the same age as the victim, that would seem to work in the prosecution's favor, just in terms of thinking in the jury selection. So I don't accept that.

MS. MILLER [prosecutor]: Your Honor, -

THE COURT: I do see that we are getting close, and there are, I don't know two or three minority jurors left in this panel. So *I think we are getting close to a serious issue here.*

I wish that somebody had said something about keeping Miss Jones and Miss Johnson. And then we address this matter because I *probably* would not have excused either one of them.

***

THE COURT: The only reason I mention Johnson at the time is because the prosecution excused both Miss Johnson and Miss Bonner. I

didn't see a reason for Miss – but I wasn't going to interfere.

I do, but I say, if some, if an objection had been made as far as Miss Johnson and Miss Jones I *probably* would have kept them on the jury.

MS. MILLER: Your Honor, may I just make a record here?

THE COURT: Sure, sure.

MS. MILLER: Under Batson v Kentucky, cited at 476 US 79, a 1986 case, prosecutor has to explain peremptory challenges with a neutral reason.

As long as I come up with a neutral reason for their dismissal, I believe that that's appropriate. And I given [sic] –

THE COURT: But the Court has to accept or reject whether the reason is neutral or not.

MS. MILLER: I understand.

THE COURT: And I'm not, I'm saying that *I think we're getting close* to a sensitive issue here on Jones and Johnson. *That's all I'm saying*. I'm making my record too.

MS. MILLER: Yes, I understand. And I think that you've made a clear record. I would just like to be able to respond.

> Miss Johnson, in terms of her reticent demeanor, this is going to be a very interesting case for these people to decide in terms of who can stand up and who has a strong enough personality. In terms of her reticent demeanor, I'm not sure that she would stand up in a jury. She's barely is [sic] audible [sic] when she speaks.
>
> THE COURT: Why didn't you ask her that? You didn't ask any questions of any of these jurors. You just simply are excusing them.
>
> MS. MILLER: I think that they have given me the neutral reason. And I don't think that there is anything that says that I have to question them if I can give a neutral reason.

Pet. App. 219a–222a (emphasis added).

At this point, the prosecutor indicated that she had her own *Batson* objection, stating that counsel for co-defendant Knight had been excusing white women from the jury and that she believed "they're . . . not being released except for they are white." Pet. App. 222a–223a. Knight's counsel protested, then asked if the trial judge was going to allow Ruby Jones to be struck. Pet. App. 223a. The trial judge did not respond directly but stated: "If she's still here, I'm going to keep her." Pet. App. 224a. A courtroom deputy told the trial judge that Jones had already gone "downstairs." Pet. App. 224a.

The trial judge then asked counsel to respond to the prosecutor's reverse-*Batson* objection. Knight's counsel stated: "I believe the answer lies in the panel

that's left. There is no pattern. . . . White women are not a big problem for me in the jury. They're there already." Pet. App. 224a.

Rice's counsel interjected and stated: "If it might focus the Court here a little bit, I mean the whole point of Batson is that the [sic] there defendant was a black person." Pet. App. 225a. He added, "[i]f we or my brother counsel systemically excluded whites of which the panel, I mean as the Court can see, is eighty percent white." Pet. App. 225a–226a. The trial judge interjected "[m]ore than that." Pet. App. 226a. The trial judge then made the following comments:

> THE COURT: We have to be realistic here. I really don't want any problems with this case, especially along these lines.
>
> I'm not satisfied with the prosecutor's response as to potential juror Jones and Johnson. But I think they've already left.
>
> So I'm going to say from this point on let's be very careful about the selection. If you think that you, if the defense is not satisfied with me just giving a cautionary instruction to the prosecution, then I'll address any other remedy.
>
> But realistically I think all of us are being, trying to be conscientious about the selection of these jurors because of the racial makeup of the jury panels, which we don't have any control over.

> I'm just saying, I let Jones and Johnson go without holding them, especially Jones. I guess I should have held her and I didn't do that. I'll take the fault for that. But from this point on let's try to be very careful with this jury selection. We are close to getting this jury selected.

Pet. App. 226a–227a.

At this point, Knight's counsel asked if the court would entertain bringing excused jurors Jones and Johnson back. The trial judge indicated that this had already been attempted. A courtroom deputy stated that he and an employee of the jury commission had attempted to locate the excused jurors, but could not find them. Pet. App. 227a. The trial judge then stated: "Okay. *I don't think it is serious enough at this point. We do have some minorities left on the jury panel and I'll be watching this very closely*." Pet. App. 227a (emphasis added).

Jury selection continued to completion without further objection. Pet. App. 229a–230a. After giving the petit jury some preliminary instructions and excusing them for the day, the trial judge concluded by stating her satisfaction with the panel chosen for this case and the process that resulted in the panel:

> With the panel that we ended up with, I think that any *Batson* problems that may have been there have been cured.
>
> We have the same number if not more jurors, African-American female jurors on the panel as

> if we had kept Miss Christina Johnson and Miss Ruby Jones.
>
> *I don't think either side ended up selecting this panel for any reason other than I think that these are the ones who will be the fair and impartial persons to hear and try this case.*

Pet. App. 231a (emphasis added).

The jury convicted Rice and Knight as charged. Pet. App. 233a. The trial judge sentenced Rice to mandatory life for the murder conviction and two years for his felony-firearm conviction. Pet. App. 236a.

C. State-court review of Rice's conviction

Following his conviction and sentencing, Rice filed an appeal in the Michigan Court of Appeals.

Rice asserted a number of grounds for relief during his state direct appeal but not a *Batson* claim. The Michigan Court of Appeals affirmed. Pet. App. 164a–172a.

Rice applied for leave to appeal in the Michigan Supreme Court. The Court vacated "the portion of the judgment of the Court of Appeals concerning defendant's peremptory challenge issue under *Batson* v. *Kentucky* . . . and remand[ed] for reconsideration of that issue." Pet. App. 156a–157a.

On remand, the Michigan Court of Appeals again affirmed Rice's conviction, but this time specifically addressed the *Batson* claim. Pet. App. 158a–163a.

Rice again sought leave to appeal, and the Michigan Supreme Court granted that request. Pet. App. 154a–155a. But the Court ultimately affirmed Rice's conviction in a lengthy written opinion. Pet. App. 98a–153a. Four Justices signed the majority opinion; three Justices dissented.

The majority determined that "no *Batson* violation occurred in this case and the trial judge neither explicitly or implicitly found such a violation." Pet. App. 127a. The majority opinion stated that, "[g]iving the appropriate degree of deference to the trial judge's ultimate finding that the prosecutor did not engage in purposeful discrimination, we affirm defendants' convictions." Pet. App. 127a–128a.

The dissenters concluded that "[a] fair reading of the voir dire transcripts indicates the trial court found that venire members Johnson and Jones were excluded on the basis of race." Pet. App. 152a. The dissent determined that the improper exclusion of these venire members was not cured by the eventual racial makeup of the jury, and that the trial court erred in continuing the proceedings without remedying the *Batson* violations. Pet. App. 152a–153a.

D. Federal habeas corpus proceedings

The District Court granted Rice habeas relief on his *Batson* claims, concluding that "the Michigan Supreme Court's decision was an unreasonable determination of the facts in light of the evidence presented during the trial court proceedings." Pet. App. 92a. The Sixth Circuit affirmed, agreeing with the dissenting Michigan Supreme Court Justices: "[t]he statements by the trial court unambiguously indicate

that the trial court discredited the prosecutor's proffered reasons for her peremptory strikes, thereby resolving the *Batson* inquiry against the prosecutor." Pet. App. 31a. While the trial judge "did not expressly state that the prosecutor engaged in discrimination, [her] explicit rejection of the prosecutor's proffered race-neutral rationale necessarily constitutes such a finding." Pet. App. 31a. The Sixth Circuit also conceded that, while the trial judge appeared to misunderstand the nature of her duty under *Batson* in addition to erroneously believing that *Batson* "demands racial proportionality," this did not undermine her ultimate finding that the prosecutor's stated race-neutral reasons for her strikes were not valid. Pet. App. 31a–32a.

Because the Sixth Circuit concluded that the Michigan Supreme Court's ultimate factual determination was unreasonable under (d)(2), it reviewed Rice's underlying constitutional claim *de novo*, without AEDPA's limitations. Pet. App. 32a–33a. And under *de novo* review, the Sixth Circuit concluded that a *Batson* violation occurred during jury selection requiring that the "conviction be vacated." Pet. App. 33a–39a. Accordingly, the Court affirmed the District Court and ordered that a conditional writ of habeas corpus issue requiring the State to retry Rice within 180 days or release him from custody. Pet. App. 39a.

On January 20, 2012, the Sixth Circuit denied rehearing and rehearing en banc. Pet. App. 173a. On February 6, the Sixth Circuit stayed the mandate so the State could file this petition. Pet. App. 174a.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's decision conflicts directly with this Court's recent decisions directing lower courts to apply AEDPA's deferential standard of factual review.

The Sixth Circuit granted habeas relief by holding that when a state court adopts one of two possible readings of a trial court record, the state court decision can be deemed an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2). But the mere existence of an alternative interpretation of a state-court trial record does not, standing alone, equate to (d)(2) unreasonableness. In fact, there was nothing particularly "unreasonable" about the Michigan Supreme Court's finding here. If the Michigan trial-court judge had found a *Batson* violation, as the Sixth Circuit panel believed, then she would have declared a mistrial and begun selecting a new jury. She did not. That fact is strong evidence that the trial judge did not find a *Batson* violation. The Sixth Circuit's expansion of AEDPA factual review is at odds with AEDPA and this Court's recent decisions.

A habeas applicant's burden of establishing entitlement to relief is "difficult to meet." *Harrington* v. *Richter*, 131 S. Ct. 770, 786 (2011). Habeas corpus is an "extraordinary" remedy, *Bousley* v. *United States*, 523 U.S. 614, 621 (1998), and AEDPA imposes a "highly deferential" standard for evaluating state-court rulings, demanding that "state-court decisions be given the benefit of the doubt." *Renico* v. *Lett*, 130 S. Ct. 1855, 1862 (2010) (internal citations omitted). The Sixth Circuit here neither afforded deference to the

Michigan Supreme Court's decision nor gave it "the benefit of the doubt." Instead, in resolving Rice's *Batson* claim, the federal courts acted as if they were "super-appellate state courts" not subject to AEDPA's limitations. See *Ponnapula* v. *Spitzer*, 297 F.3d 172, 182 (2d Cir. 2002). As this Court stated in *Richter*, 131 S. Ct. at 786–87:

> Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. (Internal quotations and citations omitted.)

Here, there was no "extreme malfunction" in the state-court system, nor was the state court's ruling "lacking in justification . . . beyond any possibility for fairminded disagreement," as described in *Richter*. Though the Sixth Circuit panel might have decided this case differently had it been the court reviewing this case on direct appeal, that was not its role. The panel should have given the Michigan Supreme Court's decision–and in particular its factual findings–the considerable deference AEDPA and this Court require. See *Renico* v. *Lett*, 130 S. Ct. at 1866. The Sixth Circuit panel's expansion of federal habeas review represents a fundamental and continuing misunderstanding of AEDPA and this Court's precedents that this Court

has been forced to correct repeatedly. E.g., *Howes* v. *Fields*, 132 S. Ct. 1181 (2012); *Bobby* v. *Dixon*, 132 S. Ct. 26 (2011); *Renico* v. *Lett*, 130 S. Ct. 1855 (2010); *Berghuis* v. *Smith*, 130 S. Ct. 1382 (2010).

For example, the Sixth Circuit panel stated in this case that "AEDPA, read properly, is a limitation on the otherwise broad equitable power of federal courts to grant writs of habeas corpus" and that the "deference AEDPA demands is only as strong as the limitations it imposes." Pet. App. 21a. That statement reflects a backward view of AEDPA's role. As this Court recently held in *Cullen* v. *Pinholster*, 131 S. Ct. 1388, 1400 (2011), AEDPA deference is the rule, not the exception, when examining a state court decision in a federal habeas proceeding. In other words, AEDPA is not "merely a limitation" on federal habeas review. Rather, AEDPA defines the very limited instances when a federal habeas corpus remedy is available.

Similarly, the Sixth Circuit cited *Richter*, 131 S. Ct. at 786, to support its view that AEDPA is merely a limitation on the otherwise broad power of federal courts to grant habeas relief. But this Court in *Richter* said just the opposite: where "fairminded jurists" can disagree on the correctness of the state court decision, federal habeas relief is precluded. 131 S. Ct. at 786. This is not an exception to granting habeas relief, but rather the guiding principle. "If a state court denies the claim on its merits, the claim is barred in federal court unless one of the exceptions § 2254(d) . . . applies." *Id.*, at 787. The Sixth Circuit erred grievously in transposing "the rule" with "the exception" in federal habeas jurisprudence.

While greatly expanding the bounds of habeas review, the Sixth Circuit panel simultaneously usurped state courts' legitimate role in resolving factual disputes. The panel's statement that the federal courts have "broad" authority within the habeas corpus area relates to the fashioning of a remedy, not to state-court factual findings. See, e.g., *Gentry* v. *Deuth*, 456 F.3d 687, 697 (6th Cir. 2006) ("[h]aving correctly issued the writ, the choice of habeas remedy lies within the district court's sound discretion."). Section 2254(d) is "designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 131 S. Ct. at 787. The Sixth Circuit panel's contrary view led the panel to grant habeas relief where AEDPA prohibits it.

This case presents a textbook example of a federal court paying only lip-service to this Court's AEDPA jurisprudence. There were two ways to read the trial court's statements, as the Michigan Supreme Court majority and dissent highlighted. The majority made the following predicate factual findings:

- The trial judge's remarks, considered in context, do not reflect a finding that the prosecutor engaged in purposeful discrimination. Instead, the comments demonstrate "that her true motivation was to ensure some modicum of racial balance in the jury panel." Pet. App. 90a.

- The trial judge's true motivation was reflected in her comment: "I think all of us are being, trying to be conscientious about the selection of these jurors because of the racial makeup of the jury panels, which we don't have any control over." Pet. App. 90a.

- The trial judge's statements did not imply that she would have kept venire members Jones and Johnson on the jury because the prosecutor had used peremptory challenges to exclude them on the basis of race. Rather, the trial judge's statements "implied that she would have kept them on the jury to ensure that the number of African-Americans jurors remained proportionate to the number of Caucasian jurors." Pet. App. 90a.

- The trial judge found that no *Batson* violation occurred "because a satisfactory number of African-American females were still present on the jury." Pet. App. 126a.

These factual predicates drove the Michigan Supreme Court majority's ultimate factual determination: "no *Batson* violation existed in this case and the trial judge neither explicitly nor implicitly found that the prosecutor purposefully discriminated." Pet. App. 99a.

In contrast, the dissenting opinion, while agreeing with most of the majority's legal reasoning, rendered *contrary* predicate factual findings concerning the trial judge's actions and words:

- After the prosecutor proffered explanations for her peremptory challenges to venire persons Johnson and Jones that were race-neutral as a matter of law, the trial judge moved to the third *Batson* step.[3] The trial judge concluded that the

[3] It is worth noting that the author of the dissent, Justice Cavanagh, prefaces many of his findings with "[i]n my view," "[o]n

prosecutor had engaged in purposeful discrimination and excluded Johnson and Jones on the basis of race. Pet. App. 138a.

- The trial judge's comments that she wanted to seat a racially balanced jury do not undermine her finding that the prosecutor excluded venire members Johnson and Jones on the basis of race in violation of *Batson*. Pet. App. 140a–141a.

- The trial judge believed (incorrectly) that the *Batson* violation was "cured" because the jury ultimately seated was racially proportionate. Pet. App. 146a–149a.

The dissent's predicate factual findings drove a contrary ultimate factual determination: "[w]ith respect to veniremembers Johnson and Jones, I . . . would conclude that the trial court believed that these veniremembers were excluded on the basis of race." Pet. App. 138a.

The point is that the Michigan Supreme Court majority made its determination, and that finding was a fair and reasonable inference from the trial-court record. Three Michigan Supreme Court Justices disagreed, accepting Rice's view, illustrating that "fairminded jurists could disagree" on the correct interpretation of the record. But it was that very room for disagreement that precluded the Sixth Circuit panel from granting habeas relief. *Richter*, 131 S. Ct.

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the basis of my review," or "I believe." Pet. App. 131a—153a. In so doing, Justice Cavanagh clearly indicates that he has a differing factual interpretation of the trial judge's conduct and what it means.

at 786. The controlling standard is reasonableness of the Michigan Supreme Court's finding. *Renico*, 130 S. Ct. at 1865 ("The Court of Appeals' interpretation of the trial record is not implausible. . . . But other reasonable interpretations of the record are also possible. . . . Given the foregoing facts, the Michigan Supreme Court's decision upholding the trial judge's exercise of discretion–while not necessarily correct–was not objectively unreasonable.").

There was nothing unreasonable about the majority's finding. Had the trial-court judge found a *Batson* violation, she would have declared a mistrial and begun selecting a new jury. She did not do that. That is compelling evidence that the trial-court judge did not find a *Batson* violation, and the Michigan Supreme Court majority's finding to that effect was reasonable.

In sum, it is not clear that the Michigan Supreme Court erred at all, "much less so transparently that no fair minded jurist could agree with that court's decision . . . ." *Bobby* v. *Dixon*, 132 S. Ct. at 27. As this Court recently noted in its unanimous decision reversing the Ninth Circuit in *Felkner* v. *Jackson*, 131 S. Ct. 1305, 1307 (2011), the state appellate court "carefully reviewed the record at some length" and found no *Batson* violation. As in *Felkner*, this Court should grant Michigan's petition and reverse.

II. This Court should grant the petition for a writ of certiorari to resolve how 28 U.S.C. § 2254(d)(2) and (e)(1) interrelate.

The relationship between §§ 2254(d)(2) and (e)(1) is an open question, one that has yet to be resolved by

this Court and which divides the federal courts of appeals. When properly interpreted and applied, the interplay of (d)(2) and (e)(1) would make a difference here. Even if federal habeas judges could conclude that the Michigan Supreme Court's factual findings were "unreasonable" under (d)(2), the trial-court record does not overcome (e)(1)'s presumption of correctness. That reality demonstrates a second, independent way that the Sixth Circuit's grant of habeas relief under (d)(2) was erroneous.

A. The relationship between (d)(2) and (e)(1) remains an open question after this Court's decision in *Wood* and divides the federal courts of appeal.

This Court has yet to directly address the interrelation of §§ 2254(d)(2) and (e)(1). In several cases, this Court has either found it unnecessary to resolve this question, see *Rice* v. *Collins*, 546 U.S. 333, 339 (2006) (assuming *arguendo* that only (d)(2) applied and finding that the state-court decision was not unreasonable) or simply hinted at what that interrelation might be, compare *Miller-El* v. *Cockrell (Miller-El I)*, 537 U.S. 322, 341 (2003) (suggesting in a case involving whether a certificate of appealability should have been granted that it was incorrect for the federal court of appeals to merge (d)(2) and (e)(1)) with *Miller-El* v. *Dretke (Miller-El II)*, 545 U.S. 231, 265 (2005) (appearing to merge (e)(1) and (d)(2)).

The issue was directly presented in *Wood* v. *Allen*, 130 S. Ct. 841 (2010). In *Wood*, this Court acknowledged that despite "statements [the Court has] made about the relationship between §§ 2254(d)(2) and

(e)(1) in cases that did not squarely present the issue . . . , we have explicitly left open the question whether § 2254(e)(1) applies in every case presenting a challenge under § 2254(d)(2) . . . .” 130 S. Ct. at 848–49. Although the question was directly presented in *Wood*, this Court did not resolve it: “Because the resolution of this case does not turn on them, we leave for another day the questions of how and when § 2254(e)(1) applies in challenges to a state court’s factual determinations under § 2254(d)(2).” *Wood*, 130 S. Ct. at 851.

In *Wood*, this Court recognized that the question of (d)(2) and (e)(1)’s interplay “has divided the Courts of Appeals.” *Wood*, 130 S. Ct. at 848. It also noted that the federal courts of appeals have taken different approaches to the open question. *Id.* at 848 n.1 (citations omitted). Leaving the question open is now causing havoc in the Sixth Circuit, which in two recent published opinions (including this one) has either ignored the interrelation between (d)(2) and (e)(1) and nonetheless granted relief pursuant to (d)(2), see *Walker* v. *McQuiggan*, 656 F.3d 311, 323 (6th Cir. 2011) (Cook, J., dissenting),[4] or found the interrelation of the two sections irrelevant, see *Rice*, 660 F.3d at 254 n. 6 (the present case). Notably, in both cases, the Sixth Circuit departed from its own precedent, which

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[4] The State of Michigan has filed a petition for a writ of certiorari to this Court from the Sixth Circuit’s similarly misguided decision in *Walker*. That petition is pending before this Court in case number 11-1011. The State suggests that, because both cases raise similar claims and relief, this Court consider granting a writ of certiorari in both cases and consider them jointly or, in the alternative, hold one of the cases in abeyance while the other is addressed on the merits.

adhered to the basic observations made in *Miller-El I*. *Ayers* v. *Hudson*, 623 F.3d 301, 308 (6th Cir. 2010).

B. The only proper construction of § 2254 gives meaning to both (d)(2) and (e)(1).

The burden imposed on habeas applicants under section (e)(1) is an additional and even more deferential burden than that in (d)(2). See *Wood*, 130 S. Ct. at 849. Section 2254(e)(1) contains both a burden of production and an exacting burden of persuasion: a habeas petition must rebut by clear and convincing evidence factual findings by the state court, which are *presumed* correct. In that way, (e)(1)'s standard is more focused than the (d)(2) "objectively unreasonable" standard of review.

Properly construed, (d)(2) and (e)(1) together constitute a two-part inquiry. As the First, Third, Fourth, Fifth, and Tenth Circuits have held, challenges to individual or predicate factual determinations are evaluated using (e)(1). Then, once the (e)(1) task is accomplished, the overarching or ultimate factual determination (which relies upon the individual predicate factual determinations) is evaluated under the general reasonableness stated of (d)(2). E.g., *Lambert* v. *Blackwell*, 387 F.3d 210, 235–36 (3d Cir. 2004). This interpretation gives each section meaning.

Other approaches to the interplay between (d)(2) and (e)(1) either ignore (e)(1)'s presumption of correctness in deciding claims concerning state factual findings/determinations, or apply (e)(1) only when new evidence is presented in a federal habeas court, either by conducting an evidentiary hearing in federal court, or by otherwise considering evidence that was not

before the state court at the time of its decision. Neither of these approaches is consistent with AEDPA or this Court's decisions interpreting AEDPA, for the reasons detailed below.

First, any approach that ignores or relegates (e)(1) to irrelevancy cannot be reconciled with AEDPA's text. This Court has previously noted in interpreting AEDPA that "Congress wished to . . . prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law. When federal courts are able to fulfill these goals within the bounds of the law, AEDPA instructs them to do so." *Williams* v. *Taylor*, 529 U.S. 362, 386 (2000) (Opinion of Stevens, J.). Likewise, this Court has noted, also in addressing AEDPA, that it is "a cardinal principle of statutory construction that we must give effect if possible to every clause and word of statute." 529 U.S. at 402 (Opinion of O'Connor, J., internal citations and quotations omitted). Finally, it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colauitti* v. *Franklin*, 439 U.S. 379, 392 (1979). Michigan's approach—which provides a road map by which a federal habeas court and habeas practitioners are to apply these sections—is consistent both with AEDPA's language and this Court's interpretation.

Second, it renders (e)(1) superfluous to adopt an approach (like that of the Ninth Circuit) that causes (e)(1) to be relevant only when a federal court considers new evidence in deciding whether a state court's factual determination is unreasonable under (d)(2). This Court held in *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011), that federal habeas courts are forbidden from

considering new evidence, whether that evidence is presented in an evidentiary hearing in federal court or otherwise, in determining whether a state court merits adjudication violates AEDPA. *Id.* at 1400 n.7.

C. Proper construction of (d)(2) and (e)(1) should require a different result in this case.

Resolution of the interplay between (e)(1) and (d)(2) should be outcome determinative here. Unlike *Wood*, the Sixth Circuit panel here found the Michigan Supreme Court's ultimate factual determination objectively unreasonable. Also, unlike *Wood*, an interpretive difference between (e)(1) and (d)(2) should change the outcome of this case. That is: if (e)(1) is applied to the predicate facts found by the Michigan Supreme Court before reviewing the ultimate (d)(2) determination by the Michigan Supreme Court, the State prevails. The (e)(1) factual findings (noted in Section I, *supra*) serve as analytic guideposts and, when unrebutted by clear and convincing evidence, inescapably point to the conclusion that the Michigan Supreme Court was objectively reasonable in concluding that the trial court did not find a *Batson* violation.

Although the trial judge's words and actions are subject to two opposing interpretations, the Michigan Supreme Court majority determined that the trial judge's concern was with seating a petit jury that was racially proportionate, not that the prosecutor was exercising peremptory challenges based on the race of the venire members (the ultimate factual determination). Demonstrating merely that the words

and actions of the trial judge are subject to another *possible* interpretation is insufficient to overcome the (e)(1) presumption of correctness.[5]

The Sixth Circuit's mistake was to reassess the majority's predicate factual determinations under (d)(2) rather than (e)(1). Under (e)(1), Rice has a greater burden: overcoming the presumption of correctness that applies to each predicate fact. And Rice did not satisfy that burden because he did not (and could not) present clear and convincing evidence to the contrary.

In sum, there was no "extreme malfunction" in the state court system, nor was the state court's ruling "so lacking in justification . . . beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786. The mere existence of a plausible alternative reading of the state trial-court record does not demonstrate unreasonableness; accordingly, habeas relief under (d)(2) was unjustified. More important, allowing the circuit conflict regarding (d)(2) and (e)(1) to percolate will result inevitably in additional federal-court violations of comity and federalism, the principles that Congress enacted AEDPA to vindicate.

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[5] Although not appearing to be a predicate fact in the causative sense, the majority and dissenting opinions also had polar opposite views of whether defense counsel properly understood *Batson.* The Michigan Supreme Court majority indicated that the manner in which defense counsel phrased his *Batson* objection "demonstrated his misunderstanding of *Batson*." Pet. App. 100a. The dissent disagreed: "[D]efense counsel's remarks do not demonstrate his misunderstanding of *Batson*." Pet. App. 139a. This disagreement illustrates how the division between the Michigan Supreme Court was merely a result of divergent views of what ambiguous conduct and words meant.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Joel D. McGormley
Appellate Division Chief

John S. Pallas
Assistant Attorney General

Attorneys for Petitioner

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