No. 13-85

In the
Supreme Court of the United States

TONY PATTERSON, WARDEN, HOLMAN CORRECTIONAL FACILITY, ET AL.,
Petitioners,
v.
RICKY D. ADKINS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF

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August 26, 2013

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REPLY BRIEF

The Court should grant the petition for certiorari and reverse the lower court. Alternatively, the Court should grant, vacate, and remand. In the intervening case of *Lee v. Commissioner*, another panel of the lower court held that the decision below is "flatly inconsistent" with this Court's case law. *Lee v. Comm'r*, __ F.3d __, 2013 WL 3957735 at *46 (11th Cir. Aug. 1, 2013). This Court should GVR to give the lower court the opportunity to evaluate *Lee v. Commissioner* in the first instance and, ultimately, to apply the correct AEDPA standard of review to the facts of this case.

The vehicle arguments in Adkins's brief in opposition are unavailing. There is a well-developed split and no impediment to this Court's review. Most importantly, the proper AEDPA standard of review really matters in this case. The *Batson* issue uniquely turns on credibility because the prosecutor admitted that he was wrong about Billy Morris's marital status, but nonetheless maintained that he struck Morris based on that mistake. The *Batson* claim was evaluated years after trial thanks only to a state-court procedural rule that allowed the state court to review the claim for plain error only. Neither the lower court nor Adkins has ever explained *why* the prosecutor would have struck Billy Morris because of his race, as opposed to the prosecutor's stated reason. Adkins is a white defendant who murdered a white woman for reasons of sex, not race. And it is undisputed that the district attorney's office at issue had no history of striking based on race, and the district attorney left one black juror on the jury.

The lower court found a *Batson* violation only by reading snippets of the record against the state court's judgment, instead of in deference to it. For example, Adkins's brief in opposition and the lower court cite as evidence of racism the prosecutor's statement that, because the defendant is white, he was not concerned about race during jury selection. BIO 3. But a court is clearly not applying a deferential standard of review when it reads a statement *disclaiming an interest in the race of jurors* as evidence of race-discrimination. Similarly, Adkins and the lower court fault the state courts for relying on an affidavit presented after the *Batson* hearing because it was not subjected to cross-examination. BIO 4. But they ignore the fact that Adkins's lawyers had already been allowed to cross-examine the prosecutor under oath and on the witness stand about the reasons for his jury strikes (which is highly unusual for a *Batson* hearing).

A. The court of appeals decided the question presented.

Adkins spends much of his BIO arguing that the Petitioners did not adequately raise the question presented in the courts below. *See* BIO 9-13. To the contrary, the proper standard of review under AEDPA was the focus of the lower-court briefing and the crux of both the district-court and appellate-court decisions. The Petitioners' brief spent several pages on the proper standard of review under AEDPA and attempted to distinguish this case from the erroneous circuit-level cases relied on by Adkins. *See* Reply App. 5a-10a. The Petitioners expressly argued

that the trial court's and appellate court's conclusory statements that they had considered all the circumstances were sufficient to warrant deference. *See* Reply App. 9a.[1] This is so even though those courts did not expressly recount and evaluate all the supposedly relevant facts.

For his part, Adkins disputed Petitioners' arguments. He argued, for example, that the "complete absence in the Court of Criminal Appeals' opinion of any comparative juror analysis" rendered the judgment unreasonable and subject to *de novo* review. Reply App. 13a. The lower court agreed with Adkins, followed its prior panel decision in *McGahee*, and expressly applied a *de novo* standard of review to the state-court judgment. In doing so, the court of appeals expressly referenced and purported to follow this Court's decision in *Harrington v. Richter*. Pet. App. 16a.

This case thus presents "fully developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). "[E]ven if [there] were a claim not raised by petitioner below, [this Court] would ordinarily feel free to address it, since it was addressed by the court below." *Lebron v.*

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[1] Specifically, the trial court said "'[a]fter reviewing those jurors struck by the State and the explanations given, this Court finds that there was no purposeful racial discrimination in the peremptory strikes exercised by the State as to Billy Morris, or any other black juror struck." Rep. App. 9a. The appeals court similarly said "'[a]fter a careful review of the reasons given by the prosecutor and after examining the testimony taken at the *Batson* hearing, we find that no *Batson* violation occurred here.'" Rep. App. 9a.

National R.R. Passenger Corp., 513 U.S. 374, 377 (1995); *accord United States v. Williams*, 504 U.S. 36, 41 (1992); *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991). As the decisions of both the district court and the court of appeals indicate, the proceedings in this case have always been about the proper standard of review governing Adkins's claim.

Whether the Petitioners made the "precise arguments" that they might make in this Court, they contested Adkins's assertion that his *Batson* claim should be reviewed *de novo* based on the state courts' failure to "consider" certain facts in a written opinion. *Yee*, 503 U.S. at 534. "Once a federal claim is properly presented, a party can make any argument in support of that claim [in this Court]; parties are not limited to the precise arguments they made below." *Id.* Adkins cannot get any traction from waiver arguments.

B. There is a split of authority.

The court of appeals' decision implicates a clear split of authority with the Ninth and Eleventh Circuits on one side and nearly everyone else on the other.

Adkins's argument to the contrary attacks a straw man. He argues, for example, that *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004), is not on the Eleventh Circuit's side of the split because the court in that case said "state courts are not required to address every jot and tittle of proof." BIO 14. But that is not what the court below held either. Instead,

the court below held that a state court's failure to "mention" *significant evidence* is enough to render its decision "unreasonable" and subject it to *de novo* review. That is precisely what the Ninth Circuit did in *Taylor*. *See Taylor*, 366 F.3d at 1001 ("state courts' failure to consider, or even acknowledge" certain "highly probative testimony casts serious doubt on the state-court fact-finding process and compels the conclusion that the state-court decisions were based on an unreasonable determination of the facts").

Similarly, Adkins argues that several other circuits are in line with the Ninth and Eleventh Circuits based on language about the importance of reviewing all the facts. *See* BIO 15 & nn.19-28. But none of those circuits have done what the Eleventh Circuit did here: they have not reviewed a state court's decision *de novo* based on the way the state court wrote its opinion. Instead, the First, Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have expressly rejected that kind of analysis. Pet. 17-25. And most of them have done so in *Batson* cases just like this one. *See Messiah v. Duncan*, 435 F.3d 186, 193 (2d Cir. 2006); *McKinney v. Artuz*, 326 F.3d 87, 100 (2d Cir. 2003); *Fields v. Taylor*, 588 F.3d 270, 276 (5th Cir. 2009); *Akins v. Easterling*, 648 F.3d 380, 393-94 (6th Cir. 2011); *Braxton v. Gansheimer*, 561 F.3d 453, 462 (6th Cir. 2009); *Edwards v. Roper*, 688 F.3d 449, 459 (8th Cir. 2012); *Smulls v. Roper*, 535 F.3d 853, 861-63 (8th Cir. 2008); *Saiz v. Ortiz*, 392 F.3d 1166, 1176-80 (10th Cir. 2004). There is a well-developed split on the question presented.

C. *Lee v. Commissioner* underscores the need for this Court's review.

After the petition for certiorari was filed, another panel of the Eleventh Circuit decided *Lee v. Commissioner*, ___ F.3d ___, 2013 WL 3957735 (11th Cir. August 1, 2013). In *Lee*, the court rejected the same argument that prevailed here: "that the state appellate court's decision in [t]his case is an unreasonable application of *Batson* and is not entitled to any AEDPA deference because that opinion did not mention or discuss every relevant fact or argument he offered in support of his *Batson* claim." 2011 WL 3957735, at *35. Instead of following *Adkins*, the *Lee* panel held that the *Adkins* panel's central ruling was wrongly decided under this Court's precedents. The panel explained that "[t]he analysis about AEDPA deference to state court opinions, used by the *Adkins* majority opinion, is flatly inconsistent with . . . well-established Supreme Court" precedent and "does not bind us or any future panels of this Circuit." *Id.* at *46.

Adkins erroneously argues that the *Lee* decision moots the need for this Court's review because the panel in *Lee* did not dispute the ultimate conclusion in this case, even as the *Lee* panel refused to follow the first panel's reasoning. BIO 13. But the *Lee* panel did not purport to independently evaluate the evidence under the proper standard of deferential review. And, as explained at length in the petition for certiorari, the facts here are such that the proper deferential standard of review tips the scale in favor of the Petitioners.

Ultimately, the *Lee* decision underscores that the lower courts are confused about how to review poorly-written or cursory state-court decisions under AEDPA. The split between the Ninth Circuit and other courts of appeals remains. And if not reversed, the judgment below will stand as an anomaly. It will impose the burden on the State of retrying a 25 year-old murder case even though another panel of the same court has now found, correctly, that the court below employed a fundamentally flawed legal analysis when ordering that retrial. The only way to resolve the continued disarray in the lower courts is for this Court to grant the writ.

D. In the alternative, the Court should GVR in light of *Lee v. Commissioner*.

In the alternative, the Court should grant, vacate, and remand in light of the Eleventh Circuit's conclusion in *Lee v. Commissioner* that the panel in this case applied the wrong standard of review. The Court often grants, vacates, and remands when the lower court's decision is called into question by an intervening decision. "Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996); *accord id.* at 191-92 (Scalia, J.,

dissenting) (agreeing that GVR is proper "where an intervening factor has arisen that has a legal bearing upon the decision" below).

Lee v. Commissioner is the kind of intervening decision that warrants a GVR. *E.g. Alabama v. Ritter*, 454 U.S. 885 (1981) (GVR in light of intervening lower-court decision). The Eleventh Circuit has expressly recognized that the panel's reasoning in this case is "flatly inconsistent" with this Court's precedents, and the panel in this case has not had an opportunity to consider and respond to *Lee*. Accordingly, if the Court decides not to grant the petition and reverse, the Court should nonetheless grant, vacate, and remand so that the lower court can apply the correct standard of review to the facts of this case or otherwise address *Lee v. Commissioner*.

CONCLUSION

This Court should grant certiorari and reverse the Eleventh Circuit's judgment or, in the alternative, grant, vacate, and remand in light of *Lee v. Commissioner*.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-12380-P
CAPITAL CASE

RICKY DALE ADKINS,

Petitioner - Appellant,

v.

TONY PATTERSON, Warden,
Holman Correctional Facility, et al.,

Respondents - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ALABAMA, MIDDLE DIVISION
Case No. 4:06-cv-04666-SLB-HGD

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. . .

This Court's decision in *McGahee v. Alabama Department of Corrections*, 560 F.3d 1252 (11th Cir. 2009), is instructive on this point, particularly because it was decided under the same standard of review. *Id.* at 1255, 1270. In *McGahee*, this Court found that "[b]ecause the [state] court omitted from step three of its analysis crucial facts which [the defendant] raised in his brief to that court . . . the Court of Criminal Appeals did not review 'all relevant circumstances' as required by Batson." *Id.* at 1263 (quoting *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723).

Here, as in *McGahee*, the Court of Criminal Appeals failed to address "crucial facts" raised by Adkins in his brief on return to remand. In assessing the genuineness of the prosecution's reasons, the appellate court failed to address, inter alia, the strength of the prima facie case established by Adkins' Vol. 11, R-34b, pp. 31-34; the fact that the prosecution explicitly noted the race of every black veniremember (and only black veniremembers) on the jury list the prosecutor relied upon in striking the jury, Vol. 11, R-34b, p. 25; the fact that certain reasons provided by the prosecution for striking black veniremembers were incorrect and/or directly

contradicted by the record, Vol. 11, R-34b, pp. 5, 10-11; the fact that the prosecution's own notes contradicted or did not support its reasons for striking black veniremembers, Vol. 11, R-34b, pp. 8, 24-25; the fact that age was provided as a reason for striking black veniremembers ranging in age from 32 to 86, Vol. 11, R-34b, p. 19; the fact that the prosecution struck five out of nine black prospective jurors for being 'single" yet failed to explain how marital status related to the case at hand, Vol. 11, R-34b, pp. 14-22; and the fact that the prosecution failed to question jurors about many of the reasons it provided as a basis for striking them, Vol. 11, R-34b, pp. 12-13, 26-29. The Court of Criminal Appeals also failed to conduct any comparative analysis of black veniremembers who were struck with white veniremembers who served on Adkins's jury. In contrast, Judge Bowen's dissenting opinion discussed many facts ignored by the majority and concluded that "[i]t is obvious here that the district attorney engaged in disparate treatment of black veniremembers struck as opposed to white veniremembers possessing the same characteristics." *Adkins*, 639 So. 2d at 520 (Bowen, P.J., dissenting).

All of these circumstances – discussed in more detail below – have bearing on the State's motivation for striking black veniremembers and yet none of them were considered by the Court of Criminal Appeals. The state court's failure to do so clearly renders its decision unreasonable under AEDPA. *See McGahee*, 560 F.3d at 1265-66.

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No. 11-12380-P

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RICKY DALE ADKINS,

Appellant,

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TONY PATTERSON, Warden,
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Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

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C. Standard of Review

This Court set forth the following standard of review for habeas cases:

> Because we are reviewing a final state habeas judgment, "our review is greatly circumscribed and is highly deferential to the state courts" under, as amended by the Antiterrorism and Effective Death Penalty Act of 1996. *Crawford v. Head,* 311 F.3d 1288, 1295 (11th Cir.2002). "When reviewing the district court's denial of a habeas petition, we review questions of law and mixed questions of law and fact *de novo,* and findings of fact for clear error." *Nyland v. Moore,* 216 F.3d 1264, 1266 (11th Cir.2000). A federal court may not grant habeas relief unless the decision of the state court either was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Our review of findings of fact by the state court is even more deferential than under a clearly erroneous standard of review. "[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." *Id.* § 2254(e).

Our review of legal conclusions by the state courts is also especially deferential. A state court decision is contrary to the clearly established precedent of the Supreme Court "(1) if the state court applies a rule that contradicts the governing law as set forth in Supreme Court case law, or (2) if the state court confronts a set of facts that are materially indistinguishable from those in a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent." *Bottoson v. Moore,* 234 F.3d 526, 531 (11th Cir.2000) (citing *Williams v. Taylor,* 529 U.S. 362, 406, 120 S.Ct. 1495, 1519-20, 146 L.Ed.2d 389 (2000)). An unreasonable application of federal law occurs when the state court "identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case" or "unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." *Putman v. Head,* 268 F.3d 1223, 1241 (11th Cir. 2001).

Under the unreasonable application clause of section 2254(d), a federal habeas court may

> not issue the writ on the ground that, in its independent judgment, the state court applied federal law incorrectly. *See Bell v. Cone,* 535 U.S. 685, 698-99, 122 S.Ct. 1843, 1852, 152 L.Ed.2d 914 (2002). This clause imposes a "'highly deferential standard for evaluating state-court rulings,' which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti,* 537 U.S. 19, 24, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (2002) (quoting *Lindh v. Murphy,* 521 U.S. 320, 333 n. 7, 117 S.Ct. 2059, 2066 n. 7, 138 L.Ed.2d 481 (1997)). The habeas applicant must show that the state court applied federal law to the facts of his case in an objectively unreasonable manner. *See id.* at 25, 123 S.Ct. at 360. An "unreasonable application of federal law is different from an incorrect application of federal law." *Williams,* 529 U.S. at 410, 120 S.Ct. at 1522. Even clear error, standing alone, is not a ground for awarding habeas relief. *See Lockyer v. Andrade,* 538 U.S. 63, 75, 123 S.Ct. 1166, 1175, 155 L.Ed.2d 144 (2003).

Stephens v. Hall, 407 F.3d 1195, 1201-1202 (11th Cir. 2005).

. . .

ARGUMENT

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Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a federal habeas court cannot grant habeas relief on a *Batson* claim unless the

court determines that "the state-court conclusion [was] 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Rice v. Collins*, 546 U.S. 333, 338-339, 126 S.Ct. 969, 974 (2006) (citing 28 U.S.C. § 2254(d)). For that reason, this Court can grant Adkins habeas relief on his *Batson* claim only if this Court determines that the state courts' adjudication of this claim was an unreasonable application of federal law or based on an unreasonable determination of the facts. *Id.* *See also McNair v. Campbell*, 416 F.3d 1291, 1310 (11th Cir. 2005). As set forth below, Adkins has failed to sustain his burden of proof.

. . .

C. The Alabama Court Of Criminal Appeals' Decision Was Not Contrary To And Does Not Involve An Unreasonable Application Of Clearly Established Federal Law.

1. Third-Step Inquiry

Adkins argues that the Alabama Court of Criminal Appeals did not conduct a proper third-step inquiry in this case because it failed to address all the relevant facts raised in Adkins's brief to that Court. Adkins relies on this Court's opinions in *McGahee v. Alabama Dept. of Corr.*, 560 F.3d 1252 (11th Cir. 2009), and *Bui v. Haley*, 321 F.3d 1304 (11th Cir. 2003), to support this argument.

First, as set forth above, it is clear that the trial court and the Alabama Court of Criminal Appeals completely reviewed the circumstances in this case before determining that there was no *Batson*

violation. The trial court stated the following in its order denying the *Batson* motion: "After reviewing those jurors struck by the State and the explanations given, this Court finds that there was no purposeful racial discrimination in the peremptory strikes exercised by the State as to Billy Morris, or any other black juror struck." (Vol. 8, Tab#27, pp. 48-49) The Alabama Court of Criminal Appeals stated the following when it found no *Batson* violation: "After a careful review of the reasons given by the prosecutor and after examining the testimony taken at the *Batson* hearing, we find that no *Batson* violation occurred here." *Adkins*, 639 So. 2d at 517. Both the trial court and the Alabama Court of Criminal Appeals concluded that the prosecutor's race-neutral explanations were credible and, thereby, reached the third prong of the *Batson* inquiry. *See Hightower v. Terry*, 459 F.3d 1067, 1072 n.9 (11th Cir. 2006) ("The trial court's overruling of Hightower's *Batson* objection would have defied logic had the court disbelieved the prosecutor's race-neutral explanations. We may therefore make 'the common sense judgment' – in light of defense counsel's failure to rebut the prosecutor's explanations and the trial court's ultimate ruling – that the trial court implicitly found the prosecutor's race-neutral explanations to be credible, thereby completing step three of the *Batson* inquiry.").

Moreover, the facts in this case are distinguishable from the facts in *McGahee* and *Bui*. This is not a case where the Alabama Court of Criminal Appeals ignored the fact that the State proffered "an explicitly racial reason" for striking a prospective juror – that the prosecution did not want

to leave him as the sole black on the jury. *McGahee*, 560 F.3d at 1264-1266, 1268-1270. Nor is this a case where an assistant district attorney gave the reasons for the district attorney's strikes without ever stating that she had discussed with the district attorney his reasons for striking the black jurors even though she was given three opportunities to so testify and then failed to give a reason for one of the strikes of a black juror. *Bui*, 321 F.3d at 1315. Finally this is not a case where the Alabama Supreme Court relied on wholly irrelevant circumstances to conclude that the State had a race-neutral reason for striking a juror where no explanation was given for this strike by the State. *Id.,* at 1317-1318. The holdings in *McGahee* and *Bui* have no application to this case and do not require a finding by this Court that the conclusion by the state courts of no purposeful discrimination is an unreasonable determination of the facts and an unreasonable application of *Batson*.

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ARGUMENT

I. THE STATE COURT DID NOT CONSIDER "ALL RELEVANT FACTORS" IN REJECTING THE *BATSON* CLAIM.

The State does not dispute that, in the context of a *Batson* claim, a reviewing court must consider "all relevant circumstances" in determining whether a defendant has established purposeful discrimination. *Batson v. Kentucky*, 476 U.S. 79, 96, 106 S. Ct. 1712, 1723 (1986); see also *Hernandez v. New York*, 500 U.S. 352, 363, 111 S. Ct. 1859, 1868 (1991) (plurality opinion) ("An invidious discriminatory purpose may often be inferred from the totality of the relevant facts." (emphasis added) (quoting *Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 2048-49 (1976))).

In failing to consider "all relevant circumstances" together at *Batson*'s step three, the state court's decision constituted an unreasonable application of clearly established federal law. A consideration of all of the evidence makes clear that the State engaged in impermissible racial discrimination in striking nine of the eleven African-Americans in the venire.

. . .

The State fails to address Adkins's claim that there is a complete absence in the Court of Criminal Appeals' opinion of any comparative juror analysis, although Adkins had clearly made those arguments before the court. Vol. 11, Tab#34b, pp. 5, 23-24; *cf. Adkins v. State*, 639 So. 2d 515, 520-22 (Ala. Crim. App. 1993) (Bowen, P.J., dissenting) (engaging in comparative juror analysis). As previously noted in Adkins's opening brief as well as this one, the prosecution gave reasons such as age, knowledge of the case and having a relative in prison as reasons for striking black jurors, but did not strike white jurors with the same characteristics. *Miller-El II* makes clear that comparative juror analysis is a theory about the evidence, not the evidence itself. *Miller-El II*, 545 U.S. at 241 n.2, 125 S. Ct. 2326 n.2.

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