No. _____

In The
Supreme Court of the United States

JEFFERY LEE,

Petitioner,

v.

KIM THOMAS, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

LESLIE S. SMITH
Federal Defenders
MIDDLE DISTRICT OF ALABAMA
817 S. Court Street
Montgomery, AL 36104
334.834.2099
Leslie_Smith@fd.org

DAVID J. BURMAN
Counsel of Record
NICHOLAS P. GELLERT
ELVIRA CASTILLO
DAVID A. PEREZ
PERKINS COIE LLP
1201 Third Avenue,
Suite 4900
Seattle, WA 98101
206.359.8000
DBurman@perkinscoie.com

Attorneys for Petitioner Jeffery Lee

CAPITAL CASE
QUESTIONS PRESENTED

The prosecutor in Petitioner's capital trial used all 21 peremptory strikes and 17 of 18 cause strikes against blacks (38 of 39 total). Petitioner's *Batson* challenge added that the jurisdiction had a history of *Batson* violations. Before providing his facially race-neutral explanations, the prosecutor explained that his strikes were motivated in part by defense counsel's strikes of white veniremembers. Petitioner's habeas petition contended that the state courts misapplied clearly established federal law by failing to consider the credibility of the facially neutral reasons in light of the overall statistical pattern, the lack of foundation for some of the prosecutor's reasons, the history of *Batson* violations in that jurisdiction, and the prosecutor's race-conscious explanation, as required under *Batson*'s third step.

The Eleventh Circuit acknowledged that the state court's analysis did not include these "relevant circumstances," but concluded that the Court's decision in *Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770 (2011), precluded relief. In *Richter*, the Court determined that when a state court summarily dismisses a federal claim *without explanation*, the claim is presumed to have been adjudicated on the merits and subject to deference. Here, the Eleventh Circuit applied *Richter* to a state court's reasoned decision to replace the state's otherwise unreasonable adjudication of Petitioner's claim with its own analysis. The

CAPITAL CASE

QUESTIONS PRESENTED – Continued

circuit courts are split on whether *Richter* applies outside the context of summary dispositions and more generally on whether to ignore a state court's clearly erroneous reasoning. The petition therefore presents this question for review:

> **Whether federal habeas courts should apply *Richter*'s presumption to a state court's reasoned decision in order to rehabilitate the state court's unreasonable application of clearly established federal law.**

PARTIES TO THE PROCEEDING

The Petitioner is Jeffery Lee, a capital defendant who is in state custody and was the petitioner-appellant in the court below. Respondents are the Commissioner of the Alabama Department of Corrections, Kim Thomas, and the Warden of Holman Prison, Tony Patterson. They were respondents-appellees in the court below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a-134a) is reported at 726 F.3d 1172. The unreported decision of the United States District Court for the Southern District of Alabama (Pet. App. 136a-349a) is available at 2012 WL 3137901. The decision of the Alabama Court of Criminal Appeals (Pet. App. 352a-519a) is available at 898 So.2d 790.

JURISDICTION

The Eleventh Circuit's opinion was filed on August 1, 2013. Pet. App. 1a. The Eleventh Circuit denied rehearing en banc on September 24, 2013. Pet. App. 520a-21a. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State

shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides, in pertinent 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.

STATEMENT OF THE CASE

A. The State Court Trial

Jeffery Lee, as a young black man, was charged with capital murder for killing Jimmy Ellis and Elaine Thompson in the course of a robbery, and with

attempted murder for injuring Helen King. All three victims were white. RE 266-67, 270; T44-R8-9, 11.

The State successfully challenged 18 venire-members for cause – 17 of them were black. RE 22; Doc. 1, p. 2. The State then used all 21 peremptory strikes against black veniremembers. *Id*. Thus, the state exercised 38 of 39 strikes, 97.4%, to remove blacks from the jury pool.

Defense counsel raised a challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986):

> MR. JACKSON [defense counsel]: We're not satisfied, we're going to make a *Batson* Motion, Judge. Given this county, Dallas County's history of racial discrimination in making jury selection and also the problem the District Attorney's office has experienced with having so many cases overturned with *Batson* problems.
>
> THE COURT: How long have they had that problem? I don't ever remember Mr. Greene having one.
>
> MR. JACKSON: *Robert Thomas v. State*. Given all that, and given the fact that the **State [h]as exercised all of their peremptory challenges striking all blacks**, we're suggesting that the State hasn't made a prima facie case.
>
> THE COURT: You're saying all their strikes were Afro-American?
>
> MR. JACKSON: Yes.

> THE COURT: That's a prima facie case. All right. They're strikes for one race. All right, Mr. Greene.

RE 1127-28; T1-R187-88 (emphasis added).

The prosecutor first denied the history of racial pattern strikes, but then conceded that in making his strikes he had in mind the fact that most of defense counsel's strikes were against whites:

> MR. GREENE: First of all, Judge, there's no history of racial discrimination in striking the jury either in the District Attorney's Office or in this Circuit. . . . **Also the defense, most of its strikes, were striking white jurors. In fact, I think all but three or four were exercised to remove white jurors from the panel.**

RE 1128; T1-R188 (emphasis added). The prosecutor then provided brief, facially race-neutral reasons for his individual strikes. However, as discussed below, examination of just two of those strikes – against veniremembers D.G. and D.M. – illustrate that the reasons given were contrary to or unsupported by the record, and testing those reasons against all relevant circumstances – something the state courts failed to do – demonstrates that the strikes were racially motivated, in violation of the Equal Protection Clause.

The trial court never scrutinized *any* of the State's proffered reasons for its 21 peremptory challenges – improbably all exercised against blacks. The

court simply provided the prosecution time to assert race-neutral explanations – regardless how cursory, improbable, or inconsistent with the facts of what the jurors had just said – and then overruled Lee's *Batson* objection. In doing so, the trial court relied upon the racial make-up of the jury that remained:

> THE COURT: All right. It appears you have given factually race valid reasons for striking. I will, however, note the make-up of the jury as it is impaneled contains, let's see, nine blacks and three whites.

RE 1130; T1-R190. That was the trial court's entire analysis under *Batson*'s third step. The court never explored the history of racially motivated jury selection in Dallas County, the statistical near-impossibility that 21 consecutive strikes against blacks could be race-neutral, or the prosecutor's race-conscious explanation regarding defense counsel's strikes against white jurors. *Id*.

B. The State Appeal

Lee appealed his conviction to the Alabama Court of Criminal Appeals ("CCA"), arguing, *inter alia*, that the trial court erred in denying his *Batson* motion. Specifically, Lee argued that the trial court misapplied *Batson*'s third step by failing to consider all the relevant circumstances, including the strike pattern (all 21 peremptories against blacks), Dallas County's history of *Batson* violations, and the prosecutor's race-conscious explanation for his strikes.

The CCA began its analysis of Lee's *Batson* claim by repeating an error committed by the trial court: omitting *Batson*'s step three entirely from its explanation of the *Batson* framework that it would later apply to Lee's claim. Pet. App. 367a ("After the appellant makes a timely *Batson* motion and establishes a prima facie showing of discrimination, the burden shifts to the state to provide a race-neutral reason for each strike of a minority veniremember.") (citation and quotation marks omitted). The CCA then affirmed the trial court's conclusion that the prosecutor's stated reasons were facially "race neutral," pursuant to *Batson*'s step two. Pet. App. 365a-66a (strikes based on opposition to death penalty are facially race-neutral); Pet. App. 368a (strikes based on arrest records are facially race-neutral); Pet. App. 368a (strikes based on lack of cooperation or responses are facially race-neutral); Pet. App. 369a-70a (strikes based on familiarity with defendant or his family are facially race-neutral). The CCA simply restated the prosecutor's given reasons, and provided a citation to support the proposition that the reason given was facially race-neutral. Pet. App. 367a-70a. But this analysis did not involve any assessment whatsoever of the prosecutor's credibility or the plausibility of his reasons.

At no point did the CCA discharge its duties under *Batson*'s step three by analyzing the *credibility* of the prosecutor's given reasons in light of the totality of the circumstances, including the astounding pattern of 21 consecutive strikes against blacks,

Dallas County's history of *Batson* violations, and the prosecutor's racially-charged explanation for his strikes. For instance, in assessing Lee's argument that the State "improperly struck veniremembers J.H., O.M., and D.G. based on their demeanor," the CCA simply noted that demeanor is a race-neutral reason to strike a juror. Pet. App. 373a. But the CCA never analyzed or determined whether the prosecutor's assertions about demeanor were *credible*. *See, e.g.*, Pet. App. 373a-74a (observing that the State struck D.G. based on demeanor, but not analyzing the credibility of this reason).

Likewise, the CCA even acknowledged that D.G. did not express any opposition to the death penalty – contrary to the State's proffered reason for striking him. But the CCA concluded (without any support) that "the prosecutor was simply mistaken about veniremember D.G.'s views about the death penalty," Pet. App. 372a, and found no error because the State's other reason for striking D.G. – that he allegedly had a family member who had been "convicted" of a property crime – "was race neutral," Pet. App. 372a. But ratifying that a particular reason is facially race-neutral is only relevant to *Batson*'s second step. *Batson*'s step three involves the court's independent assessment of the *credibility* of that reason – an assessment the CCA never performed.

Ultimately, the CCA's step three analysis was deficient in at least three ways:

- The CCA failed to analyze the *credibility* of the prosecutor's stated reasons, especially in light of that court's acknowledgement that the first reason given for striking D.G. was false, and the lack of any meaningful voir dire on the alternative justifications. *See Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) (concluding that because one reason the prosecutor provided was invalid, the other was less credible); *Miller-El v. Dretke* ("*Miller-El II*"), 545 U.S. 231, 246 (2005) (failure to conduct "meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a shame and a pretext for discrimination") (citation omitted);

- The CCA failed to consider, or even mention, the pattern of strikes (both peremptory and for cause) that targeted blacks. *See Batson*, 476 U.S. at 92 (noting that "total or seriously disproportionate exclusion" of blacks from a jury venire "is itself such an unequal application of the law as to show intentional discrimination") (citations and quotation marks omitted); and,

- The CCA failed to consider, or even mention, Dallas County's history of *Batson* violations. *See Miller-El v. Cockrell* ("*Miller-El I*"), 537 U.S. 322, 347 (2003) (evidence that "the culture of the District Attorney's Office in the past was suffused

> with bias against African Americans in jury selection . . . is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions"); *Miller-El II*, 545 U.S. at 240 ("[A]lthough some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson*'s explanation that a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination.").[1]

After the Alabama Supreme Court denied review, Lee sought habeas relief in federal court.

C. Habeas Corpus Proceedings

Lee's habeas corpus petition argued that the state court unreasonably applied federal law by failing to discharge its duties under *Batson*'s step three. Pet. App. 150a. The district court agreed that the CCA unreasonably applied federal law under *Batson* because the CCA did not examine all the relevant facts when reviewing the trial court's denial

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[1] A 2010 study examining the Dallas County district attorney's office found that since *Batson* was decided the State has used 79% of its peremptory strikes against black venire-members. Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 14 (August 2010), *available at* http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf.

of Lee's *Batson* objection. Pet. App. 172a-73a. In particular, the trial court "made no mention of the number of strikes that the State exercised against black jurors, or the purported history of *Batson* problems in the Dallas County District Attorney's Office, even though Lee unequivocally raised such issues in his principal brief on direct appeal." Pet. App. 172a. Accordingly, the district court applied *de novo* review to Lee's *Batson* claim, but ultimately denied Lee habeas relief.

D. The Eleventh Circuit Appeal

In a published opinion, the Eleventh Circuit affirmed the district court's denial of habeas relief, but disagreed with the district court's conclusion that the CCA unreasonably applied *Batson*'s step three. The panel agreed that the CCA's analysis omitted several relevant circumstances critical to *Batson*'s step three, including Dallas County's history of *Batson* violations and the remarkable fact that the prosecutor used all 21 of his peremptory strikes against blacks. Pet. App. 85a-86a. The panel also acknowledged that no state court ever made an explicit credibility finding concerning *any* of the prosecutor's stated reasons. Pet. App. 86a. But according to the Eleventh Circuit, Lee's arguments concerning the state court's failure to discharge its duties under *Batson*'s third step was an attempt to "establish[ ] specific writing requirements for state court opinions." Pet. App. 85a. In the Eleventh Circuit's view, a state court properly discharges its duties

under *Batson*, even when its step three analysis omits several relevant circumstances bearing on the credibility of the prosecutor's explanations.

In reaching that conclusion, the Eleventh Circuit extended this Court's decisions in *Harrington v. Richter*, ___ U.S. ___, 131 S. Ct. 770 (2011), and *Johnson v. Williams*, ___ U.S. ___, 133 S. Ct. 1088 (2013), too far. Those cases stand for the proposition that when there is *no explanation* as to why the state court dismissed one or more claims, a habeas court must apply AEDPA deference to "determine what arguments or theories . . . could have supported [] the state court's [unexplained] decision." *Richter*, 131 S. Ct. at 786. The panel reasoned that the analytical flaws in the CCA's *Batson* analysis were more akin to a summary disposition. Pet. App. 88a-90a. The panel rejected Lee's argument that *Richter* and *Williams* do not apply to reasoned opinions that contain analytical flaws. Pet. App. 88a.

Lee also argued that neither *Richter* nor *Williams* permits a federal habeas court to re-write a state court opinion whose analysis and application of federal law was unreasonable. But according to the panel, when applying § 2254(d)(1)'s "unreasonable application of clearly established federal law" standard, the actual reasoning a state court employed is wholly irrelevant. Pet. App. 89a. The Eleventh Circuit also reasoned that it "makes no sense to say that a state court decision is entitled to AEDPA deference if the opinion fails to contain discussion at all of a claim

but is entitled to no deference if it contains some but less than complete discussion." Pet. App. 89a.

The panel acknowledged, however, that its legal reasoning and conclusions could not be reconciled with at least two recent Eleventh Circuit decisions: *Adkins v. Warden, Holman CF*, 710 F.3d 1241 (11th Cir.), *cert. denied*, ___ U.S. ___, 134 S. Ct. 268 (2013), and *McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252 (11th Cir. 2009). In those cases, the Eleventh Circuit concluded that the petitioner was entitled to *de novo* review on his *Batson* claim because the state courts failed to consider all relevant circumstances at *Batson*'s third step. *Adkins*, 710 F.3d at 1254-55; *McGahee*, 560 F.3d at 1261-62. The panel here reduced the Eleventh Circuit's reasoning in *Adkins* and *McGahee* to "loose language," and explicitly stated that it would not follow either decision. Pet. App. 93a.

Lee sought rehearing en banc, arguing that the panel erred in extending *Richter* to non-summary disposition cases, and erred in concluding that state courts can omit *Batson*'s "all relevant circumstances" from step three. The Eleventh Circuit denied Lee's petition. Pet. App. 520a-21a.

REASONS FOR GRANTING THE WRIT

I. A SIGNIFICANT CIRCUIT CONFLICT EXISTS ON THE IMPORTANT QUESTION OF WHETHER *HARRINGTON v. RICHTER* APPLIES OUTSIDE THE CONTEXT OF SUMMARY DISPOSITIONS.

A. THE ELEVENTH CIRCUIT EXTENDED *HARRINGTON v. RICHTER* TOO FAR IN CONCLUDING THAT ANALYTICALLY FLAWED DECISIONS CAN BE RELABELED "SUMMARY DISPOSITIONS" FOR PURPOSES OF AEDPA DEFERENCE.

The Eleventh Circuit has created a new regime in which a federal habeas court ignores an unreasonably incomplete application of the federal rule by relabeling those errors and omissions "partial summary dispositions." In doing so, the panel extends *Harrington v. Richter*, 131 S. Ct. 770 (2011), beyond what this Court intended. In *Richter*, the California Supreme Court had issued a one-sentence summary order denying the petitioner's federal claim. *Id*. at 783. Generally, when a state court issues a summary disposition, a habeas court "look[s] through" that decision to examine the "last *explained* state-court judgment" that adjudicated the federal claims "on the merits." *Ylst v. Nunnemaker*, 501 U.S. 797, 805-06 (1991). Under *Ylst*, there is a presumption that later unexplained orders rest on the same grounds as the last reasoned decision. *Id*. at 802. This is called the "look through" doctrine.

However, *Richter* presented a scenario where the "look through" doctrine would not work. Richter filed his state habeas petition directly with the California Supreme Court, which has original jurisdiction over those claims. *Richter*, 131 S. Ct. at 783. After the California Supreme Court summarily dismissed his petition, without explanation, there was no other state court opinion to which the "look through" doctrine could be applied. *Id*. Therefore, the question in *Richter* was whether AEDPA deference "applies when state-court relief is denied **without an accompanying statement of reasons**." *Id*. at 780 (emphasis added). The Court established a rebuttable presumption that summary dismissals are decisions on the merits (which qualify for deference), "in the absence of any indication or state-law procedural principles to the contrary." *Id*. at 784-85. But the "*Richter* presumption" provides no guidance to those cases where there is no dispute that the state court issued a reasoned (but analytically flawed) decision on the merits. In cases where the "look through" doctrine identifies the last reasoned state court decision, meaning the parties do *not* dispute that there is a decision on the merits, then the habeas court's role is to analyze the reasonability of that decision – not rewrite it.

Lest there be any doubt about *Richter*'s limits, last Term, in *Johnson v. Williams*, ___ U.S. ___, 133 S. Ct. 1088 (2013), the Court confirmed that *Richter* is limited to summary dismissal cases. In *Williams,* the Court reiterated that *Richter* applies "when a

state court issues an order that summarily rejects without discussion *all* the claims raised by a defendant." *Id*. at 1091 (emphasis added). *Williams* clarified that the *Richter* presumption also applies to those instances where a state court discusses one claim, but rejects another *entire* federal claim "without expressly addressing that claim." *Id*. at 1096.

Taken together, *Richter* and *Williams* address a *procedural* question, rather than a substantive one: whether a particular claim (or set of claims) was adjudicated on the merits. But where the parties agree that the claims at issue were adjudicated on the merits, but dispute whether that adjudication was an "unreasonable application of clearly established federal law," neither *Richter* nor *Williams* apply.

The Eleventh Circuit's new standard – which treats flawed decisions as summary dispositions – conflates an unreasonable application of law with an adjudication on the merits. The inquiry into whether a claim was adjudicated on the merits determines whether the state court opinion is subject to AEDPA's deferential standard of review in the first place. In contrast, the question of whether a state court unreasonably applied federal law serves the opposite purpose: to determine whether a claim should be exempted from this deferential standard of review. By conflating these two inquiries, the Eleventh Circuit's holding effectively eliminates the unreasonable application inquiry by nullifying § 2254(d)(1).

Nevertheless, the Eleventh Circuit insists that the Court's logic in *Richter* would make "no sense" if the *Richter* presumption applies to decisions without any explanation, but not to decisions with scant explanation. Pet. App. 89a. While the Eleventh Circuit's argument has some force, the results it would produce reveal its flaws. If the Eleventh Circuit's new standard were applied moving forward, habeas courts could invoke *Richter* to convert a state court's unreasonable analysis of federal law into a "partial summary disposition." Instead of applying the *Richter* presumption to a summary disposition to determine whether a particular claim has been "adjudicated on the merits" (a procedural question), a habeas court could apply the *Richter* presumption to a state court's unreasonable analysis of a *sub-element* of a multi-part test, *e.g.*, *Batson*'s step three (a substantive question). This approach would direct habeas courts to ignore the flaws in a state court's analysis, rather than considering these flaws as evidence that the state court unreasonably applied federal law under § 2254(d). Habeas courts would then apply AEDPA deference to unreasonable applications of federal law by "rehabilitating" flawed state court opinions that would otherwise receive no deference.

In effect, habeas courts could invoke *Richter* to "fill in the blanks" for analytically unreasonable state court opinions, and rewrite state court opinions from the federal bench. The specter of federal courts rewriting state court opinions is the opposite of comity, and raises serious federalism concerns. Federal

courts should take state courts at their word when a state court reveals the reasons behind its decision. As Judge Calabresi pointed out in *Hawthorne v. Schneiderman*, "to impute" different reasoning to a state court decision from the federal bench "is not comity" but rather "[i]nsulting" to that state court. 695 F.3d 192, 200 (2d Cir. 2012) (Calabresi, J., concurring). Nor is it efficient, because "[r]eviewing actual reasons rather than imputing hypothetical ones would be more efficient not just for the federal courts, but also for litigants, who now are forced to anticipate every argument that [habeas courts] might conceive." *Id.* Thus, the novelty and scope of the Eleventh Circuit's new framework threatens to derail habeas review by asking federal courts to "move the goal post" by curing a state court's otherwise unreasonable analysis of a federal rule.

Ultimately, ignoring a state court opinion's analytical flaws is to mistake *Richter*'s holding and its logic. The scope of *Richter*'s holding is specific and narrow: when a state court rejects an *entire claim* without explanation, *Richter* provides that a federal habeas court should presume that the state court performed its duties in accordance with the Constitution. And when a state court discloses its reasoning, but omits critical factors that it should have considered before rejecting a habeas petitioner's *Batson* claim, § 2254(d)(1) instructs the court to give that claim its proper adjudication. It was therefore error to derive from *Richter*'s narrow holding a bizarre new practice of denying habeas relief by rewriting a state

court's otherwise unreasonable application of clearly established federal law. Section 2254 tells federal courts to *defer* to state court opinions; it does not empower federal courts to *rewrite* state court opinions.

In sum, the Eleventh Circuit's interpretation of AEDPA's standards is itself an important question of nationwide importance. The Court should grant *certiorari* to clarify that *Richter*'s rebuttable presumption cannot be used to insulate analytically flawed decisions from AEDPA review.

B. THERE IS A CIRCUIT SPLIT ON WHETHER *RICHTER* APPLIES TO REASONED DECISIONS OR ONLY APPLIES TO SUMMARY DISPOSITIONS.

Since *Richter* was announced, a conflict in the circuit courts has already developed over whether *Richter*'s presumption can be applied outside the context of summary dispositions. The Eighth Circuit has followed the Eleventh Circuit's approach in applying *Richter* to reasoned decisions. By contrast, the Fourth and Sixth Circuits are internally divided, while the Seventh and Ninth Circuits have strictly applied *Richter* to summary dispositions, although the Seventh Circuit has recently expressed some uncertainty about where to draw the line.

i. The Sixth Circuit is internally split on this question. In *English v. Berghuis*, a Sixth Circuit

panel considered whether a Michigan court reasonably applied federal law in adjudicating the habeas petitioner's *Batson* claim. 529 Fed. App'x 734 (6th Cir. 2013). The Sixth Circuit panel declined to apply *Richter* because "[u]nlike the state court's decision in *Richter*, the Michigan Court of Appeals' decision did provide a richly developed analysis." *Id*. at 743.

But in *McClellan v. Rapelje*, the Sixth Circuit applied the *Richter* presumption to a state court decision that was arguably "on the merits." 703 F.3d 344 (6th Cir.), *cert. denied*, 134 S. Ct. 399 (2013). Even though the state court order stated that the claims were dismissed for "lack of merit," the Sixth Circuit applied *Richter*'s rebuttable presumption and concluded that the state court did *not* adjudicate the defendant's ineffective assistance of counsel claim "on the merits." *Id*. at 350-51. Based on that conclusion, the Sixth Circuit applied *de novo* review to the habeas petitioner's federal claim and granted relief. *Id*. at 351. This Court later denied *certiorari*. 134 S. Ct. 399 (2013).

Notably, Justice Alito and Justice Scalia dissented from that denial of *certiorari*. In dissent, Justice Alito asserted that the Sixth Circuit's decision in *McClellan* "was based on a serious misreading" of *Richter*. *Id*. at 399. Specifically, Justice Alito clarified that "[u]nder *Harrington* [*v. Richter*], when a state court summarily rejects an appeal without clearly indicating whether the disposition was based on the merits of the claims presented or instead on procedural grounds, a federal habeas court must presume

that the decision was on the merits. . . . By contrast, when the state court makes it clear that a summary disposition was on the merits, *Harrington*'s rebuttable presumption **has no application**." *Id*. (emphasis added). The dissent goes on to emphasize that *Richter*'s presumption "comes into play *only* when a state court's order is ambiguous" about whether the claim was adjudicated on the merits. *Id*. at 401. According to Justices Alito and Scalia, who both joined the *Richter* majority, if there is "a merits disposition," then the *Richter* presumption "has no place in the court's analysis." *Id*. at 402. The Sixth Circuit in *McClellan* did the same thing the Eleventh Circuit did here – but accomplished the opposite result. Like the Eleventh Circuit, the Sixth Circuit applied the *Richter* presumption outside the context of a summary disposition, but in contrast to the Eleventh Circuit, the Sixth Circuit then concluded that the presumption had been rebutted and applied *de novo* review. In both cases, however, *Richter* was extended beyond the context of a summary disposition, an "error [that] may derail many . . . habeas cases." *Id*.

ii. The Eighth Circuit has been more firm in its extension of *Richter*. In *Williams v. Roper*, the Eighth Circuit applied *Richter*'s presumption to a state postconviction court decision that affirmatively gave reasons why counsel's performance was deficient. 695 F.3d 825, 833-34 (8th Cir. 2012). The majority rejected the dissent's contention that *Richter* did not apply when the state court issued a reasoned decision. *Id*. at 834-35.

iii. The Fourth Circuit is also split on this question. In *Richardson v. Branker*, the Fourth Circuit applied *Richter* to a state court's reasoned decision denying a defendant's federal claims. 668 F.3d 128 (4th Cir. 2012). Although there was no dispute that the state courts adjudicated the habeas petitioner's claims "on the merits," the Fourth Circuit nevertheless cited to and applied *Richter*'s holding that a habeas court "must determine what arguments or theories support or, as here, could have supported, the state court's decision." *Id*. at 140 (quoting *Richter*, 131 S. Ct. at 786).

However, in *Winston v. Pearson*, the Fourth Circuit explicitly declined to extend *Richter* outside the context of a summary disposition. 683 F.3d 489 (4th Cir. 2012). The court in *Winston* determined that "*Richter*'s reasoning is inapposite . . . where [the petitioner] does not contest the thoroughness of the state-court decision but rather the court's unreasonable denial of his requests for discovery and an evidentiary hearing." *Id*. at 502. *Winston* also pointed out that "*Richter* mentions nothing of possible defects in a state-court decision save the summary nature of its disposition, and we accordingly conclude that it does not affect our analysis." *Id*. *See also Davis v. McCall*, No. 4:11-cv-3263-MGL-TER, 2013 WL 1282130, *15 (D.S.C. Feb. 1, 2013) ("However, *Richter* does not appear to be applicable here where the [state court] clearly addressed the merits of some of the issue[s] raised at PCR, but not others.").

iv. In conflict with various decisions from the Fourth, Sixth, Eighth, and Eleventh Circuits, several Seventh Circuit decisions have rejected extending *Richter* beyond the summary disposition context. In *Sussman v. Jenkins*, the State of Wisconsin argued that *Richter* applied to a reasoned state court opinion. 642 F.3d 532, 533 (7th Cir. 2011). Judge Ripple rejected this argument, explaining that *Richter* was "inapplicable to the present case" because *Richter* "addresses the situation in which a state-court decision 'is unaccompanied by an explanation.'" *Id*. at 534. In contrast to the Eleventh Circuit, Judge Ripple declined to treat the state court's reasoned decision "as a holding devoid of explanation." *Id*.

Two other Seventh Circuit opinions have echoed Judge Ripple's warning about extending *Richter*. In *Wooley v. Rednour*, the Seventh Circuit pointed out that *Richter* did not apply in that case because "there [was] little need for uncertainty regarding the reasoning of the Illinois courts," because the state court "made the grounds for its ruling abundantly clear." 702 F.3d 411, 422 (7th Cir. 2012). The *Wooley* panel went on to note that it "would be perverse, to say the least, if AEDPA deference required this court to disregard a state court's expressed rationale for a decision and presume instead that Illinois's courts affirmatively found [a different rationale]." *Id*. The Seventh Circuit reiterated this reasoning in *Harris v. Thompson*, 698 F.3d 609 (7th Cir. 2012). There the court again declined to apply *Richter* outside the summary disposition context, reasoning that it had

"ample reason to think some other explanation for the state court's decision is more likely – the very reasons the state court actually gave." *Id*. at 624.

But after this Court's decision in *Williams*, the Seventh Circuit expressed some uncertainty. In *Brady v. Pfister*, the Seventh Circuit determined that after *Williams* "the state court's reasoning continues to be relevant wherever it has given an explanation, notwithstanding the holding in *Richter*" but "[t]he presumption the *Williams* Court adopted . . . means that state courts must be given the benefit of the doubt when their opinions do not cover every topic raised by the *habeas corpus* petitioner." 711 F.3d 818, 825-26 (7th Cir. 2013). But where a state court employs bad reasoning, "it is no longer appropriate to attach any special weight" to that reasoning and "the federal court should turn to the remainder of the state record" to determine if the state court reached the correct result. *Id*. at 827; *see also Stitts v. Wilson*, 713 F.3d 887, 893 (7th Cir. 2013) (explaining that "where the state court's reasoning was unreasonable, [the court] should then consider whether there is 'a chain of reasoning under which the state court's conclusion can be reconciled with established federal law'") (quoting *Brady*, 711 F.3d at 824).

v. The Ninth Circuit in *Cannedy v. Adams* also declined to extend *Richter*. 706 F.3d 1148 (9th Cir. 2013). The panel in *Cannedy* remarked that *Richter* arose from a unique context in California where there was *no reasoned decision* to which a habeas court could direct the "look through" doctrine. *Id*. at 1157-58.

The court went on to say that "it does not follow from *Richter* that, when there *is* a reasoned decision by a lower state court, a federal habeas court may no longer 'look through' a higher state court's summary denial to the reasoning of the lower state court." *Id*. at 1158.

* * *

In sum, the Eleventh Circuit's decision to extend *Richter* beyond the context of summary dispositions is itself an important issue of nationwide concern, as it will affect how habeas petitions are adjudicated moving forward. This issue has put the Eighth and Eleventh Circuits in conflict with the Seventh and Ninth Circuits, while internally splitting the Fourth and Sixth Circuits. Additionally, two Justices of this Court have expressed grave doubts about *Richter*'s applicability outside the context of summary dispositions.

II. THERE IS A NATIONWIDE CIRCUIT SPLIT ON WHETHER SECTION 2254(d) REQUIRES A HABEAS COURT TO CONSIDER THE STATE COURT'S ANALYSIS TO DETERMINE WHETHER THE DECISION WAS BASED ON AN "UNREASONABLE APPLICATION" OF FEDERAL LAW.

A. THE CIRCUITS ARE SPLIT ON WHETHER A STATE COURT'S REASONING IS RELEVANT TO A HABEAS COURT'S REVIEW.

A conflict has developed in the circuit courts on the important question of how to weigh a state court's express reasoning on habeas review. The First, Second, Fifth, Eighth, and Tenth Circuits have held that a habeas court must review only the result, and not the reasoning, of a state court decision. By contrast, the Ninth Circuit has rejected the notion that a state court's reasoning cannot be considered on habeas review. And despite the panel decision below, the Eleventh Circuit and the Seventh Circuit are both internally conflicted on this issue.

In the decision below, the Eleventh Circuit made clear that its determination of whether the state court had reasonably applied clearly established federal law was not contingent on the actual reasoning the state court employed. Pet. App. 89a. By downgrading to the point of irrelevance a state court's reasoning, the Eleventh Circuit's opinion plainly conflicts with this Court's decision in *Early v. Packer*, 537 U.S. 3 (2002) (per curiam). In *Early*, the Court

indicated that § 2254 does not preclude relief if *either* "the reasoning [or] the result of the state-court decision contradicts [Supreme Court authority]." *Id*. at 8. *See also Panetti v. Quarterman*, 551 U.S. 930, 953-54 (2007) (concluding that the state court's factfinding procedures merit no deference because they were based on an antecedent unreasonable application of federal law as revealed through the state court's reasoning).

i. Despite this conflict with Supreme Court precedent, the Eleventh Circuit is not alone in downplaying the significance of a state court's reasoning. Recently, in *Higgins v. Cain*, the Fifth Circuit considered whether a state court's adjudication of a habeas petitioner's ineffective assistance of counsel claim was reasonable. 720 F.3d 255 (5th Cir. 2013). Like the Eleventh Circuit here, the Fifth Circuit made clear that in applying § 2254(d) to the habeas petitioner's claim, its focus was on the state court's "'ultimate legal conclusion'" and "'not the written opinion explaining that decision.'" *Id*. at 261 (quoting *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc)).

ii. The Eighth Circuit articulated this same focus in *Williams v. Roper*, which examined "the ultimate legal conclusions reached by the [state] court, not merely the statement of reasons explaining the state court's decisions." 695 F.3d 825, 831 (8th Cir. 2012) (citations omitted). Similarly, the Tenth Circuit has explained that, under AEDPA, the court must "focus on the *result* of the state court decision, not its reasoning." *Byrd v. Workman*, 645 F.3d 1159, 1172

(10th Cir. 2011) (quoting *Saiz v. Ortiz*, 392 F.3d 1166, 1176 (10th Cir. 2004)) (reviewing the state court decision for an unreasonable determination of the facts). The First, Second, and Sixth Circuits have also adopted this approach to AEDPA review. *See Foxworth v. St. Amand*, 570 F.3d 414, 429 (1st Cir. 2009) ("[O]n habeas review, the ultimate inquiry is not the degree to which the state court's decision is or is not smoothly reasoned; the ultimate inquiry is whether the outcome is reasonable."); *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) ("deficient reasoning will not preclude AEDPA deference" as long as the result does not constitute an unreasonable application of federal law); *Holder v. Palmer*, 588 F.3d 328, 341 (6th Cir. 2009) (deferring to state court decision, despite "flawed or abbreviated" reasoning).

iii. In conflict with these circuits, the Ninth Circuit has embraced an approach that falls more in line with AEDPA's plain language. For instance, in *Frantz v. Hazey*, the Ninth Circuit explained that "mistakes in reasoning" can constitute error under AEDPA. 533 F.3d 724, 734 (9th Cir. 2008) (en banc). That is, to determine the reasonableness of a decision, habeas courts must focus their review "on state courts' actual reasoning rather than hypothetical alternative lines of analysis." *Id*. at 738 n.15. The Ninth Circuit's recent decision in *Cannedy v. Adams* reiterated the importance of reviewing actual state court reasoning instead of "hypothetical reasons that could have supported" the state court's reasoning. 706 F.3d 1148, 1157 (9th Cir. 2013). Similarly, in *Taylor v.*

Maddox, the Ninth Circuit explained that a state court's "failure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding." 366 F.3d 992, 1008 (9th Cir. 2004); *see also Gentry v. Sinclair*, 705 F.3d 884, 908 n.16 (9th Cir. 2012) ("Our review looks only to the reasoning and result of the decision.").

iv. The Seventh Circuit has recently adopted an approach similar to the Ninth Circuit. In *Shaw v. Wilson*, the Seventh Circuit granted habeas relief after concluding that the state court's reasoning took "too narrow a view of the matter." 721 F.3d 908, 918 (7th Cir. 2013). And in *Hall v. Zenk*, the Seventh Circuit reviewed the reasoning underlying a state court's adjudication of the prejudice prong of petitioner's ineffective assistance of counsel claim. 692 F.3d 793, 805-06 (7th Cir. 2012). *See also Oswald v. Bertrand*, 374 F.3d 475, 483 (7th Cir. 2004) (concluding that "the reasonableness of a decision ordinarily cannot be assessed without considering the quality of the court's reasoning"). *But see Hennon v. Cooper*, 109 F.3d 330, 334-35 (7th Cir. 1997) (concluding that the ultimate result, and not the quality of the state court's reasoning process, is the focus of habeas review).

v. The Third Circuit is also conflicted on the role of a state court's reasoning in AEDPA review. In *Marshall v. Hendricks*, the Third Circuit concluded that the New Jersey Supreme Court unreasonably

applied federal law when its "entire reasoning" consisted of a single sentence without any "analysis or explanation." 307 F.3d 36, 110 (3d Cir. 2002). The state court's failure to consider additional evidence rendered the decision unreasonable under AEDPA. *Id*. The Third Circuit has advanced this approach in several recent, unpublished decisions. *See Echols v. Ricci*, 492 Fed. App'x 301, 312 (3d Cir. 2012) (determining that the state court's "line of reasoning was not an objectively unreasonable application" of federal law); *Young v. Grace*, 525 Fed. App'x 153, 158 (3d Cir. 2013) (stating that petitioner failed to cite any Supreme Court opinion inconsistent with the state court's "opinion or rationale"). But in *Hollman v. Wilson*, the Third Circuit took an opposite view, stating that the state court's rationale did not affect its ruling because AEDPA required a focus on the result, not the reasoning of the state court decision. 158 F.3d 177, 180 n.3 (3d Cir. 1998); *see also Rodriguez v. Rozum*, No. 12-2881, 2013 WL 3481816, at *5 (3d Cir. July 1, 2013) (downplaying reasoning in favor of emphasizing "the state court's ultimate decision").

vi. Moreover, despite the decision below, the Eleventh Circuit itself is internally conflicted on this question. For example, shortly before its decision in *Lee*, the Eleventh Circuit concluded that the same state court at issue here (Alabama's CCA) had unreasonably applied federal law by not considering all of the relevant circumstances bearing on a habeas petitioner's *Batson* claim. *Adkins*, 710 F.3d at 1252. The Eleventh Circuit panel in *Adkins* made clear that

the state court's insufficient reasoning, as reflected in the state court's actual opinion, was an unreasonable application of *Batson*. *Id*. Earlier, the Eleventh Circuit had reached an identical result in *McGahee*. 560 F.3d at 1263-65 (noting that the state court's analysis failed to include several relevant facts bearing the credibility of the prosecutor's explanations for his peremptory strikes). District courts in the Eleventh Circuit have also followed this approach. *See, e.g.*, *Hall v. Thomas*, ___ F. Supp. 2d ___, 2013 WL 5446105, at *12 (S.D. Ala. Sept. 30, 2013) (finding that the state court "failed to follow clearly established law when it did not consider 'all relevant circumstances' in its analysis of the trial court's ruling.") (citing *Batson*, 476 U.S. at 96) (emphasis in original).

The Court should grant *certiorari* to resolve this significant circuit split.

B. SECTION 2254(d) REQUIRES A HABEAS COURT TO REVIEW A STATE COURT'S ANALYSIS TO DETERMINE WHETHER THE STATE COURT UNREASONABLY APPLIED FEDERAL LAW.

The Court should resolve this circuit split by concluding that a habeas court's role is not limited to mere rubberstamp approval so long as the state court's bottom line appears "reasonable." Instead, the Court should conclude that § 2254(d) requires a habeas court to analyze the state court's decision to

determine (i) whether a constitutional violation occurred and, if so, (ii) whether the federal court is authorized to remedy that violation.

Section 2254(d) establishes the general proposition that habeas relief "shall not be granted . . . *unless*" the conditions outlined in subsections (1) or (2) are met. 28 U.S.C. § 2254(d). Subsection (1) authorizes a federal court to remedy a constitutional violation where the state court's "adjudication of the claim . . . 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." 28 U.S.C. § 2254(d)(1) (emphasis added). Subsection (2) extends this authority to situations where the state court's adjudication of a federal claim "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." 28 U.S.C. § 2254(d)(2) (emphasis added). Taken together, these provisions establish three categories of analytical errors that, if found to exist, would require a federal court to issue the writ: (1) decisions that are contrary to clearly established federal law; (2) decisions that involve unreasonable applications of clearly established federal law; and (3) decisions that are based on an unreasonable determination of the facts.

To determine whether any of these defects exist in a state court decision, a federal court must look to the process underlying the state court's adjudication. For instance, the second and third categories employ

past participles ("***involved*** an unreasonable application" and "***was based on*** an unreasonable determination of the facts"). The plain language of § 2254(d) directs the inquiry not just at the outcome but also at the ancillary findings and reasoning that *produced* that outcome. Thus, § 2254(d) establishes two requirements for habeas relief: (1) that a constitutional violation has occurred, and (2) that it be traced to a material defect or analytical flaw in the state court's adjudicative proceedings.

Ultimately, AEDPA's deferential framework is designed to "further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Given those interests, AEDPA strikes a balance between insulating adequate state court decisions from federal interference and allowing habeas relief in those cases where the state court's adjudication of a federal claim was analytically flawed. *See Panetti*, 551 U.S. at 953-54 ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. . . . We therefore consider petitioner's claim on the merits and without deferring to the state court[ ]."); *Miller-El I*, 537 U.S. at 340 ("Deference does not by definition preclude relief. A federal court can disagree with a state court's . . . determination and, when guided by AEDPA, conclude the decision was unreasonable.").

When a state court's reasoning reveals an unreasonable application of clearly established federal law, the plain language of § 2254(d)(1) authorizes habeas

courts to adjudicate the petitioner's federal claims without deference to the state court. Neither federalism nor comity interests demand a different balance.

III. THE ELEVENTH CIRCUIT SHOULD NOT HAVE DEFERRED TO THE STATE COURT'S ADJUDICATION OF LEE'S *BATSON* CLAIM BECAUSE THE STATE COURT UNREASONABLY APPLIED CLEARLY ESTABLISHED FEDERAL LAW.

In applying AEDPA's deferential framework, the Court has instructed habeas courts to first ascertain the "clearly established Federal law," namely, "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (citation omitted). In the second step, the habeas court must determine whether the State court adjudication unreasonably applied that clearly established U.S. Supreme Court case law. *Id*. at 73 (citation omitted). The Court has clarified that "[a]voiding these pitfalls does not require citation of our cases – indeed, it does not even require *awareness* of our cases, so long as **neither the reasoning nor the result** of the state-court decision contradicts them." *Early*, 537 U.S. at 8 (emphasis added).

i. At the time of Lee's trial, it was clearly established federal law that, under the Equal Protection Clause, a criminal defendant has a constitutional "right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson*,

476 U.S. at 85-86. The Court has established a three-step inquiry to determine whether a prosecutor has used peremptory strikes in a discriminatory manner:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El I, 537 U.S. at 328-29 (citations omitted); *see also Batson*, 476 U.S. at 96-98. Neither party disputes that Lee established a prima facie case of purposeful discrimination, or that the prosecutor provided facially race-neutral reasons for the strikes – thereby satisfying *Batson*'s first and second steps. The dispute here centers on whether the trial court discharged its duties under *Batson*'s third step. "In deciding *whether* the defendant has made the requisite showing [of purposeful discrimination], the trial court should *consider all relevant circumstances*." *Id*. at 96 (emphasis added).

The Court has made clear that the inquiry at step three is not whether the reasons the prosecutor offered for the strikes were race-neutral, but whether those reasons were *credible*. "[T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it *requires* the judge to assess the *plausibility* of that reason in light of *all*

evidence with a bearing on it." *Miller-El II*, 545 U.S. at 251-52 (emphasis added). Thus, to discharge its duties under *Batson*'s third step, "a court must undertake *a sensitive inquiry* into such circumstantial and direct evidence of intent as may be available." *Batson*, 476 U.S. at 93 (citation and quotation marks omitted) (emphasis added). It "goes without saying" that the court's sensitive inquiry at *Batson*'s third step "includes the facts and circumstances that were adduced in support of the prima facie case." *Miller-El I*, 537 U.S. at 340. A state court's failure to consider "all relevant circumstances" at *Batson*'s third step is an unreasonable application of federal law under § 2254(d). *Miller-El II*, 545 U.S. at 240.

Accordingly, if the prosecutor's strike pattern and the jurisdiction's history of *Batson* violations were offered as support for the prima facie case, but the state court failed to consider those factors in its third step analysis, then "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Richter*, 131 S. Ct. at 786.

ii. Here, the Eleventh Circuit acknowledged that the last reasoned state court opinion failed to consider several relevant circumstances pursuant to *Batson*'s step three, specifically: (i) the prosecutor's strike rate, (ii) Dallas County's history of *Batson* violations, (iii) the prosecutor's race conscious explanation for his strikes, and (iv) the significance of the prosecutor's multiple flawed explanations. Pet. App. 86a ("We agree that the state court's opinion in Lee's

case did not mention those two circumstances."). Because the state court unreasonably applied clearly established federal law at *Batson*'s step three, the Eleventh Circuit should have reviewed Lee's *Batson* claim *de novo*.

But the Eleventh Circuit ignored the state court's unreasonable application of the *Batson* standard, myopically focusing instead on whether the "bottom line" decision to reject Lee's *Batson* claim could survive deferential review. Pet. App. 117a-129a. But habeas review does not work that way. Federal courts defer to state courts when they reasonably apply federal law, even when the federal court thinks the state was wrong. But where, as here, a state court does not reasonably apply federal law, deference comes to an end. Because the CCA opinion was "dependent on an antecedent unreasonable application of federal law," *Panetti*, 551 U.S. at 953, the Eleventh Circuit should not have deferred to its conclusions.

iii. No matter what standard of review or deference is applied, Lee is entitled to habeas relief on the merits because the record demonstrates that the prosecutor engaged in an aggressive and transparent campaign to remove blacks from the venire – 21 of 21 peremptory strikes, and 38 of 39 strikes total – in violation of *Batson* and the Equal Protection Clause. While Lee maintains that each of these strikes were racially motivated, his briefing focuses on just two. *See Snyder*, 552 U.S. at 478 ("The Constitution forbids striking even a single prospective juror for a discriminatory purpose.").

The State cited three reasons for peremptorily striking D.G.: that he was opposed to the death penalty, that he had a "family member involved and convicted of a property crime," and that he was "very uncooperative about answers." RE 1130; T1-R190. All three were pretextual. First, the record shows that D.G. did not oppose the death penalty:

> MR. GREENE: [D.G.], how do you feel about this matter? Do you feel like you could sit on this jury and weigh this testimony for and against each of these issues and make a decision based on what you think the facts were, or **do you have some feelings that are deep inside that you've got one way or the other**?
>
> D.G.: **No.** I'll have to listen to the evidence.
>
> MR. GREENE: If the evidence showed you that the best decision would be life without parole, do you think you could do that?
>
> D.G.: Yes.
>
> MR. GREENE: And if the best decision to you was that the death penalty was required, could you do that?
>
> D.G.: **I could.**

RE 1116-17; T1-R129-30 (emphasis added). The State's assertion that D.G. was opposed to the death penalty was simply false.

The State's second reason for striking D.G. is problematic for two reasons. First, D.G. did *not* state

he had a family member accused and convicted, he simply indicated that he had *experience* with property crimes – either because he, someone in his family, or a friend had been accused of one. *See* RE 1089; T1-R51. Once again, the prosecutor's assertion was wrong. Second, a white juror that the State did not strike, E.E., provided the same answer. *Id.* In fact, the State passed up *twelve* opportunities to strike E.E. – opting to strike twelve black jurors instead.[2] Notably, the prosecutor did not ask either D.G. or E.E. any follow-up questions about their respective family members' property crimes to assess how, if at all, that would influence their impartiality. RE 1089; T1-R51. Nor did the trial court assess the plausibility of the State's second objection to D.G. even though it applied equally to a white juror who the State had not stricken when it had the opportunity to do so. RE 1130; T1-R190.

Finally, the State's third reason for striking D.G. – that D.G. was allegedly "very uncooperative" – finds no support in the record, which shows that D.G. answered all the State's questions without obstinacy or apparent bias. RE 1089, 1116-17; T1-R51, 129-30. Moreover, despite the State's *post hoc* rationalizations, the State never explained how D.G. was uncooperative, and the trial court never assessed the plausibility of this objection. RE 1130; T1-R190. Thus, of the State's three reasons for striking D.G.: the first

[2] *See* State's Habeas Checklist, Vol. 5-Tab 33-Pg. 4 (showing order of peremptory strikes by the State and defense).

was false, the second was both false and applied equally to a white juror whom the State did not strike, and the third finds no support in the record. Yet the trial court never assessed the plausibility of *any* of the State's objections to D.G. RE 1130; T1-R190.

As for D.M., the State asserted that it peremptorily struck this black juror because he "has a general opposition to the death penalty, and does have a bit of an arrest record." *Id.* But D.M. stated **five times** that he could vote for the death penalty. RE 1118-19, 1120; T1-R163-64, 174. Not only that, D.M. stated he would be *opposed to life without parole* if the prosecutor proved that Lee intentionally killed more than one person during a robbery. *Id*. As for the State's assertion about D.M.'s arrest history, the record contradicts this assertion. In response to the prosecutor's questions about being accused of a property crime, drug crimes, and violent crimes, D.M. remained silent, which means that D.M. effectively testified under oath that he had *not* been arrested. RE 1084-94; T1-R36-46. The State asserted otherwise, but never entered any arrest histories into the record, and the trial court never verified that any arrest records actually pertained to D.M. – or any of the jurors for that matter. RE 1121, 1128-30; T1-R181, 188-90. Nor did the State explain how or why the unverified arrest record justified a peremptory strike. *Id*. Thus, of the State's two objections against D.M., one was false, and the other finds no support in the record.

Moreover, the State's questionable reasons for striking D.G. and D.M. must also be considered in light of two other relevant circumstances the CCA never considered: Dallas County's history of *Batson* violations and the prosecutor's explicitly racial explanation – that he was striking blacks because the defense was striking whites.

Even under AEDPA's deferential framework, "it's not possible to bend the record far enough to sustain the state court's opinion, if habeas corpus is to 'stand[ ] as a safeguard against imprisonment of those held in violation of the law.'" *Doody v. Ryan*, 649 F.3d 986, 1027 (9th Cir. 2011) (Kozinski, J., concurring in result) (quoting *Richter*, 131 S. Ct. at 780). A habeas court cannot stand by when a prosecutor trying a capital case uses all 21 of his peremptory strikes against blacks, provides contradictory and incorrect reasons for those strikes, and explicitly states that he targeted blacks because the defense was targeting whites. Comity is important, but "[c]omity doesn't mean comatose." *Id*. The Equal Protection Clause demands more from our judicial system. "To hold otherwise would render *Batson*'s protections against race discrimination in jury selection illusory." *Lynn v. Alabama*, 493 U.S. 945, 948 (1989) (Marshall, J., dissenting from denial of *certiorari*).

In sum, Lee has met his obligations for habeas relief: he has established that a constitutional violation occurred, and demonstrated that the state court

failed to remedy this violation because of a material defect in its adjudication of that claim.

CONCLUSION

Petitioner respectfully requests that this Court grant *certiorari* to resolve these significant circuit conflicts.

Respectfully submitted,

LESLIE S. SMITH
Federal Defenders
MIDDLE DISTRICT OF ALABAMA
817 S. Court Street
Montgomery, AL 36104
334.834.2099
Leslie_Smith@fd.org

DAVID J. BURMAN
Counsel of Record
NICHOLAS P. GELLERT
ELVIRA CASTILLO
DAVID A. PEREZ
PERKINS COIE LLP
1201 Third Avenue,
Suite 4900
Seattle, WA 98101
206.359.8000
DBurman@perkinscoie.com

Attorneys for Petitioner Jeffery Lee