No. 13-775

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

(Restated)

1. Has Lee waived or otherwise failed to preserve arguments under *Batson v. Kentucky*, 476 U.S. 79 (1986), that he failed to make to the state trial court?

2. Should this Court decline to review Lee's claim that the circuits are split over whether to consider the reasoning or only the result of a state court decision in an "unreasonable application" claim when the result would be the same under either analysis in this case?

3. Should this Court decline to review Lee's claim that the Eleventh Circuit improperly extended the presumption in *Harrington v. Richter*, 131 S.Ct. 770 (2011), when the Eleventh Circuit relied primarily on its own precedent and merely drew an analogy based on language in *Harrington*?

4. Should this Court decline to review Lee's question presented, that the Eleventh Circuit improperly applied *Harrington*, when his claim under *Batson* is meritless under any standard of review?

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STATEMENT OF THE CASE

In December 1998, Jeffery Lee killed Jimmy Ellis and Elaine Thompson, and wounded Helen King, when he shot them with a sawed-off shotgun in a pawn shop. The shop's surveillance camera recorded Lee as he shot his victims, and Lee later confessed as well. The State charged Lee with the capital murder of Ellis and Thompson, the attempted murder of King, and one count of capital murder for murdering two or more persons pursuant to the same course of conduct.

A. Voir dire before the Alabama trial court

Lee was tried in Dallas County, which was at the time 63% black and 35% white. CensusViewer, *Population of Dallas County, Alabama: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Graphs, Quick Facts*, available at Censusviewer.com /county/AL/Dallas (last visited Feb. 12, 2014). The jury venire pool was 54.6% black and 45.4% white or other. Vol. 5, Tab R-30 at C.8-21.[1]

After removing jurors for cause, the parties exercised their peremptory strikes. During this process, the prosecutor and defense counsel alternately removed jurors from the pool until only 12 were left. The State used its 21 preemptory strikes against black jurors; the defense struck only 2 black jurors and 18 white jurors. Vol. 5, Tab R-30

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[1] These citations mirror the format of the State's Habeas Corpus Checklist, which is an index to the state court trial and post-conviction proceedings. Doc. 21 (habeas corpus checklist); Doc. 23 (hard copy of the state record). The state court record consists of 22 volumes.

at C.8-21 & Tab R-33 at C.1-4. Each party's last strike served as an alternate. Vol. 5, Tab R-33 at C.4.

Defense counsel initially expressed satisfaction with the jury. Vol. 3, Tab R-5 cont'd at TR.187. But he then changed his mind and challenged the prosecutor's strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986), contending that the district attorney's office had a history of discrimination. Vol. 3, Tab R-5 cont'd at TR.187. When questioned by the court, defense counsel proffered one case, *Ex parte Thomas*, 601 So.2d 56 (Ala. 1992), and noted that the State had exercised all of its peremptory challenges against black jurors. Vol. 3, Tab R-5 cont'd at TR.187. Concluding that this made a prima facie case, the trial court asked for the state's response. Vol. 3, Tab R-5 cont'd at TR.188.

The prosecutor denied any history of racial discrimination in the district attorney's office, explained that very few cases were overturned on appeal for *Batson* violations, and denied that any strikes in this case were motivated by racial animus. Vol. 3, Tab R-5 cont'd at TR.188. Instead, the prosecutor explained that he exercised most of his strikes in this capital case against jurors who expressed opposition to the death penalty. Vol. 3, Tab R-5 cont'd at TR.188. The prosecutor also noted that almost all of the defense strikes were against white jurors, even though white jurors were the minority race in the jury pool. Vol. 3, Tab R-5 cont'd at TR.188. Specifically, the prosecutor explained:

> [S]trike number 139, [D.M.], [D.M.] has a general opposition to the death penalty, and does have a bit of an arrest record.

The next strike was number 194, [A.S.] who has an arrest record of some note. Number 88 was the next strike, [D.G.]—no, [J.H.], he opposed the death penalty. Didn't want to answer questions about it, does have an arrest record. Our number 17 was strike number four…

[A.B.] opposed to the death penalty. Strike number five was number 56, [J.E.]. Opposed to the death penalty. Strike number six was juror number 100, [J.H.], opposed to the death penalty. Strike number seven was number 23, [M.B.], opposed to the death penalty. Strike number eight was juror number five, [S.B.]. Opposed to the death penalty. Strike number nine was [Q.A.], juror number one. He has knowledge of the defendant. Knew his family. Very uncomfortable about it. Strike number 10 was juror number 149, [O.M.]. Opposed to the death penalty. Didn't want to serve. Very uncooperative about the questions I asked. Strike number 11 was 126 [M.K.] Opposed to the death penalty. Strike number 12, number 171, [G.P.], opposed to the death penalty. Strike number 13 was 191, [V.S.]. [V.S.] was generally opposed to the death penalty. Has been involved in an incident where her spouse was charged with a drug offense and been found not guilty, and she was involved in some type of altercation with somebody. Strike number 14 was 155, [J.M.]. Opposed to the death penalty.

> Strike number 15, was number 123, [T.J.].[2] Opposed to the death penalty. Strike number 16 was 105, [E.H.]. Opposed to the death penalty. Strike number 17 was 246, [J.W.]. Opposed to the death penalty. Strike number 18 was 146, [M.M.]. Opposed to the death penalty. Strike number 19 was number 86, [D.G.]. Family member involved and convicted of a property crime. Opposed to the death penalty. Very uncooperative about answers. He had to be struck. Number 20 was number 57, [A.E.]. Opposed to the death penalty. Very cooperative about the answer. Our final strike was number 213, [K.S.]. Child support hearing this week. Wanted to be off for that. I only assume we're prosecuting same. Struck him for that reason.

Vol. 3, Tab R-5 cont'd at TR.188-90.

The court concluded that the prosecutor provided race-neutral reasons for striking these jurors. Vol. 3, Tab R-5 cont'd at TR.190. The court also noted that the final jury was 70% black: the jury was composed of nine blacks, three whites, one black alternate, and one white alternate. Vol. 3, Tab R-5 cont'd at TR.190. Defense counsel then argued that the State's reasons for striking juror K.S. were pretextual because, in defense counsel's view, K.S. expressed no animosity against the district attorney. Vol. 3, Tab R-5 cont'd at TR.190-91. The prosecutor explained that K.S. was involved in a child support proceeding, in which the

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[2] It is unclear why the prosecutor exercised a peremptory strike against T.J. The court earlier excused T.J. for cause. Vol. 3, Tab R-5 cont'd at TR.185.

district attorney's office was involved. Vol. 3, Tab R-5 cont'd at TR.191. Defense counsel made no further argument about the prosecutor's motivations and did not question the prosecutor's explanation about any other peremptory strikes. Vol. 3, Tab R-5 cont'd at TR.190-91. The court overruled the *Batson* motion. Vol. 3, Tab R-5 cont'd at TR191. Importantly, K.S. served as an alternate and later served on the jury when another juror was absent. Vol. 4, Tab R-14 at TR.379; Vol. 5, Tab R-33 at C.4.

After trial, the jury found Lee guilty as charged. Vol. 4, Tab R-16 at TR.412. By a vote of seven to five, the jury recommended a sentence of life without parole. Vol. 4, Tab R-26 at TR.460. Taking all the circumstances into account, the trial court sentenced Lee to death for the three capital murder counts and to life in prison for the attempted murder count. Vol. 4, Tab R-29 at TR.492.

B. Alabama Court of Criminal Appeals

Lee appealed. The Alabama Court of Criminal Appeals (ACCA) initially remanded the case for reasons irrelevant to this petition. On return to remand, the ACCA considered, among other things, Lee's contention that the trial court improperly denied his *Batson* motion. App. 364-76. The ACCA noted that the prosecutor provided race-neutral reasons for his peremptory challenges. App. 366-70. The court explained that the only *Batson* challenge that Lee had preserved was to juror K.S. But any arguments about K.S. were moot because he was an alternate who ultimately served on the jury. App. 370.

The ACCA then reviewed Lee's new appellate arguments about other jurors for plan error. App. 370. Specifically, the court evaluated Lee's arguments about alleged disparate treatment of black and white jurors, arrest records, and the demeanor of certain jurors. App. 370-76. Rejecting Lee's arguments under a deferential plain error standard of review, the ACCA affirmed his convictions and sentences. App. 364-76, 518-19.

C. Federal Habeas Proceedings

Lee eventually filed a federal habeas petition, pursuant to 28 U.S.C. §2254. Among other claims, he raised the *Batson* issue. The district court rejected some of Lee's arguments because he failed to exhaust them in state court, App. 157-58, but it noted that he could not show that a different result would have occurred if he presented those arguments to the ACCA, App. 159-63. It rejected Lee's remaining *Batson* arguments on their merits as well. App. 163-80.

The Eleventh Circuit affirmed. On appeal, Lee challenged only the state's peremptory strikes of D.G. and D.M. The Eleventh Circuit reviewed *Batson* and related cases, recounted the jury selection process in Lee's trial, and considered the ACCA's evaluation of Lee's *Batson* claim. App. 55-77. The panel next considered the applicability of deference under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

First, the panel considered whether the ACCA's plain error review was an adjudication "on the merits" or an independent state-law procedural bar. App. 77-85. It held that "when a state appellate court

applies plain-error review and in the course of doing so, reaches the merits of a federal claim and concludes there is no plain error, that decision is an adjudication 'on the merits' for purposes of §2254(d) and thus AEDPA deference applies to it." App. 84. The panel noted that its decision was consistent with the decisions of other circuits that had expressly addressed the issue. App. 81-84 (citing *Douglas v. Workman*, 560 F.3d 1156, 1171, 1177-79 (CA10 2009); *Fleming v. Metrish*, 556 F.3d 520, 530-32 (CA6 2009)).

The panel next considered Lee's contention that the ACCA unreasonably applied *Batson* by failing to address every argument he raised about his *Batson* claim. App. 85. The panel explained that this Court had explicitly stated in *Harrington* that state courts "need not address every argument," or even explain their reasoning, to be entitled to AEDPA deference. App. 86 (citing *Harrington*, 131 S.Ct. at 784-85). The panel viewed *Johnson v. Williams*, 133 S.Ct. 1088 (2013), as further support of its reasoning that a state court decision is entitled to AEDPA deference if it "contains some but less than complete discussion." App. 88-89. The panel also noted this Court's admonition in *Woodford v. Visciotti*, 537 U.S. 19 (2002), that state court decisions should be given the benefit of the doubt, and federal courts should presume that state courts know and follow the law instead of readily attributing error to them. App. 90 (citing 537 U.S. at 24). The panel then reviewed Eleventh Circuit precedent. App. 90-117. Based primarily on its analysis of its own decisions, the panel rejected "Lee's claim that the state appellate court's decision is an unreasonable application of

Batson because it did not explicitly mention his allegation of a jury-discrimination history and did not make an explicit credibility finding on *Batson*'s third prong." App. 117.

ARGUMENT

Lee discusses AEDPA deference and *Harrington v. Richter* at length, but this case is, at its heart, about whether every court to consider the question held correctly that the State did not exercise its peremptory strikes in a racially discriminatory fashion. It is true that all of the State's peremptory strikes were exercised against black jurors. But that is not the only relevant circumstance here. The jury pool was majority black and, because defense counsel struck almost exclusively white jurors, it remained majority black for all of the prosecutor's strikes. Unlike the final jury in *Batson*, which was composed only of white jurors, 476 U.S. at 83, or the jury in *Miller-El v. Dretke*, 545 U.S. 231 (2005), which included only one black juror, *id.* at 240, the trial jury in Lee's case was composed of nine black jurors and three white jurors. Although one juror was replaced by an alternate, that alternate was also black. The prosecutor explained his race-neutral reasons for striking each of the jurors. Defense counsel did not even argue that these reasons were pretextual except as to K.S., a juror that was eventually seated. And none of Lee's post-trial challenges provide any reason to believe that the trial court was wrong when it concluded that the prosecutor did not discriminate on the basis of race.

This case also presents an insurmountable vehicle problem: because Lee failed to make these

Batson arguments at trial, the ACCA had to review them for plain error, without the benefit of a ruling by the trial court. As the District Court explained, the procedural posture of Lee's *Batson* claim is very much in doubt. App. 179 n.35. Moreover, although Lee makes much of the appropriate standard of review to apply here, the standard would not make a difference in this case. Lee asks this Court to correct alleged errors in the Eleventh Circuit's analysis of *Harrington*. No error occurred here, and Lee's attempt to describe two circuit splits fails. But even if the Eleventh Circuit erred in applying *Harrington*, neither it nor the Alabama state courts erred in applying *Batson*. Lee's *Batson* challenge is the ultimate question, and the resolution of that question does not depend on the resolution of Lee's proposed question presented. For these reasons, this Court should deny Lee's petition for certiorari.

I. The Court likely cannot even reach the question that Lee presents.

This Court cannot consider Lee's arguments about the AEDPA standard of review because they are directed towards jurors that he never challenged in the state trial court. Under *Batson*, a defendant bears the burden of showing that a prosecutor purposely discriminated on the basis of race in making peremptory strikes. 476 U.S. at 96-98. First, the defendant must make a *prima facie* showing, based on "all relevant circumstances," that the prosecutor has exercised peremptory challenges to remove jurors based on their race. *Id.* at 96. Relevant circumstances include a pattern of strikes against jurors of one race or the prosecutor's questions or

statements during voir dire and while striking the jury. *Id.* at 97. Once the defendant makes a *prima facie* showing, the prosecutor must come forward with a "neutral explanation" for removing those jurors. *Id.* at 96-97. At that point, "[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98. Although the "final step involves evaluating the persuasiveness of the justification proffered by the prosecutor . . . the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (internal quotation marks omitted).

Lee's cert petition is directed toward strikes of jurors that he never challenged in the state trial court. Lee focuses his arguments in this Court "on whether the trial court discharged its duties under *Batson*'s third step" with respect to the prosecutor's reasons for striking D.G. and D.M. Pet. 34. If the inquiry is limited to this question as Lee frames it, there can be no dispute: Before the trial court, after the prosecutor offered race-neutral reasons for striking the jurors, defense counsel did not question any of those reasons, except with respect to K.S. Vol. 3, Tab R-5 cont'd at TR.190-91. And K.S. eventually served as an alternate, and then on the jury, mooting any objection to that peremptory challenge. Vol. 4, Tab R-14 at TR.379; Vol. 5, Tab R-33 at C.4.

The state trial court clearly considered "all relevant circumstances" that Lee actually put before it: the court noted the prosecutor's race-neutral reasons, and it noted the racial composition of the jury panel, commenting that there were nine black

and three white jurors. Vol. 3, Tab R-5 cont'd at TR.190-91. Although defense counsel mentioned one case, *Ex parte Thomas*, 601 So.2d 56 (Ala. 1992), in which the state allegedly committed a *Batson* violation, he adduced no other evidence of a history of discrimination by the Dallas County prosecutor. Vol. 3, Tab R-5 cont'd at TR.187-91. Defense counsel made no further objection about pretext or purposeful discrimination. Vol. 3, Tab R-5 cont'd at TR.190-91. The trial court expressly considered all the arguments that Lee actually put before it, and Lee waived his challenges to the other jurors that the prosecutor struck by failing to challenge the prosecutor's reasons as pretextual.

Lee's arguments about jurors D.G. and D.M. are likely waived for the purposes of federal habeas review because he failed to present them to the state trial court.[3] At the very least, before this Court could address the question presented, it would have to decide the much more difficult question about how a federal habeas court should treat a state-appellate-court decision that applies plain-error review to waived constitutional claims. It is, at a minimum,

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[3] *See Haney v. Adams*, 641 F.3d 1168, 1171-72 (CA9 2011) ("an objection at trial is a prerequisite to a *Batson* challenge for purposes of habeas review"); *Abu–Jamal v. Horn*, 520 F.3d 272, 280-84 (CA3 2008), *vacated on other grounds by Beard v. Abu–Jamal*, 130 S.Ct. 1134 (2010) (same); *Allen v. Lee*, 366 F.3d 319, 327–28 (CA4 2004) (*en banc*) (same); *Carter v. Hopkins*, 151 F.3d 872, 875–76 (CA8 1998) (same); *McCrory v. Henderson*, 82 F.3d 1243, 1247 (CA2 1996) (same); *Sledd v. McKune*, 71 F.3d 797, 799 (CA10 1995) (same); *Thomas v. Moore*, 866 F.2d 803, 804 (CA5 1989) (same).

incongruous for a federal habeas court to review a constitutional claim *de novo* when the only state court to review the claim did so for plain error because the claim was not properly preserved.

For these reasons, the District Court expressed "qualms with the procedural posture of petitioner's *Batson* arguments." App. 179-80 n.35. The District Court was right to be concerned. As in the lower court, Lee is "asking this Court in its habeas role to second-guess the trial judge's *Batson* determination based on dozens of pages of briefing (and intricate dissection of the transcript of the jury selection process) that the trial judge never saw, based on arguments he never heard because they were never articulated by defense counsel at trial." App. 179 n.5. Even if there were a cert-worthy question in this case—and there is not, as explained below—this Court cannot answer it without first untangling a host of unsettling and fact-specific waiver issues arising from Lee's failure to address the strike of any juror except K.S. in the state trial court.

II. This case does not implicate a circuit split.

Lee contends that circuits have applied different analyses when considering claims that state courts unreasonably applied federal law, but even if this is true, the circuits would not reach different results in this case. He also argues that the Eleventh Circuit erroneously applied the *Harrington* presumption to incomplete decisions, contending that it should apply only to summary dispositions where it is not clear from the language of the disposition whether the court addressed the merits of a claim. He asserts that a circuit split exists over how *Harrington*'s

presumption applies. He is wrong on all counts. There is no circuit split over the meaning of *Harrington* or whether deference applies to state-court decisions like the one at issue here.

A. The circuits would not reach different results in this case.

Lee cites several cases in which he contends that circuit courts "held that a habeas court must review only the result, and not the reasoning, of a state court decision." Pet. 25. Perhaps more accurate is his statement that courts have "downplay[ed] the significance of a state court's reasoning." Pet. 26.

Several circuits, including the Eleventh, have held that the focus of an "unreasonable application" inquiry is the "ultimate legal conclusion." *Williams v. Roper*, 695 F.3d 825, 831 (CA8 2012), *cert denied*, 134 S.Ct. 85 (2013); *Gill v. Mecusker*, 633 F.3d 1272, 1290-91 (CA11 2011); *Holder v. Palmer*, 588 F.3d 328, 341 (CA6 2009) (giving deference to a state court's decision even "where the state court's reasoning is flawed or abbreviated"); *Neal v. Puckett*, 286 F.3d 230, 246 (CA5 2002) (*en banc*). And others likewise focus on whether the "outcome" is reasonable. *Foxworth v. St. Amand*, 570 F.3d 414, 429 (CA1 2009) (noting that the outcome was "both plausible and adequately supported"); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 890 (CA3 1999) (*en banc*) (explaining that a state court unreasonably applied federal law if the "decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified"). The Second Circuit noted that "sound reasoning" would "enhance the likelihood" that a state court

reasonably applied federal law, but it concluded that "deficient reasoning will not preclude AEDPA deference," ultimately focusing on the outcome of a state court's decision. *Cruz v. Miller*, 255 F.3d 77, 86 (CA2 2001). This avoids "grading their papers," *id.*, and a "tutelary relation to the state courts." *Hennon v. Cooper*, 109 F.3d 330, 335 (CA7 1997).

Lee argues that the Ninth Circuit created a split with its decision in *Frantz v. Hazey*, 533 F.3d 724 (CA9 2008) (*en banc*). Although the court opined in a footnote that courts should consider state courts' reasoning to determine whether the state court unreasonably applied federal law, *Frantz* was about AEDPA's "contrary to" analysis. *Id.* at 734. Even so, the Ninth Circuit was not concerned merely with "deficient reasoning"; it was considering the state court's "use of the wrong legal rule or framework" when it stated that federal habeas courts should not be concerned only with the outcome. *Id.* Because the state court's decision resulted from conclusions of law drawn from the wrong legal standard, the Ninth Circuit reviewed the petitioner's claim *de novo*. *Id.* at 734-35, 737. Although the Ninth Circuit later stated that the state court's reasoning could inform the "unreasonable application" inquiry in *Cannedy v. Adams*, 706 F.3d 1148 (CA9 2013), *cert. denied*, ___ U.S. ___ (2014), the court still asked whether any "reasonable argument" could support the denial of the petitioner's claim. *Id.* at 1160-61. The court even noted that if it was required "to consider hypothetical reasons that may reasonably support" the state court's decision, the record revealed no such reasons. *Id.* at 1159. Thus, even under an outcome-focused

approach, the Ninth Circuit would have granted habeas relief in these cases.

Likewise, the Seventh Circuit's analysis would lead to the same result. Lee correctly points out that, in *Shaw v. Wilson*, 721 F.3d 908 (CA7 2013), the Seventh Circuit called the state court's reasoning "too narrow." *Id.* at 918. But the standard the Seventh Circuit used to evaluate the state court's decision is consistent with a focus on the outcome: "An application of Supreme Court precedent is reasonable—even if wrong in our view—so long as fairminded jurists could disagree over its correctness." *Id.* at 914. And it concluded that jurists would not disagree that the petitioner's counsel had provided ineffective assistance, *id.* at 918, and that the petitioner demonstrated prejudice, *id.* at 919. Again, even without considering the state court's reasoning, the Seventh Circuit concluded that the outcome was incorrect, and the petitioner was entitled to relief.

Lee also points to certain Third Circuit decisions that he claims illustrate an internal conflict. In *Hollman v. Wilson*, 158 F.3d 177 (CA3 1998), the Third Circuit concluded that although the state court's decision rested on an "erroneous view" of the law, the court did not "render a decision contrary to clearly established federal law under any reading of the relevant standard." *Id.* at 180, 180 n.3. And in *Marshall v. Hendricks*, 307 F.3d 36 (CA3 2002), the Third Circuit explained that the problem involved a lack of evidence—the state court did not know what counsel did to investigate mitigating evidence, or what mitigating evidence existed, in the defendant's capital case because it did not hold a hearing. *Id.* at

115-17. It held that an analysis of a claim under *Strickland v. Washington*, 466 U.S. 668 (1984), must be "based on a complete record." 307 F.3d at 115. Thus, the bottom-line issue was the state court's "unreasonable determination of the underlying facts." *Id.* at 116.

In the end, the circuits have consistently concluded that, where the outcome of a state court's decision is wrong, the state court's decision is not entitled to AEDPA deference. But Lee has identified no court that has relied on the state courts' reasoning alone to declare its decision "unreasonable" and evaluate the claim *de novo*, which is what Lee argued the lower courts should have done.

B. There is also no circuit split about the application of *Harrington*'s holding.

The circuits are not split over the meaning of *Harrington*. In *Harrington*, this Court considered whether federal habeas courts should defer, under 28 U.S.C. §2254(d), to a state court's denial of relief without an accompanying statement of reasons as an adjudication on the merits. 131 S.Ct. at 780. Reasoning that §2254(d) speaks of a "decision," this Court noted that evaluating such a decision does not require an opinion or explanation of the state court's reasons. *Id.* at 784. Even when the state court provides no explanation, the habeas petitioner still bears the burden of showing that "no reasonable basis" existed for the state court's denial of relief. *Id.* And without "any indication or state-law principles to the contrary," federal courts should presume that the summary disposition was an adjudication of the

petitioner's claim on the merits. *Id.* at 784-85. A petitioner may overcome this presumption by showing that "there is reason to think some other explanation for the state court's decision is more likely." *Id.* at 785.

The Sixth Circuit has squarely addressed *Harrington*'s holding, overruling its own prior precedent presuming that summary dispositions are not adjudications on the merits for AEDPA purposes. *Werth v. Bell*, 692 F.3d 486, 493 (CA6 2012), *cert. denied*, 133 S.Ct. 1590 (2013). Instead, consistent with *Harrington*, the Sixth Circuit held that summary dispositions are presumed to be merits adjudications unless there is some "indication or [state-law] procedural principle to the contrary." *Id.* at 493 (quoting *Harrington*, 131 S.Ct. at 785).

Lee attempts to show that the Sixth Circuit rendered internally inconsistent decisions in *English v. Berghuis*, 529 F. App'x 734 (CA6 2013) (unpublished), and *McClellan v. Rapelje*, 703 F.3d 344 (CA6), *cert. denied*, 134 S.Ct. 399 (2013). But in *English*, the Sixth Circuit distinguished *Harrington* because the state court provided a "richly developed" but incorrect analysis. 529 F. App'x at 743. The state court decision's "plain language" showed that the court did not consider the merits of the petitioner's claim.[4] *Id.* at 745. Likewise, in *McClellan*, the state courts did not consider the merits of the petitioner's claim. Instead, the state trial court dismissed the

[4] Although Lee asserts that *English* involved a *Batson* claim, the petitioner in that case made a juror bias claim under *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). 529 F. App'x at 739.

petitioner's habeas petition as procedurally defaulted, and the state appellate court denied leave to appeal "for lack of merit in the grounds presented." 703 F.3d at 348. Although the state had argued, in federal habeas proceedings, that the petitioner's claim was procedurally defaulted, it argued on appeal to the Sixth Circuit that the state appellate court's summary disposition was actually on the merits, relying on *Harrington*. *Id.* Declining to entertain the state's inconsistent arguments, the Sixth Circuit applied *Werth* and concluded that the record showed that the state court did not adjudicate the merits of the petitioner's claim. *Id.* at 349-51; *but see* 134 S.Ct. at 399 (Alito, J., dissenting from denial of certiorari) (arguing that *Harrington*'s presumption applies only where a summary disposition is ambiguous, not where a state court makes clear that its adjudication is on the merits).

In the other cases Lee cites, circuit courts have distinguished *Harrington*. Courts have declined to apply *Harrington* when state courts obviously failed to adjudicate the merits of a claim. For example, in *Woolley v. Rednour*, 702 F.3d 411 (CA7 2012), *cert. denied*, 134 S.Ct. 95 (2013), the Seventh Circuit considered a *Strickland* claim, which the state appellate court had denied based only on the prejudice prong. The Seventh Circuit rejected the state's argument, based on *Harrington*, that the habeas court nonetheless owed deference to the state court on the performance prong because the state ultimately prevailed. *Id.* at 421. Declining to reach this nonsensical result, the court distinguished *Harrington* on its facts, explaining that *Harrington* involved an unexplained summary disposition, not a

reasoned one. *Id.* at 422. Likewise, in *Winston v. Pearson*, 683 F.3d 489 (CA4 2012), *cert. denied*, 133 S.Ct. 1458 (2013), the state court denied the petitioner's claim under *Adkins v. Virginia*, 536 U.S. 304 (2002), on procedural grounds, and the Fourth Circuit directed the district court to consider the claim *de novo*. 683 F.3d at 494-96; *Winston v. Kelly*, 592 F.3d 535, 542, 549-57 (CA4 2010). On appeal from the district court's *de novo* review, the Fourth Circuit considered *Harrington*, as well as *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011), at the state's urging, but it concluded that neither case required a rejection of its first decision in the petitioner's case that the state court did not adjudicate the petitioner's *Adkins* claim on its merits. 683 F.3d at 498-501.

The Ninth Circuit also considered *Harrington* in *Cannedy v. Adams*, responding to the dissent's argument that the look-through doctrine no longer applied. 706 F.3d at 1157-58. The majority rejected this argument, explaining that *Harrington* had nothing to do with the look-through doctrine because no reasoned state court decision existed in that case to which the reviewing court could look. *Id.* at 1158. Although the Ninth Circuit explained that *Harrington*'s presumption was limited, it did so not because the parties disputed the application of that presumption, but because of a need to clarify that *Harrington* did not abrogate the "look through" doctrine. *Id.*

Courts have also considered language from *Harrington*, using it to inform their analysis without actually applying its presumption. For example, in *Williams v. Roper*, the Eighth Circuit reversed the

district court's grant of habeas relief to the petitioner on his *Strickland* claim. 695 F.3d at 827. The state court clearly adjudicated both prongs of the petitioner's *Strickland* claim, but the district court failed to apply AEDPA deference. *Id.* at 830-31. The Eighth Circuit cited *Harrington* for its explanation of the *Strickland* prejudice standard and the need to search for "any reasonable argument" that the state court properly applied *Strickland*. *Id.* at 831-32. It also cited *Harrington* in response to the dissent, drawing an analogy between brief conclusions about prejudice and summary dispositions and noting that, even when a state court fails to explain its reasons at all, the petitioner still bears the burden of showing that there was no reasonable basis for its denial of relief. *Id.* at 834, 837.

Similarly, the Fourth Circuit cited language from *Harrington* about the writ of habeas corpus guarding against "extreme malfunctions" and issuing in only "exceptional circumstances" because of "fundamental notions of state sovereignty." *Richardson v. Branker*, 668 F.3d 128, 132, 138 (CA4), *cert. denied*, 133 S.Ct. 441 (2012) (quoting and citing *Harrington*, 131 S.Ct. at 786-87). Its discussion of *Harrington* focused primarily on its application of "the significant deference that federal courts must accord to state court decisions adjudicating habeas corpus claims on their merits." 668 F.3d at 138. The Fourth Circuit noted *Harrington*'s admonition to consider whether any reasonable argument could support the state court's determination, and it applied that analysis to the petitioner's *Strickland* claim. *Id.* at 140-41. Its only mention of *Harrington*'s presumption appears in a footnote, where it explained that the district court

should have deferred to the state court's resolution of the petitioner's *Brady* claim, even though the state court referred generically to "exculpatory evidence" instead of specifically addressing the categories of evidence in the petitioner's claim. *Id.* at 144 n.19. And, perhaps in acknowledgement that it was not actually applying *Harrington*'s presumption, it used the signal "see" to refer to *Harrington*. *Id.* at 144 n.19.

Despite Lee's characterization of these cases, only one squarely depended on *Harrington* for its holding. There is, therefore, no circuit split. Any difference in application of *Harrington* can be explained by looking to the facts, arguments, or procedural postures of each case. This question does not merit review by this Court.

III. Even if there were a circuit split, the Eleventh Circuit's decision here does not implicate it.

The Eleventh Circuit's decision in this case would not implicate a circuit split, even if there were one.

A. The Eleventh Circuit cited *Harrington* only as further support for its pre-existing case law.

The Eleventh Circuit cited *Harrington* as support for its commonsense holding that state courts need not address every argument to be entitled to AEDPA deference. App. 86 (citing 131 S.Ct. at 784-85). It further noted its own pre-existing precedent stating that habeas courts should focus on the state court's ultimate legal conclusion, not whether the state

court considered every possible argument in reaching that conclusion. App. 87 (citing *Gill*, 633 F.3d at 1290). The Eleventh Circuit explained that language from *Harrington* supported this precedent, explaining that a summary disposition is a decision resulting from an adjudication, and in such cases the petitioner still bears the burden of showing that no reasonable basis existed for denying relief. App. 87-88 (citing 131 S.Ct. at 784). The court also noted this Court's refusal to "requir[e] a statement of reasons," allowing state courts to manage their own dockets and opinion-writing practices. App. 88 (citing 131 S.Ct. at 784).

The Eleventh Circuit further supported its analysis by relying on *Johnson v. Williams*. Consistent with *Harrington*, this Court explained that a state court's decision is entitled to AEDPA deference "when it 'addresses some but not all of a defendant's claims.'" App. 88 (quoting 133 S.Ct. at 1094). The Eleventh Circuit noted that this Court again declined to "impose mandatory opinion-writing standards on state courts." App. 89 (citing 133 S.Ct. at 1095). Based on these cases, the Eleventh Circuit explained that *Batson*'s "all relevant circumstances" analysis did not impose a requirement that state courts "set[] out every relevant fact or argument" in their written opinions. App. 89. The court then surveyed its own precedent, noting its long-standing rule that AEDPA deference is appropriate even for summary dispositions. App. 90. To elucidate such dispositions, the Eleventh Circuit inferred "implicit findings." App. 90-92. That is, when a state court did not explicitly address an argument, the reviewing

court could infer the state court's finding from its ultimate conclusion.

The Eleventh Circuit did not rely on *Harrington* for any presumption that a state court's incomplete analysis was a merits decision; it had already concluded that the state court denied Lee's *Batson* claim on its merits. Instead, the Eleventh Circuit relied on language from *Harrington* and *Johnson* to explain that this Court has declined to impose opinion-writing requirements on state courts. If a summary disposition is entitled to AEDPA deference, so is a reasoned opinion that does not address all of the petitioner's arguments, especially in a case like this one, where the ACCA addressed Lee's 32 principal arguments about various claims in an opinion spanning over 100 pages. App. 352-519. Lee's characterization of other circuits' citations of *Harrington* does not alter this common-sense conclusion.

B. Lee has not shown, even under his reasoning-focused analysis, that *de novo* review would apply on the facts of this case.

Lee is wrong about the state courts' evaluation of his *Batson* claim. He argues that the third step of *Batson* requires a court to determine whether a prosecutor's race-neutral reasons were credible. Pet. 34. But he provided the trial court no reason to doubt the prosecutor's credibility; indeed, he did not pursue any further objection, except to K.S., which objection became moot when K.S. served on the jury. Lee also contends that because the state appellate court failed to address explicitly every argument he made, it

cannot have considered all relevant circumstances. Pet. 35-36. But *Batson* does not uniquely impose an opinion-writing requirement on state courts. The state appellate courts fully considered and addressed Lee's arguments about *Batson* in a published opinion. That was sufficient for the state courts' judgment to be entitled to deference under AEDPA.

IV. Even under *de novo* review, the Alabama courts properly denied Lee's *Batson* challenge.

Lee argues that the Eleventh Circuit erred in declining to review his *Batson* claim *de novo*. But, even under *de novo* review, Lee is not entitled to relief on his *Batson* claim. The Alabama courts correctly found that Lee did not show purposeful discrimination. The standard of review does not matter in this case.

A. The Alabama Court of Criminal Appeals correctly found that Lee did not show purposeful discrimination.

On appeal to the ACCA, Lee raised new arguments about his *Batson* claim for the first time. Those arguments were waived. But the state appellate court nonetheless considered each argument for plain error. Ala.R.App.P. 45A. First, the court evaluated the prosecutor's race-neutral reasons, concluding that each reason was appropriate (as Lee does not now dispute). App. 367-70. Then the court evaluated Lee's principal arguments about pretext. App. 370-76. It considered at length Lee's comparison of a white female juror with two black male jurors and concluded that the

jurors were not similarly situated. App. 371-72. The court also explained that the prosecutor shared his documentation of jurors' arrest records with defense counsel, and the record did not contradict the prosecutor's assertions about jurors' arrest records. App. 373. Regarding the prosecutor's strikes based on demeanor, the court noted that defense counsel did not explain below why these strikes were pretextual, and the prosecutor also gave additional reasons for striking these jurors. App. 373-74. The court also considered Lee's disparate treatment arguments about a white venire member and a black venire member with respect to their opinions of the death penalty, concluding that the record showed that their feelings about the death penalty were different. App. 374-75. Finally, the court rejected another disparate treatment argument because the defense struck the white juror Lee sought to use as a comparator. App. 375-76.

As the District Court expressly found, the ACCA's decision was correct even under *de novo* review. App. 173-180. The District Court noted that "the State had articulated valid, race neutral reasons for each of those strikes." App. 177. The District Court further explained that "Lee did not show that a single white veniremember left on the jury was similarly situated to a black counterpart whom the State struck." App. 177. And, even though the State struck only black jurors, "the venire panel itself was predominantly African-American when the parties commenced their peremptory strikes, such that at any given time when the prosecution exercised a peremptory strike approximately 2/3 of the venire was African-American." App. 177.

B. The Eleventh Circuit properly rejected Lee's specific arguments about D.G. and D.M.

Lee's arguments in the Eleventh Circuit focused on jurors that he did not challenge in the state trial court, that he mentioned but did not single out for special treatment in the state court of appeal, and that he only briefly mentioned for other reasons in the district court. Under any standard of review, the State did not violate *Batson* by striking D.G. and D.M.

1. Lee's arguments about D.G. fail under any standard of review. Lee argues that the prosecutor's reasons for striking D.G. were pretextual because D.G. was supposedly not opposed to the death penalty, did not have a family member convicted of a property crime, and was not uncooperative. Pet. 37-39. These contentions are belied by the record.

Although D.G. did not specifically state during voir dire that he was categorically opposed to the death penalty and would refuse to impose it, he did not raise his hand in response to the prosecutor's general questions about the venire's views. Vol. 2, Tab R-5 at TR.127-28. After the prosecutor questioned him individually, D.G. responded that he "could" impose the death penalty. Vol. 2, Tab R-5 at TR.129-30. Perhaps the prosecutor was simply mistaken about D.G.'s views, or perhaps the prosecutor did not believe that D.G. would actually impose the death penalty. Even if the prosecutor was mistaken, Lee's challenges to the prosecutor's other arguments do not hold water.

Lee contends that the record does not show that D.G. was uncooperative. But the record does reflect

that D.G. failed to answer the prosecutor's general inquiries about the death penalty. About D.G., the prosecutor stated: "Opposed to the death penalty. Very uncooperative about answers." Vol. 3, Tab R-5 cont'd at TR.190. Given the context, the prosecutor could have been referring to D.G.'s failure to cooperate in giving answers to questions about the death penalty. Lee incorrectly asserts that D.G. "answered all the State's questions," while the record shows that he did not respond at all to questions about the death penalty until the prosecutor specifically asked for his views. And if the prosecutor meant that D.G. was uncooperative in general, Lee's assertion, Pet. 38, that this "finds no support in the record" is immaterial—this sort of demeanor objection often will not find support in the transcript, which records only spoken words. With defense counsel's failure to make this specific objection at trial, the trial court had no reason to evaluate it in detail or at all.

When the prosecutor asked about "the area of property crime" and whether "somebody accused you of it, you were arrested and charged with it" or "you experienced that through a family member," D.G. responded affirmatively. Vol. 2, Tab R-5 at TR.51. Lee's present challenge to the prosecutor's statement that D.G. had a "[f]amily member involved and convicted of a property crime" is based on nothing. Vol. 3 Tab R-5 cont'd at TR.190; Pet. 37-38. The prosecutor's knowledge of the jurors' arrest records allowed him to infer that D.G. himself had not been arrested for or convicted of a property crime, lending support to his statement that a family member of D.G. had been. Lee's recharacterization of the

prosecutor's voir dire question is not enough to render the prosecutor's race-neutral reason problematic. Even if, as Lee contends, D.G. only had "experience" with property crime, that is a race-neutral reason for striking him.

2. Lee's challenge to the prosecutor's strike of D.M. likewise fails. As an initial matter, Lee did not even fully challenge the strike of D.M. in the federal district court. For example, he never argued to the federal district court that D.M. was not, as the prosecutor said, opposed to the death penalty. As the Eleventh Circuit reasoned, however, the record supports the prosecutor's statement that D.M. opposed the death penalty; although D.M. stated that he could impose it under certain circumstances, he also stated "I don't like the death penalty, I'm against it." Vol. 3, Tab R-5 cont'd at TR.174; App. 126. The court already struck all jurors who said they would categorically refuse to impose the death penalty for cause. Regardless of how many times D.M. indicated that he could impose the death penalty, the record still shows that he opposed it generally. And Lee engages in post hoc speculation about D.M.'s arrest record; the record reflects that both parties had access to the jurors' arrest records at the time of voir dire. Vol. 2, Tab R-4 at TR.22. Defense counsel at trial did not object on this basis, put the arrest records into the record, or otherwise give the prosecutor a reason to support this statement. If an inference about D.M.'s arrest record should be drawn at this point, it must be in the State's favor.

Because Lee cannot show that the prosecutor exercised his peremptory strikes based on racial

discrimination, Lee's question presented is irrelevant to the ultimate disposition of the case.

CONCLUSION

For these reasons, this Court should deny Lee's petition for certiorari.

Respectfully submitted,

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