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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

I. Lee Did Not Waive His *Batson* Claim

The Eleventh Circuit rejected the State's waiver argument. App. 117 n.35 ("Lee adequately raised in the state appellate court the claims he made in the district court and now here."). That rejection presents no "insurmountable vehicle problem," Opp. at 8, 12, and in fact was required by this Court's decisions in *Miller-El v. Dretke*, 545 U.S. 231 (2005) and *Snyder v. Louisiana*, 552 U.S. 472 (2008).

In *Miller-El*, the Court considered Miller-El's comparative-analysis argument in support of his *Batson* claim even though he had not presented the argument to the trial court. 545 U.S. at 241 n.2 (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)). The Court explained that a habeas petitioner does not waive his right to argue different theories based on the same evidence before the state courts. *Id*. The Court reiterated this point in *Snyder*. 552 U.S. at 483-85. The "same evidence, different theory" principle from *Miller-El* and *Snyder* applies even more strongly to this case because Lee has argued pretext and presented a comparative-analysis theory in all his state court appeals (unlike Snyder or Miller-El). In fact, Lee's overall argument, and the evidence on which it relies, has never changed: the State's explanations for using all 21 peremptory strikes against blacks were pretextual.

Moreover, the State's waiver argument contradicts its Petition for Writ of Certiorari in *Patterson v. Adkins*, No. 13-85 (July 15, 2013) ("*Adkins* Petition").

In that case, the Eleventh Circuit rejected the same waiver argument. *Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1249 (11th Cir.), *cert. denied*, 134 S. Ct. 268 (2013). The procedural posture of Adkins's *Batson* claim – which was even worse than Lee's – did not stop the State from urging the Court to grant certiorari, asserting that the case was "a good vehicle" for review of the same underlying issue. *Adkins* Petition at 32.

If anything, the State's waiver argument is another reason for the Court to grant certiorari. The State is challenging the Eleventh Circuit's determinations that Lee (like Adkins) did not waive his *Batson* claim, and asking the Court to revisit its reasoning in *Miller-El* and *Snyder*. To the extent the State's argument has any force, the Court should grant certiorari to clarify whether a habeas defendant may present a *Batson* comparative-analysis theory on appeal based on evidence before the trial court.

II. The Eleventh Circuit's Decision Deepens a Nationwide Split on Whether the *Richter* Presumption Can Be Used to Rehabilitate State Court Opinions that Unreasonably Apply Federal Law.

A. *Richter*'s Presumption Should Not Apply Outside the Summary Disposition Context.

A significant conflict has developed between the circuit courts about whether the Court's decision in *Harrington v. Richter*, 131 S. Ct. 770 (2011), applies

outside the summary disposition context. In *Richter*, the Court concluded that AEDPA deference applies to state court decisions that deny relief on a federal claim "without an accompanying statement of reasons." *Id*. at 780, 785. Ordinarily a habeas court "looks through" a state court's summary disposition to the "last reasoned decision" that adjudicated the federal claim "on the merits." *Ylst v. Nunnemaker*, 501 U.S. 797, 805-06 (1991). But if there is no reasoned decision behind a summary disposition (meaning there is nothing to look through to), *Richter* tells habeas courts to presume that the federal claim was adjudicated on the merits, "in the absence of any indication or state-law procedural principles to the contrary." 131 S. Ct. at 784-85.

Thus, the *Richter* presumption contains two components. The first component is a rebuttable presumption that summary disposition cases are decisions on the merits (rather than procedural dismissals), which means these summary dispositions can qualify for AEDPA deference. The second component relates to *how* that deference is applied: because summary dispositions, by definition, contain no analysis, once the *Richter* presumption attaches, *Richter* instructs habeas courts to "determine what arguments or theories supported or . . . could have supported, the state court's decision." *Id*. at 786. The two components of *Richter*'s presumption advance federalism and comity interests by making sure that habeas courts do not apply *de novo* review each time a state court decides to dismiss a federal claim summarily. In short,

Richter made clear that summary dispositions are entitled to deference under AEDPA, and outlined how that deference is applied in that context.

But *Richter*'s presumption does not apply when the state court *does* issue a reasoned decision on the merits. In those instances, the parties do not need *Richter*'s presumption because they know exactly what "arguments or theories" supported the state court's decision – the ones the state court disclosed. The question is simply whether the "arguments or theories" upon which the state court explicitly relied were a reasonable application of clearly established federal law. If so, the habeas court defers to the state court's conclusions, even if it disagrees with the outcome. But if the state court's decision involved an *unreasonable* application of federal law, then 28 U.S.C. § 2254(d)(1) instructs habeas courts to review the habeas petitioner's federal claim *de novo*.

That is how AEDPA deference should work in a post-*Richter* environment. But federalism and comity interests are turned upside down when federal habeas courts use the second component of the *Richter* presumption – which instructs habeas courts to discern what could have motivated a state court to issue a summary disposition – to *rewrite* state court opinions and cure otherwise unreasonable applications of federal law. Rewriting state court precedent is the opposite of comity and deference.

Rather than disagree with Lee's argument that *Richter* should only apply to summary dispositions,

the State urges the Court to deny certiorari, asserting that (a) there is no inter-circuit conflict about *Richter*'s scope, and (b) the Eleventh Circuit did not rely on *Richter* at all. The State is wrong on both counts.

B. The Circuits Are Deeply Divided About Whether and How to Apply *Richter* to Reasoned Decisions.

The circuits are split on how to apply *Richter*'s presumption. Three circuits have used the second component of the *Richter* presumption to rehabilitate flawed state court opinions on habeas review, thereby not limiting *Richter* to summary dispositions. In *Williams v. Roper*, 695 F.3d 825, 833-34 (8th Cir. 2012), the Eighth Circuit concluded that *Richter*'s presumption can be used to cure an unreasonable application of federal law even where "*the specific reason* articulated [by the state court] is not a reasonable basis to reject [the] claim." The Eleventh Circuit applied the same conclusion in Lee's case. App. 86a-88a. And after Lee filed his Petition, the Third Circuit applied the second component of *Richter*'s presumption to a state court's reasoned decision. *Collins v. Secretary of Penn. Dep't of Corrs.*, No. 12-3472, 2014 WL 341062, at *14-17 (3d Cir. Jan. 31, 2014).

By contrast, the Seventh and Ninth Circuits have rejected this approach, expressly recognizing that *Richter*'s presumption is limited to summary dispositions. *Woolley v. Rednour*, 702 F.3d 411, 422 (7th Cir.

2012), *cert. denied*, 134 S. Ct. 95 (2013) (stating that *Richter*'s presumption only applies "[w]here a state court's decision is unaccompanied by an explanation," and that "[i]t would be perverse, to say the least, if AEDPA deference required this court to disregard a state court's expressed rationale"); *Sussman v. Jenkins*, 642 F.3d 532, 534 (7th Cir. 2011) (refusing to apply *Richter*'s presumption because it would require the court to "treat [the state court's] statement as a holding devoid of explanation"); *Cannedy v. Adams*, 706 F.3d 1148, 1158 (9th Cir. 2013), *amended on denial of reh'g*, 733 F.3d 794 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1001 (Jan. 21, 2014) (holding that *Richter* does not apply "when there *is* a reasoned decision by a lower state court").

Adding to this turmoil, the Fourth and Sixth Circuits are internally conflicted about whether and how to apply both components of *Richter*'s presumption outside the summary disposition context. *Compare Winston v. Pearson*, 683 F.3d 489, 502 (4th Cir. 2012) (declining to apply *Richter*'s presumption because the state court issued a reasoned decision) and *English v. Berghuis*, 529 Fed. App'x 734, 743 (6th Cir. 2013) (same) *with Richardson v. Branker*, 668 F.3d 128, 140 (4th Cir. 2012) (applying *Richter*'s presumption outside the summary disposition context) and *McClellan v. Rapelje*, 703 F.3d 344, 350-51 (6th Cir.), *cert. denied*, 134 S. Ct. 399 (2013) (same). As Lee points out in his Petition, after the Sixth Circuit's

decision in *McClellan*, two Justices on this Court expressed grave doubts about extending *Richter*'s presumption beyond the summary disposition context. 134 S. Ct. at 402 (2013) (Alito, J., dissenting from denial of certiorari) (noting that when a state court issues a reasoned opinion *Richter*'s presumption "has no place in the [habeas] court's analysis").

The State's own analysis illustrates the conflict. For example, the State points out that in *English v. Berghuis*, the Sixth Circuit distinguished *Richter* because the state court's analysis was "richly developed." Opp. at 17 (quoting *English*, 529 Fed. App'x at 743). Likewise, the State acknowledges that the Seventh Circuit in *Woolley v. Rednour* declined to apply *Richter* because that case "involved an unexplained summary disposition, not a reasoned one." Opp. at 18-19 (citing *Woolley*, 702 F.3d at 422). But in the next breath the State observes that in *Richardson v. Branker* the Fourth Circuit applied the second component of *Richter*'s presumption to a state court's reasoned decision "to consider whether any reasonable argument could support the state court's determination[.]" Opp. at 20 (citing *Richardson*, 668 F.3d at 140-41). And the State defends the Eleventh Circuit's opinion below, which emphasized that *Richter* applies to *all* state court opinions – whether they are fully reasoned or summarily issued. App. 88a.

This conflict about the proper scope of *Richter*'s presumption has percolated for long enough and the circuit courts themselves recognize that they need further guidance from the Court. *See Brady v. Pfister*,

711 F.3d 818, 826 (7th Cir. 2013) ("The problem is thus not silence; it is what to do if the last state court to render a decision offers a bad reason for its decision. . . . for the time being, the courts of appeal will continue to confront this question without guidance from the [Supreme] Court."). Likewise, at least two Justices of the Court have recognized that leaving the conflict unresolved threatens to "derail many . . . habeas cases." *McClellan*, 134 S. Ct. at 402 (Alito, J., dissenting from denial of certiorari).

It is true that "federal courts have no authority to impose mandatory opinion-writing standards on state courts." *Johnson v. Williams*, 133 S. Ct. 1088, 1095 (2013). But it is equally true that federal courts do not have the authority to *rewrite* state court opinions. *Wiggins v. Smith*, 539 U.S. 510, 529-30 (2003) (observing that *post hoc* reasoning has "no bearing" on the federal court's analysis under § 2254(d)). The Court should grant certiorari to clarify that *Richter* does not justify a different result.

C. The Eleventh Circuit Explicitly Extended *Richter* Outside the Summary Disposition Context to Rehabilitate a State Court Opinion That Unreasonably Applied Federal Law.

Lee consistently has argued that the last reasoned state court decision (that of the Alabama Court of Criminal Appeals ("CCA")) failed to consider all the relevant circumstances bearing on the credibility of

the prosecutor's purportedly race-neutral explanations, and therefore unreasonably applied federal law. Specifically, in evaluating whether the reasons the State gave for its peremptory strikes were pretextual, the CCA failed to consider the prosecutor's strike rate (using all 21 strikes against blacks),[1] the prosecutor's race-conscious explanation for his strikes (that he was striking blacks in part because defense counsel was striking whites), how the prosecutor's demonstrably wrong explanations impacted the credibility of his other reasons (*e.g.*, the prosecutor's incorrect assertion that D.G. opposed the death penalty should have raised doubts about the explanations for the other 20 strikes exercised against blacks), and the district attorney's long and unfortunate history of *Batson* violations. If these "relevant circumstances" are considered together – as *Batson*'s third step requires – it "blinks reality" to deny that the prosecutor used his peremptory strikes to target black veniremembers on the basis of race. *Miller-El*, 545 U.S. at 252.

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[1] The State tries to obscure this fact by pointing out that blacks made it to the jury. But that is beside the point because there is no prejudice or harmlessness prong to a *Batson* claim, and because the Equal Protection Clause forbids striking even a single prospective juror for a discriminatory purpose. *Snyder*, 552 U.S. at 478 (citation omitted). Moreover, making a passing reference to the final makeup of the jury cannot erase the fact that the prosecutor used *every single peremptory strike* at his disposal against blacks.

In fact, the Eleventh Circuit *agreed* that the state court did not consider these relevant circumstances at *Batson*'s third step. App. 86a. At that point, the Eleventh Circuit should have applied *de novo* review to Lee's *Batson* claim because failing to apply *Batson*'s third step constitutes an unreasonable application of federal law. *Miller-El*, 545 U.S. at 240. Given the compelling compound evidence of pretext, the Eleventh Circuit would have found a *Batson* error on *de novo* review. But instead, the Eleventh Circuit used the second component of the *Richter* presumption – which instructs habeas courts to determine what arguments or theories "could have supported" the state court's opinion – to "fill in the blanks" for the state court's unreasonable application of *Batson*'s third step, thereby deferring to the state court's decision. App. 86a-88a. In doing so, the Eleventh Circuit explicitly stated that it was "reject[ing] Lee's attempt to limit *Harrington* [*v. Richter*] to state court decisions with no reasoned opinion at all." App. 88a. According to the Eleventh Circuit, "*Harrington* [*v. Richter*]'s rule and rationale are not so confined." *Id*.

In sum, the State's suggestion that the Eleventh Circuit did not explicitly extend *Richter* beyond the summary disposition context is simply wrong. The Eleventh Circuit used *Richter*'s presumption to conflate an unreasonable application of federal law with a "partial summary disposition," in order to whitewash the state court's analytical flaws. The Court should grant certiorari to make clear that § 2254(d)(1) does

not empower habeas courts to rewrite state court opinions.

III. The Circuits Remain Split on How Courts Should Consider a State Court's Reasoning Under AEDPA.

The circuits are also split on how to consider a state court's reasoning under AEDPA. The conflict is not, as the State tries to recast it, that some circuits look only to a state court's reasoning, while others look only to the state court's conclusions. Rather, the conflict is about the *degree* to which a federal circuit considers a state court's reasoning under § 2254(d)(1)'s unreasonable application inquiry. As the State concedes, five circuits (the First, Second, Fifth, Sixth, Eighth, and Tenth) have held that a state court's reasoning is not relevant because the "focus of an 'unreasonable application' inquiry is on the ultimate legal conclusion" that the state court reached. Opp. 13-14 (citations omitted).

By contrast, the Seventh and Ninth Circuits have reached the opposite conclusion. These circuits have emphasized that "the quality of the state court's reasoning," in addition to its ultimate decision, must be considered in the unreasonable application analysis. *Oswald v. Bertrand*, 374 F.3d 475, 483 (7th Cir. 2004); *see also Cannedy*, 706 F.3d at 1155-59 (applying *de novo* review pursuant to § 2254(d)(1) after concluding that the state court's analysis was an unreasonable

application of federal law); *Shaw v. Wilson*, 721 F.3d 908, 915-18 (7th Cir. 2013) (same).

Moreover, as the opinion below acknowledges, the Eleventh Circuit is internally split on this question. *See* App. 93a-94a (citations omitted). The Third Circuit has also issued conflicted opinions. *See* Pet. at 28-29.

The impropriety of an entirely outcome-based approach to habeas review is borne out in this case. A court's review of a *Batson* claim, by its nature, cannot be limited to just the final decision because *Batson* requires the state court to consider carefully "all of the circumstances that bear upon the issue of racial animosity." *Snyder*, 552 U.S. at 478. Here, the habeas court's role is to determine whether the state court considered all of the relevant circumstances at *Batson*'s third step. Lee has shown that the state courts did not. But trying to answer this question without looking at the state court's reasoning – or worse, rewriting the state court's reasoning as the Eleventh Circuit did here – is inconsistent with *Batson* and its progeny. *See, e.g., id*. at 479 (reviewing the Louisiana Supreme Court's rationale for denying Snyder's *Batson* claim).

Nor can a purely outcome-based approach be reconciled with AEDPA's plain language. As Lee points out in his Petition, AEDPA permits habeas relief if a state court decision "involved an unreasonable application of clearly established Federal law." 28 U.S.C. § 2254(d)(1). The terms "involved" and "application"

point to the process underlying a state court's decision – not just the final outcome. Thus, AEDPA's language does not focus the inquiry merely on the outcome, but rather the subsidiary findings that *produced* that outcome. *See Panetti v. Quarterman*, 551 U.S. 930, 953-54 (2007) ("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."); *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*) (state court adjudication can survive § 2254(d)(1) only where "neither the reasoning nor the result of the state court decision contradicts" Supreme Court precedents).

A habeas court's role is not limited to mere rubber-stamp approval so long as the state court's "bottom line" appears reasonable. Instead, § 2254 requires the habeas court to analyze carefully the state court's decision to determine whether a constitutional violation occurred, and if so, whether the federal court is authorized to remedy that violation.

IV. Conclusion

Lee respectfully requests that the Court grant certiorari to resolve these conflicts.

Respectfully submitted,

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