No. 10-24

In the Supreme Court of the United States

RICHARD F. ALLEN,
Comm. of Alabama Dept. of Corrections, *et. al.*,
Petitioners,

v.

JAMES CHARLES LAWHORN,
Respondent.

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

REPLY IN SUPPORT OF PETITION

Troy King
Attorney General

Corey L. Maze
Solicitor General
*Counsel of Record

J. Clayton Crenshaw
Beth Jackson Hughes
Assistant Attorneys General

Office of the Attorney General
500 Dexter Avenue
Montgomery, Alabama 36130
(334) 242-7300
cmaze@ago.state.al.us

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REPLY IN SUPPORT OF PETITION

Review and reversal are warranted because the court of appeals violated AEDPA in two ways. First, the court failed to apply 28 U.S.C. §2254(d)(1)'s "unreasonable application" clause to the state court's rejection of *Strickland* prejudice on the merits. *See* Pet. 24-25. Second, the court wrongly invoked §2254(d)(1)'s "contrary to" clause, when the state court's opinion was not "contrary to" any precedent of this Court and the lower court failed to identify the precedent to which it referred. *See* Pet. 25-27.

1. *§2254(d) Deference*: In his brief in opposition, Lawhorn fails to address the question presented—*i.e.* whether the court of appeals erred by invoking §2254(d)(1)'s "contrary to" clause. Pet. i, 25-27. The reason is simple: The lower court's invocation of the clause is indefensible.

Lawhorn briefly addresses the lower court's failure to apply §2254(d)(1)'s "unreasonable application" clause in his final paragraph. BIO 25-26. Lawhorn contends that the court of appeals was not required to apply §2254(d)(1)'s requisite deference in its written opinion because this Court vacated a capital conviction in *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*") "in an extensive analysis that hardly mentioned §2254(d)." BIO 25. But there is a simple explanation: *Miller-El II* did not involve §2254(d)(1). Miller-El overcame AEDPA's bar to relief by attacking the state court's *factual* conclusion under §2254(d)(2), not the state court's *legal* conclusion under §2254(d)(1), as Lawhorn does here. The reason that the Court "hardly mentioned §2254(d)" in the *Miller-El II* opinion, BIO 25, is that

the Court spent more than 20 pages establishing that Miller-El had proved by "clear and convincing evidence" that the state court's factual conclusion was wrong under §2254(e)(1)—a conclusion that, in the Court's view, necessarily proved that the state court's decision was based on an "unreasonable application of the facts" under §2254(d)(2). *See Miller-El*, *supra*, 240-66. In other words, the Court clearly understood and applied §2254(d)'s mandatory bar to relief in *Miller-El II*. It was simply faced with a different analysis than is required in this case.

Lawhorn also argues that, because "[a] significant portion of the Eleventh Circuit docket" consists of AEDPA cases, "[i]t is unreasonable as a matter of law to suggest that that Circuit (or this Court in *Miller-El*) is unfamiliar with or did not apply §2254(d)." BIO 25-26. We acknowledge that circuit courts decide numerous AEDPA cases. By the same token, the circuit courts often misapply or ignore §2254(d)'s deferential bar to relief. When they do, this Court grants review to ensure compliance with AEDPA, as proved by the grants of 13 State-filed petitions to correct misapplications of AEDPA over the past two Terms. *See* Pet. 28.

2. *Strickland Prejudice*: Lawhorn spends the majority of his BIO attempting to prove *Strickland's* deficient performance element with regard to (1) trial counsel's mitigation investigation/presentation and (2) trial counsel's decision to waive penalty-phase closing argument. BIO 1-21, 24-25. But both points are irrelevant here. Trial counsel's penalty-phase investigation/presentation is an entirely separate issue, which Lawhorn lost below. Pet. App. 66a-68a.

We believe that the court of appeals erred in finding deficient performance regarding counsel's decision to waive penalty-phase closing argument. That said, the State chose to exclude deficient performance from the question presented, *see* Pet. 2, because (a) the court of appeals clearly erred in its *de novo* prejudice analysis and in its failure to apply §2254(d)(1) to the prejudice analysis and (b) this Court skipped straight to *Strickland's* prejudice element last Term in *Smith v. Spisak*, 130 S.Ct. 676, 687 (2010), when addressing a similar claim that counsel's penalty-phase closing argument was deficient.

As for prejudice, Lawhorn argues that a penalty-phase closing argument would have altered Judge Sullivan's (*i.e.* the trial court's) sentencing decision because neither Lawhorn's younger brother Mac or his aunt Maxine are currently sentenced to death for their roles in William Berry's murder. BIO 22-23. Of course, the sentences being served by Lawhorn's associates cannot wash away the lower court's failure to properly apply §2254(d). Nor does either sentence help Lawhorn's prejudice argument, even under *de novo* review.

As Lawhorn correctly points out, Maxine *did* receive the death penalty for her role in the murder. BIO 23. Maxine is off death row today only because her initial conviction was reversed, *see Walker v. State*, 611 So. 2d 1133 (Ala. Crim. App. 1992), and she was convicted of a lesser-included offense at the re-trial, thereby removing death as a sentencing option. *See Walker v. State*, 919 So. 2d 1235 (Ala. Crim. App. 2004) (table).

Mac's life without parole sentence was a product of individualized sentencing. Mac was only 18 years old when he shot Mr. Berry (Lawhorn was 22), and Mac's "intelligence was borderline, and [ ] he might be considered in 'the twilight zone' of mental capability." *Mac Lawhorn v. State*, 574 So. 2d 970 (Ala. Crim. App. 1990). Mac was not present when Lawhorn chased Mr. Berry during the argument on the morning of the murder. Trial Tr. 285-91.[1] Lawhorn subsequently picked up Mac and provided the details of how the murder would occur. Trial Tr. 409-11. Lawhorn picked up Mac's weapon and handed him the shells. Trial Tr. 412-14. And it was Lawhorn, not Mac, who stood over the defenseless William Berry and shot him in the face, neck, and chest from point-blank range. Trial Tr. 419-20.

In fact, Lawhorn's reliance on what Judge Sullivan would have done had counsel presented a penalty-phase closing argument, Pet. 22-23, dooms his prejudice argument. Judge Sullivan presided over Lawhorn's trial and his post-conviction hearing, and Judge Sullivan found that the addition of a closing argument would not have altered Lawhorn's sentence. Pet. App 217a-18a. ("[T]his was a horrible crime and the jury would not have been swayed by a closing argument considering the facts of this case."). The state appellate court cannot have unreasonably applied *Strickland* under §2254(d)(1) in finding that trial counsel's decision to waive penalty-phase closing argument did not prejudice Lawhorn when Lawhorn's sentencing judge held that a closing argument would have made no difference.

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[1] The State refers to the trial transcript in this case, which is located in Document 17, Tabs 5-25 of the record.

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The court of appeals failed to properly apply §2254(d)'s mandatory deference. Lawhorn essentially concedes the point by failing to contest it. The Court should grant the petition and reverse the court of appeals, not only to enforce AEDPA, but also to prevent 20-plus years of additional, and unnecessary, litigation.

CONCLUSION

The Court should grant the petition and either summarily reverse the judgment of the court of appeals or set this case for merits briefing and argument.

Respectfully submitted,

Troy King
Attorney General

Corey L. Maze
Solicitor General
*Counsel of Record

J. Clayton Crenshaw
Beth Jackson Hughes
Assistant Attorneys General

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