No. 18-1197

In the Supreme Court of the United States

DEANNA BROOKHART, Acting Warden,
Petitioner,
v.
ANTHONY D. LEE, SR.,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

The State asks the Court to grant a writ of certiorari in a case without a final judgment, where the Seventh Circuit unanimously held that, in light of the factual record before the Illinois state court, the state court's summary dismissal of Respondent Anthony D. Lee, Sr.'s *Strickland* claim was unreasonable under 28 U.S.C. § 2254(d)(2). Following denial of the State's petition for rehearing and rehearing *en banc*, the Seventh Circuit remanded for an evidentiary hearing on the merits of Mr. Lee's *habeas* claim. The case is currently pending in the district court and is in the midst of discovery, with an evidentiary hearing scheduled for September 9-10, 2019. Mr. Lee has been seeking this evidentiary hearing on his claim for ineffective assistance of counsel for over 20 years—a hearing the state courts erroneously denied him.

The State contends a writ of certiorari should be granted because the Seventh Circuit's decision purportedly: (1) conflicts with the plain language of 28 U.S.C. § 2254(d)(2) and *Cullen v. Pinholster*, 563 U.S. 170, 180-86 (2011); and (2) creates a circuit split with the Ninth Circuit. But there are no cert-worthy issues here.

Contrary to the State's assertion, there is no conflict with Section 2254(d)(2) or *Pinholster*. Unlike *Pinholster*, where the lower courts erroneously held evidence not before the state courts could be used to determine Section 2254(d) was satisfied, the Seventh Circuit concluded Section 2254(d)(2) was satisfied based

on the state-court record alone—indeed, there was no evidentiary hearing in the district court—and the Seventh Circuit ordered the district court to hold an evidentiary hearing to adjudicate the merits of Mr. Lee's ineffective assistance of counsel claim, not to satisfy Section 2254(d). The Seventh Circuit also held Section 2254(e)(2) does not bar an evidentiary hearing because Mr. Lee made numerous requests in state court for an evidentiary hearing, each of which was denied.

Moreover, the State's argument that the Seventh Circuit's ruling disregards the state court evidentiary record is premised on a misreading of the Seventh Circuit's opinion. In support of his ineffective assistance of counsel claim, Mr. Lee alleged five witnesses submitted sworn affidavits to his trial counsel ("Trial Counsel") prior to Mr. Lee's 1996 trial that indicated they had information valuable to Mr. Lee's defense, and Trial Counsel failed to investigate those witnesses or call them at trial. Following his conviction, Mr. Lee pursued a claim for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), in state court, but the state courts dismissed Mr. Lee's claim at the pleading stage, never affording him discovery or an evidentiary hearing. In holding that the state-court dismissal was unreasonable under Section 2254(d)(2), the Seventh Circuit noted that the dismissal "depend[ed] on an unstated belief that, if called at trial, [the five witnesses] would have parroted their affidavits and refused to say another word"—an assumption the Seventh Circuit described as "unlikely," noting the possibility that the witnesses "might have provided exculpatory testimony." (App. 5a.) The State misreads

the Seventh Circuit's opinion to hold the Illinois Appellate Court (the "State Court") "made an unreasonable determination of the facts by accepting the truth of respondent's allegations," and "accepting the affidavits as true." (State Br. at 7, i.) But that is inaccurate. The Seventh Circuit took no issue with the State Court's acceptance of the truth of the affidavits. Rather, the Seventh Circuit held the State Court erred by unreasonably assuming "the language of the five affidavits would have been *the totality* of the witnesses' testimony" had counsel investigated their reports and "had they been called a[t] trial." (App. 7a, emphasis added) (noting the State Court's conclusion "depends on an unstated belief that, if called at trial, [the witnesses] would have parroted their affidavits and refused to say another word") (App. 5a).

Similarly, the State contends the state-court decision cannot be considered unreasonable because Section 2254(d)(2) requires a look at "the record presented in the State court proceeding," and in the state court proceeding here, the only evidence Mr. Lee presented was the affidavits. (State Br. at 8.) But the State ignores that Mr. Lee did have additional evidence to support his claim—for example, testimony from the witnesses themselves as to how they would have testified at trial—and the state courts prevented him from presenting that evidence by denying him an evidentiary hearing and the opportunity to take discovery.

Finally, the Seventh Circuit's decision does not conflict with *Gulbrandson v. Ryan*, 738 F.3d 976 (9th

Cir. 2013), as the State contends. (State Br. at 14-15.) Although both the Seventh and Ninth Circuits evaluated state-court decisions summarily dismissing constitutional claims without an evidentiary hearing, they did not apply different legal principles—they applied the same law, but the outcomes were different because the facts were different. In *Gulbrandson*, the Ninth Circuit concluded, based on the facts there, it *was not* unreasonable to dismiss without an evidentiary hearing; and, here, the Seventh Circuit concluded, based on different facts, it *was* unreasonable for the State Court to have summarily dismissed the claim without an evidentiary hearing. That fact-bound distinction does not create a legal conflict justifying review in this Court.

For these reasons, as fully explained below, there is no "compelling reason[]" to grant certiorari. Sup. Ct. R. 10. Accordingly, the State's petition should be denied.

STATEMENT OF THE CASE

I. Trial

Mr. Lee was tried in 1996 for aggravated kidnapping and sexual assault, among other alleged crimes, against L.M., the alleged victim, in connection with events that occurred during the early morning hours of April 15, 1995. (Lee CA Br. at 2.)[1] Mr. Burlmon Manley was Mr. Lee's co-defendant and was tried in a severed bench trial

[1] Citations to "App._" are to the Appendix to the Petition for a Writ of Certiorari. Citations to "Lee CA Br._" and "CA App._" are to Mr. Lee's Opening Brief and Separate Appendix respectively in *Lee v. Lamb*, No. 18-1005 (7th Cir.). Citations to "Dkt." are to the district court proceedings in No. 11-cv-00183 (N.D. Ill.).

in connection with the same events. (*Id.*)

Mr. Lee and L.M. were the only eyewitnesses to testify about the alleged crimes at Mr. Lee's trial, making the trial essentially a credibility contest between Mr. Lee and L.M—as the trial court said, "[t]he case does come down to credibility.[2] (*Id.* at 2, 6.) Mr. Lee and L.M. had very different accounts of what took place that night. L.M. testified she was walking alone when she was kidnapped off the street kicking and screaming by Mr. Manley and driven to a secluded location where Mr. Manley *and* Mr. Lee raped her. Mr. Lee testified that he did not rape or kidnap her. Instead, L.M. entered the car consensually; and while Mr. Manley and L.M. had intercourse, Mr. Lee had no sexual contact with L.M.

The State presented no physical evidence at Mr. Lee's trial, including no DNA evidence, no medical evidence or testimony, no seized gun, and no fingerprint or forensic evidence. (*Id.* at 6.) The State also presented no testimony from any hospital personnel or medical professional to corroborate L.M.'s story that she was raped by Mr. Lee. (*Id.*) Although the State obtained L.M.'s rape kit, the test results of the rape kit were not presented at trial. In connection with his state post-conviction petition, Mr. Lee attempted to obtain the test results, but the State refused to give him those results,

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[2] One other witness, Teresa Baragas, testified that L.M. showed up at her doorstep after the alleged crimes on the night in question. (Lee CA Br. at 2 n.3.) Ms. Baragas testified about her conversations with L.M. at that time, but Ms. Baragas was not present for and did not witness the alleged crimes. (*Id.*) A police officer also testified about events subsequent to the alleged crimes. (*Id.*)

and the State ultimately destroyed the DNA evidence.

Trial Counsel presented no evidence to corroborate Mr. Lee's testimony. At the conclusion of trial, the circuit court stated, "[t]he case does come down to credibility. The Court finds [L.M.] . . . very credible." (Lee CA Br. at 6.) Mr. Lee was convicted of five counts of aggravated criminal sexual assault and one count of aggravated kidnapping. (Lee CA Br. at 6; CA App. at SA7.) On August 23, 1996, Mr. Lee was sentenced to 100 years in prison. (CA App. at SA7; Lee CA Br. at A56; *id.* at 6.)

II. Witnesses That Trial Counsel Did Not Investigate Or Call At Trial.

Prior to trial, five witnesses submitted affidavits to Trial Counsel in support of Mr. Lee's defense. However, Trial Counsel did not call any of those individuals to testify at trial. Mr. Lee contends that, if the witnesses had testified, their testimony would have corroborated Mr. Lee's testimony and controverted L.M.'s testimony on key issues. Mr. Lee further contends that the testimony of these five witnesses was especially important because there was no physical evidence against Mr. Lee, and the case essentially came down to a swearing contest between Mr. Lee and L.M. (Lee CA Br. at 7.)

A. Five Witnesses Provide Trial Counsel With Affidavits Describing Some Of Their Knowledge Of Relevant Events.

The affidavits stated, in pertinent part, the following:

- **Brian Massenburg** attested that on the night in

question on State Street in Calumet City, he and his brother Gayland (who also submitted an affidavit), spoke to "two men in a blue cadillac" (believed to be Mr. Lee and Mr. Manley) (CA App. at SA1). After the conversation, the two men "turned the car around and started talking to a white woman and she then got into the rear of the car." (*Id.*) Mr. Lee believes that, based on the time, place, and description of the individuals and events, the "white woman" was L.M., and the "blue cadillac" was Mr. Lee's car. (Lee CA Br. at 8.)

Mr. Lee contends that, by stating that L.M. "got into" the car, without any reference to a struggle, Mr. Massenburg's testimony would have supported Mr. Lee's defense that L.M. voluntarily got into the car with Mr. Lee and Mr. Manley, and it would have refuted L.M.'s testimony that she was snatched off the street from behind with her hands bound, struggling, kicking, and screaming. (*See* CA App. at SA1; Lee CA Br. at 8.) Mr. Lee further contends that, if L.M. had been violently abducted while she was struggling, kicking, and screaming, as she contended, it is implausible that Mr. Massenburg would have described that she merely "got into" the car without any mention of force or her struggling, kicking, and screaming, and it is also implausible that Mr. Lee and Mr. Manley would have been talking to L.M. beforehand. (Lee CA Br. at 8.)

- **Gayland Massenburg** provided an affidavit that mirrored Brian Massenburg's affidavit, which Mr. Lee asserts would have been helpful to his defense for the same reasons as described above regarding Brian Massenburg. (CA App. at SA2.)

- **Charlene D. Parker** attested that she saw Mr. Lee and Mr. Manley "at the same time" at a lounge/liquor store called "Dad's" on the night in question. (CA App. at SA3.) Ms. Parker's testimony relates to testimony by both L.M. and Mr. Lee that, after L.M. entered the car, Mr. Lee drove the three of them to Dad's. Mr. Lee further testified that he and Mr. Manley went into Dad's together to buy alcohol, leaving L.M. in the car by herself, free to leave. L.M., however, testified that Mr. Manley stayed in the car, holding her captive, while Mr. Lee went into Dad's by himself. Mr. Lee believes that, because Ms. Parker attested that she saw Mr. Lee and Mr. Manley in Dad's *at the same time*, her testimony would have supported his defense that L.M. voluntarily stayed in the car and was free to leave while Mr. Lee and Mr. Manley entered Dad's together, and it would have discredited L.M.'s testimony that Mr. Manley remained in the car to prevent her from escaping while Mr. Lee was in Dad's by himself. (Lee CA Br. at 9.)

- **Phillip Elston** attested that, on the night in question, he watched a man and a woman (who Mr. Lee believes were Mr. Manley and L.M.) "entering" Mr. Lee's car at a park called "Merrill Park" while Mr. Lee sat outside the car drinking beer (CA App. at SA4). Mr. Lee contends that Mr. Elston would have provided testimony supporting his defense that he, Mr. Manley, and L.M. traveled to Merrill Park after stopping at Dad's, and Mr. Lee sat outside his car drinking beer while Mr. Manley and L.M. remained inside, presumably having sex. Mr. Lee also contends that Mr. Elston's testimony would have cast doubt on L.M.'s testimony

that, after they went to Dad's, she was driven to a location outside a "crack house" (as opposed to Merrill Park) where she was violently raped (Lee CA Br. at 9-10). Given that Mr. Elston's affidavit makes no mention of any fighting or struggle or that L.M. was crying and screaming, Mr. Lee further asserts that Mr. Elston's testimony would have contradicted L.M.'s claims that she was "sobbing uncontrollably" and "screaming hysterically" the entire time, even when she went to urinate outside the car (*id.* at 10).

- **Gail Pinkston** attested that she received a telephone call from Mr. Manley after Mr. Manley was arrested, during which Mr. Manley told her that he had had sex with "that white female in the back seat of Anthony's car" (presumably L.M. who was in the back seat of Mr. Lee's vehicle), and Mr. Lee was "no where around" during that sexual encounter (CA App. at SA6). Mr. Lee contends that Ms. Pinkston's testimony would have supported Mr. Lee's defense that he remained outside his car while Mr. Manley and L.M. presumably had sex in the car at Merrill Park. Mr. Lee also contends that Ms. Pinkston's testimony would have contradicted another part of L.M.'s testimony in which she claimed that Mr. Lee forced L.M. to perform oral sex on Mr. Manley. (Lee CA Br. at 10.)

B. Trial Counsel Does Not Contact, Investigate, Or Call At Trial Any Of The Five Witnesses.

Mr. Lee has alleged that Trial Counsel did not ever contact these witnesses or investigate their potential testimony. That allegation is supported by the following

evidence:

First, one of the witnesses, Mr. Elston, signed in 2008 a second affidavit stating that Trial Counsel never contacted him. (CA App. at SA5.)

Second, communications between Mr. Lee and Trial Counsel indicate that Trial Counsel never contacted or investigated the five witnesses. After learning that Trial Counsel had received these affidavits, approximately two to three weeks before the trial, Mr. Lee asked him whether he had contacted the witnesses about their potential testimony. Trial Counsel responded that he had not yet contacted them. After Trial Counsel did not call the witnesses at trial, Mr. Lee sent a letter to Trial Counsel asking why he did not call any of the witnesses to testify. Trial Counsel did not respond to the letter. Soon after, Mr. Lee filed a *pro se* motion for a new trial based on Trial Counsel's "fail[ure] to call and interview witnesses made known to the defense," and to which Mr. Lee attached the corresponding affidavits. (Lee CA Br. at 11.) Mr. Lee presented his motion on August 23, 1996. (*Id.*) Trial Counsel was present at that hearing and had the opportunity to respond to Mr. Lee. (*Id.*) But Trial Counsel said nothing. A reasonable inference from Trial Counsel's silence is that, as Mr. Lee alleged, Trial Counsel in fact never interviewed the five witnesses.

Third, Trial Counsel's statements in court (and lack of statements) are consistent with the other evidence indicating that he never contacted or investigated the witnesses. (Lee CA Br. at 11.) On January 31, 1996, about five months before trial began, Trial Counsel

stated at a pretrial conference that "[t]here are several witnesses who have contacted me about testifying on behalf of Mr. Lee. A couple of them just within the past week. I just have not had time to meet with all these people, hear what they have to say, and determine whether or not they will testify and how they fit in." (*Id.* at 11-12.) All five of the affidavits are dated well before January 31, 1996, and they appear to have been from the same "witnesses" Trial Counsel referenced at the pretrial conference. (*See* CA App. at SA1-SA4, SA6.) There is no further mention of these five witnesses anywhere in the record.

It is undisputed that Trial Counsel did not call any of these witnesses at trial.

III. Procedural History

A. Mr. Lee Pursues His Claim For Ineffective Assistance Of Counsel In State Court For 18 Years, And The State Courts Dismiss His Claim On The Pleadings Without Ever Permitting Discovery Or An Evidentiary Hearing.

Starting in 1998, Mr. Lee began pursuing relief under Illinois' Post-Conviction Act based on his claim for ineffective assistance of counsel under *Strickland*. Over the next 18 years, Mr. Lee was sent on a circuitous tour of Illinois' state courts in pursuit of his claim, including multiple appeals and trips to the Illinois Supreme Court, as well as multiple amended and successive petitions for relief on his claim. Mr. Lee's quest for relief in state court concluded on November 23, 2016, when the Illinois Supreme Court denied his petition for leave to appeal.

(Lee CA Br. at A49.) During this time, no state court permitted Mr. Lee to take any discovery on his claim or held an evidentiary hearing on the merits of his claim.

Mr. Lee filed his most recent petition on his *Strickland* claim in the Circuit Court of Cook County on September 26, 2014. Like the other petitions, Mr. Lee alleged ineffective assistance of counsel based on Trial Counsel's failure to investigate or call at trial the five witnesses. And like the other petitions, the circuit court denied Mr. Lee's claim on the pleadings without permitting discovery or holding an evidentiary hearing. The circuit court held that under *Strickland*, Mr. Lee "failed to show that he suffered prejudice from [Trial Counsel] not calling these witnesses." (Lee CA Br. at A13.) The court did not rule on the performance prong.

Mr. Lee then appealed to the Illinois Appellate Court (the "State Court"), which is the most recent state court to issue a written opinion on Mr. Lee's claim. The State Court affirmed the circuit court. (*See* App. 38a-67a.) The State Court, like the circuit court, denied relief solely on the ground that *Strickland*'s prejudice prong was not satisfied, but did not rule on the performance prong. (App. 61a-62a, 66a.) The State Court "consider[ed]" the text of the five affidavits and held that, "even assuming that all the affiants would testify in accord with their affidavits," Mr. Lee suffered no prejudice from Trial Counsel's alleged failure to call the witnesses at trial. (App. 66a.) The State Court arrived at that conclusion without the benefit of testimony from any of the five witnesses as to how they would have actually testified at Mr. Lee's trial.

As one example of the State Court's conclusions, the State Court discredited the Massenburgs' affidavits on the ground that the Massenburgs "do not indicate that they knew any of the[] three people [referenced in their affidavits]; and they do not offer any physical description of either the two men or the woman, except for the fact that she was white," (App. 64a), suggesting it was possible that the affidavits were referring to a different incident not involving Mr. Lee.

In response, Mr. Lee has pointed out that the Massenburgs certainly believed that they had witnessed an event involving Mr. Lee—after all, why else would they sign sworn affidavits and provide them to Mr. Lee's Trial Counsel while Mr. Lee was awaiting trial? Moreover, the Massenburgs' description of other relevant features of the scene matched the testimony provided by *both* Mr. Lee and L.M at trial—namely, they described two men making a u-turn in a blue Cadillac to talk to a white woman on State Street in Calumet City at around 12:30 a.m. or 1:00 a.m. on the night in question. (CA App. SA1, SA2.) Mr. Lee further argued that it is implausible that the Massenburgs were referring to a different instance of two men in a blue Cadillac making a u-turn to talk to a white woman on State Street in Calumet City at around 12:30 a.m. or 1:00 a.m. on the same night as the events in question.

B. The District Court Dismisses Mr. Lee's Habeas Petition Without An Evidentiary Hearing Or Discovery.

On February 22, 2017, Mr. Lee filed an Amended Petition for Writ of *Habeas Corpus* ("Amended

Petition") in the district court, claiming that his state court criminal conviction and sentence were secured in violation of his rights under the United States Constitution. (*See* Dkt. 96.) The State moved to dismiss the petition without an evidentiary hearing or discovery.

On December 4, 2017, the district court issued its Memorandum Opinion and Order, dismissing Mr. Lee's *habeas* petition without an evidentiary hearing or discovery. (Lee CA Br. at A50-A67.) The court stated that the issue of whether the State Court's conclusion was unreasonable under Section 2254(d)(2) was "a close call" and "perhaps not the result this Court would reach on a blank slate," but the district court denied the petition nonetheless. (*Id.* at A61, A67.) Because the reasonableness or not of the State Court's decision was "a close enough question," the district court issued a certificate of appealability. (*Id.* at A50.)

C. The Seventh Circuit Reverses The District Court And Orders An Evidentiary Hearing.

The Seventh Circuit unanimously reversed the District Court, holding that the State Court's factual conclusion was not entitled to deference under Section 2254(d)(2) because it was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (App. 7a, quoting 28 U.S.C. § 2254(d)(2).) The Seventh Circuit explained that the State Court concluded there was no prejudice because "none of the affidavits is *necessarily* inconsistent with Lee's guilt, while the evidence against him is strong." (App. 2a, emphasis in original.) The

court explained that, because there was no evidence beyond the affidavits themselves as to how the witnesses would have testified, the State Court's conclusion "depends on an unstated belief that, if called at trial, they would have parroted their affidavits and refused to say another word." (App. 5a.) The court observed, "[t]hat's unlikely," and in fact, the witnesses "might have provided exculpatory testimony." (*Id.*)

In addition to concluding that Section 2254(d) did not bar re-litigation of Mr. Lee's claim, the court evaluated whether it could order an evidentiary hearing under Section 2254(e)(2), which prohibits an evidentiary hearing in federal court if a petitioner has "failed to develop the factual basis of a claim in State court proceedings." (App. 5a quoting 2254(e)(2).) After oral argument, the Seventh Circuit asked the parties to submit from the state-court record Mr. Lee's requests for an evidentiary hearing, any supplemental materials in which Mr. Lee indicated what evidence would be presented at the hearing, and the state courts' rulings on those requests. Mr. Lee responded with 37 documents from the state-court record that included numerous instances in which Mr. Lee requested an evidentiary hearing and identified the specific factual issues that would be resolved and the evidence he would present at an evidentiary hearing, or strongly implied what evidence he would present. (Information Requested By the Court Regarding Mr. Lee's Requests for An Evidentiary Hearing in State Court at 1-2, No. 18-1005 (7th Cir. Nov. 5, 2018), ECF No. 35.) The Seventh Circuit observed that the state-court record contains "more than a dozen express requests for evidentiary

hearings" and "no explanation by any state judge why these requests were denied." (App. 5a.)

Thus, the court held that, based on the state-court record, "the affidavits, plus the multiple requests for hearings, show that [Mr. Lee] did try to develop the record in state court," and it was therefore "impossible to say that Lee has 'failed to develop [in state court] the factual basis of' his claim" under Section 2254(e)(2). (App. 5a-6a, alterations in original.) The court held that, because "the absence of evidence about what the trial would have been like, had these affiants testified, must be attributed to the state judiciary's failure to afford [Mr. Lee] a hearing," Mr. Lee was entitled to an evidentiary hearing to "learn what his attorney did (or omitted) and what the affiants would have said on the stand at trial." (App. 6a); *see also Williams v. Taylor*, 529 U.S. 420, 432 (2000) ("[A] person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance.").

The State filed a petition for rehearing and rehearing *en banc*—both of which were denied. (App. 35a-36a.) In an amended opinion, the court addressed a new argument presented by the State (and which is the central argument in the State's Petition for a Writ of Certiorari) that an evidentiary hearing in federal court is supposedly prohibited by *Cullen v. Pinholster*, 563 U.S. 170, 180-86 (2011). (App. 6a-7a.) The Seventh Circuit held *Pinholster* did not bar an evidentiary hearing here because *Pinholster* "does not prevent a federal court from finding factual aspects of a state

court's decision unreasonable under §2254(d)(2)." (App. 7a.) The court noted: "If the affidavits were all Lee had offered the state judiciary, then its decision may have been a reasonable application of the law to a reasonable determination of the facts. But Lee wanted to introduce more, and the state barred the door." (*Id.*) The court concluded that, "[b]y assuming that the language of the five affidavits would have been the totality of the witnesses' testimony had they been called at trial, the state made an unreasonable factual determination under §2254(d)(2), which permits a federal evidentiary hearing under §2254(e)(2)." (App. 7a.)

D. Current Status.

Mr. Lee's habeas petition is currently pending in the Northern District of Illinois in front of Judge Edmond E. Chang and is proceeding towards an evidentiary hearing. Discovery is proceeding expeditiously—the parties have issued document requests, and three depositions are complete, with more scheduled over the coming weeks. The evidentiary hearing is scheduled for September 9 and 10, 2019. (*See* Dkt. 130.)

SUMMARY OF ARGUMENT

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The State contends the Court should grant a writ of certiorari for two reasons: (1) the Seventh Circuit's decision conflicts with the plain language of 28 U.S.C. § 2254(d)(2), as well as *Cullen v. Pinholster*, 563 U.S. 170 (2011); and (2) the Seventh Circuit's decision creates a circuit split with the Ninth Circuit. (State Br. at 6-7.) As explained below, there is no "compelling reason" to grant the petition

because the Seventh Circuit's decision does not contravene Section 2254(d)(2) or *Pinholster* and because it does not create a circuit split. The State's request for certiorari in this case is especially un-compelling given that there is no final judgment. *See Mount Soledad Mem'l Ass'n v. Trunk*, 573 U.S. 954, 954 (2014) (statement of Alito, J.) ("[P]etitioner seeks certiorari before judgment. In my view, it has not met the very demanding standard we require in order to grant certiorari at that stage.").

ARGUMENT

I. Certiorari Should Be Denied Because The Seventh Circuit's Decision Does Not Contravene The Plain Language Of Section 2254(d)(2) Or *Pinholster*, As The State Contends.

A. Certiorari Should Be Denied Because The State Misreads The Seventh Circuit's Opinion.

The State's argument that the Seventh Circuit's Opinion violates the plain language of Section 2254(d)(2) and *Pinholster* is based on a fundamental misreading of the Seventh Circuit's decision.

First, contrary to the State's assertion, the Seventh Circuit did not hold that the State Court "made an unreasonable determination of the facts by accepting the truth of respondent's allegations," or "accepting the affidavits as true." (State Br. at 7, i.) Nor did the Seventh Circuit hold that Mr. Lee was entitled to an evidentiary hearing "because the state court declined to conduct an evidentiary hearing based on speculation that the witnesses *might* recant or expand upon their

affidavits." (State Br. at 10, emphasis in original.) Rather, the Seventh Circuit held the State Court erred by unreasonably assuming "the language of the five affidavits would have been *the totality* of the witnesses' testimony had they been called a[t] trial." (App. 7a, emphasis added.) The Seventh Circuit explained the State Court's decision "depends on an unstated belief that, if called at trial, [the five witnesses] would have parroted their affidavits and refused to say another word." (App. 5a.) The Seventh Circuit determined that was "unlikely," and in fact, the witnesses "might have provided exculpatory testimony." (*Id.*)

The State also contends the State Court decision is not unreasonable because Section 2254(d)(2) requires a look at "the record presented in the State court proceeding," and in the state court proceeding here, the only evidence Mr. Lee presented was the affidavits. (State Br. at 8.) While it is true that the only evidence attached to Mr. Lee's state-court petition was the affidavits, Mr. Lee sought to present additional evidence to support his claim, and the State Courts prevented him from presenting it by denying him an evidentiary hearing and not permitting him to take discovery, and instead assumed that the witnesses "would have parroted their affidavits and refused to say another word." (App. 5a.) For example, Mr. Lee sought to take discovery and present testimony from the witnesses themselves as to how they would have testified at trial (in addition to other evidence supporting his claim). As the Seventh Circuit put it: "If the affidavits were all Lee had offered the state judiciary, then its decision may have been a reasonable application of the law to a

reasonable determination of the facts. But Lee wanted to introduce more, and the state barred the door." (App. 7a); *see also Pappas v. Miller*, 750 F. App'x 556, 560 (9th Cir. 2018) (holding a "state court's factual determination was unreasonable under § 2254(d)(2) because the fact-finding process [was] itself defective," due to "the state court's denial of [petitioner's] opportunity to properly develop the record" at an evidentiary hearing) (internal quotation marks and citations omitted).

Relatedly, in an effort to justify the State Court's treating the affidavits as the witnesses' actual word-for-word testimony, the State mischaracterizes the affidavits as "proffer[s]" of "the witnesses' proposed testimony" that Mr. Lee used to support his *Strickland* claim. (State Br. at 8.) There is no evidence in the record suggesting that the affidavits were intended to serve as proffers. On their face, they merely indicate that the witnesses had relevant information and that they could have been helpful to Mr. Lee's defense, had Trial Counsel investigated those witnesses. Indeed, over the many years that Mr. Lee has pursued his *Strickland* claim, he has requested an evidentiary hearing to learn the full extent of what the witnesses' testimony would have been, (ECF No. 35 at 1-2, *supra*, p. 17), but Mr. Lee has never stated that the affidavits constituted proffers of proposed testimony.

B. Certiorari Should Be Denied Because The Seventh Circuit Correctly Held Neither Section 2254(d)(2) Nor *Pinholster* Barred An Evidentiary Hearing In Federal Court.

The State contends the Seventh Circuit "disregarded

the plain language" of Section 2254(d)(2) and *Pinholster* by ordering an evidentiary hearing. (State Br. at 7-9.) The State is mistaken. As explained below, the Seventh Circuit correctly ruled that Mr. Lee's claim survived Section 2254(d)'s re-litigation bar and that an evidentiary hearing was not prohibited by Section 2254(e)(2).

1. The Seventh Circuit Correctly Ruled Section 2254(d)(2) Was Satisfied Based On The Factual Record Before The State Court.

To be entitled to a hearing on the merits of a *habeas* claim, a petitioner must satisfy Section 2254(d)'s re-litigation bar. 28 U.S.C. § 2254(d); *Williams*, 529 U.S. at 444. As is relevant here, Section 2254(d)(2) permits claims where the state court decision "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." In *Pinholster*, the Court held that a federal *habeas* petitioner must overcome the limitation of Section 2254(d) "on the record that was before that state court." 563 U.S. at 185-86 (holding "the Court of Appeals erred in considering the District Court evidence in its review under § 2254(d)(1)").

Here, the Seventh Circuit concluded Section 2254(d)(2) was satisfied based on the record in state court. (App. 7a.) Unlike in *Pinholster*, no new evidence has been presented in the federal courts. Addressing the evidence considered by the State Court, the Seventh Circuit explained, "[b]y assuming that the language of

the five affidavits would have been the totality of the witnesses' testimony had they been called a[t] trial, the state made an unreasonable factual determination under §2254(d)(2)." (*Id.*)

Thus, consistent with the rule of *Pinholster*, the Seventh Circuit did not consider any evidence outside the state-court record in determining that (d)(2) was satisfied. And, unlike the facts in *Pinholster* where the Ninth Circuit improperly considered evidence presented in the federal district court (that was outside the state record) in making a determination under Section 2254(d), the Seventh Circuit did not consider any evidence outside the state-court record—indeed, there was no extra-record evidence for it to consider because the district court did not hold an evidentiary hearing or permit discovery. Unlike *Pinholster*, the Seventh Circuit ordered an evidentiary hearing in federal court for purposes of adjudicating the merits of Mr. Lee's *Strickland* claim, not for assessing whether Mr. Lee could satisfy Section 2254(d).

The Seventh Circuit's decision is comparable to *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), in which the Court held a state court's decision to reject a *habeas* petitioner's *Atkins* claim without affording him an evidentiary hearing *was unreasonable* under U.S.C. § 2254(d)(2), in part because the state court drew unreasonable inferences from an expert's declaration. *Id.* at 2273, 2276-77. The Court remanded to permit an evidentiary hearing, even though some of the information in the declaration "may have cut against

Brumfield's claim." *Id.* at 2280.[3]

2. The Seventh Circuit Correctly Ruled An Evidentiary Hearing Was Permitted Under Section 2254(e)(2) Based On Mr. Lee's Extensive Efforts In State Court To Develop The Factual Basis For His Claim.

After a court determines that Section 2254(d) does not bar re-litigation, a petitioner is only allowed an evidentiary hearing if Section 2254(e)(2) does not prohibit one. 28 U.S.C. § 2254(e)(2); *Williams*, 529 U.S. at 434. Section 2254(e)(2) prohibits evidentiary hearings where a petitioner has "failed to develop the factual basis of a claim in State court proceedings," unless certain circumstances are present. Thus, where a petitioner has not "failed to develop the factual basis of

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[3] The Criminal Justice Legal Foundation argues in its *amicus* brief that *Harrington v. Richter*, 562 U.S. 86 (2011) dictates that the Seventh Circuit incorrectly held that Section 2254(d) did not bar re-litigation. Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner at 7, *Brookhart v. Lee*, No 18-1197 (U.S. May 7, 2019). But *Richter* involved wholly irrelevant facts and in no way mandates that the Seventh Circuit was wrong. The Court in *Richter* held it was not unreasonable for a state court to conclude there was no prejudice based on the distinct facts at issue there—namely, counsel's failure to consult blood evidence experts or offer their testimony in a murder prosecution because the expert serology evidence presented in the state *habeas* proceeding established nothing more than a theoretical possibility that the second victim's blood was in an area where the petitioner said he was shot, and sufficient circumstantial evidence pointed to the petitioner's guilt. If anything, *Richter* supports Mr. Lee's contention that the specific facts of a case dictate whether a state court ruling is unreasonable or not.

a claim in State court proceedings," (e)(2) does not prohibit an evidentiary hearing. *Williams*, 529 U.S. at 430 (citation omitted). "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 432.

Here, the Seventh Circuit determined that (e)(2) did not bar an evidentiary hearing because "the affidavits, plus the multiple requests for hearings, show that [Mr. Lee] did try to develop the record in state court," and it was therefore "impossible to say that Lee has 'failed to develop [in State Court] the factual basis of' his claim." (App. 5a, 6a, alterations in original.) In particular, the court found the state-court record contains "more than a dozen express requests for evidentiary hearings" and "no explanation by any state judge why these requests were denied." (App. 5a.) Those numerous requests for an evidentiary hearing, along with requests to conduct discovery in state court, demonstrate Mr. Lee was sufficiently diligent in attempting to develop the record. *See Williams*, 529 U.S. at 440-44 (holding petitioner was sufficiently diligent in efforts to develop the facts supporting his juror bias and prosecutorial misconduct claims).

C. The Seventh Circuit's Decision Does Not Allow An "End Run" Around State Law Pleading Requirements, As The State Alleges.

The State contends the Seventh Circuit's decision offers *habeas* petitioners an "end run around state pleading requirements" and "compels Illinois to sacrifice either its postconviction pleading requirements or the

finality of its state-court judgments." (State Br. at 10.) However, the Seventh Circuit did not in any way suggest that state courts must grant evidentiary hearings to classes of claims not previously entitled to evidentiary hearings under federal law. The Seventh Circuit merely held that, based on the specific facts in this case, it was unreasonable for the State Court to dismiss Mr. Lee's claim at the pleading stage based on the assumption that the text of the five affidavits would have constituted the entirety of the witnesses' trial testimony. (App. 7a.)

Moreover, state law pleading requirements are not a justification for denying a petitioner an evidentiary hearing where federal law requires that an evidentiary hearing be held. *See Arizona v. United States*, 567 U.S. 387, 406 (2012) ("The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (citation omitted). The State cites no cases to the contrary. Both *Johnson v. Lee*, 136 S. Ct. 1802 (2016), and *Beard v. Kindler*, 558 U.S. 53 (2009), relate to the irrelevant principle that to "qualify as an 'adequate' procedural ground, capable of barring federal habeas review, a state rule must be 'firmly established and regularly followed.'" *Johnson*, 136 S. Ct. at 1805 (citation omitted); *Beard*, 558 U.S. at 60 ("We have framed the adequacy inquiry by asking whether the state rule in question was 'firmly established and regularly followed.'") (citation omitted).

D. The Seventh Circuit Does Not "insist[] that state courts hold evidentiary hearings in circumstances where federal courts would not," As The State Alleges.

The State's argument that the Seventh Circuit somehow "insist[s] that state courts hold evidentiary hearings in circumstances where federal courts would not" (State Br. at 11) is without merit. Not one of the cases cited by the State supports this proposition or renders the Seventh Circuit's decision problematic.

The State claims the Seventh Circuit's decision conflicts with *DeCologero v. United States*, 802 F.3d 155 (1st Cir. 2015), and *Purkey v. United States*, 729 F.3d 860 (8th Cir. 2013), which stand for the proposition that "federal district courts are not required to conduct evidentiary hearings . . . if the movant's allegations, accepted as true, would not entitle the movant to relief." (State Br. at 11.) But the Seventh Circuit obviously did not contradict such a basic principal of pleading. The problem, again, is that the State is assuming the affidavits were a proffer of the witnesses' entire testimony and that Mr. Lee was supposedly claiming that their trial testimony would have replicated their affidavits verbatim. As discussed above, these assumptions are unreasonable. (*Supra*, I.B.)

Similarly, the State claims the State Court's analysis of Mr. Lee's claim was consistent with this Court's typical analysis of *Strickland* claims "based on proffers of extrarecord evidence." (State Br. at 12-13, citing *Harrington v. Richter*, 562 U.S. 86, 112-13 (2011), *Bobby v. Van Hook*, 558 U.S. 4, 12 (2009) (*per curiam*); *Schriro*

v. Landrigan, 550 U.S. 465, 481 (2007), and *Strickland v. Washington*, 466 U.S. 668, 700 (1984)). Again, these affidavits were not proffers. Moreover, nowhere in *Harrington*, *Bobby*, *Schriro*, or *Strickland* does the Court treat a witness affidavit as synonymous with a petitioner's proffer of evidence.

The State also claims the Seventh Circuit's decision conflicts with cases asserting federal courts need not hold an evidentiary hearing "on a defendant's claim where the defendant's allegations regarding extrarecord evidence are insufficiently detailed." (State Br. at 11-12, citing *Lynn v. United States*, 365 F.3d 1225, 1238-39 (11th Cir. 2004), *United States v. Balzano*, 916 F.2d 1273, 1296-97 (7th Cir. 1990), and *United States v. Olson*, 846 F.2d 1103, 1111 (7th Cir. 1988)). But the sufficiency of detail in Mr. Lee's allegations is not an issue that has been raised or ruled on in connection with Mr. Lee's *habeas* petition and appeal. Although the Seventh Circuit did not address the issue directly (nor did the State raise the issue), the Seventh Circuit concluded Mr. Lee's allegations were sufficiently detailed to entitle him to an evidentiary hearing.

Moreover, *Lynn*, *Balzano*, and *Olson* do not stand for the proposition for which the State cites them. In *Olson*, the court ruled on the petitioner's ineffective assistance of counsel claim *after* the federal district court held an evidentiary hearing on that claim. 846 F.2d at 1108-09. In *Balzano*, no evidentiary hearing was requested. Finally, in *Lynn*, the court held an evidentiary hearing was unnecessary because the testimony of potential witnesses would be duplicative based on the submission

of multiple, detailed affidavits. 365 F.3d at 1230.

II. Certiorari Should Be Denied Because The Seventh Circuit's Decision Does Not Create A Circuit Split With The Ninth Circuit.

The State claims the Seventh Circuit's decision conflicts with *Gulbrandson v. Ryan*, 738 F.3d 976 (9th Cir. 2013), but that is not so. In *Gulbrandson*, a *habeas* petitioner argued his trial counsel was ineffective for failing to call an expert witness—who had already testified at trial—at the petitioner's sentencing hearing. *Id.* at 986. In post-conviction proceedings, the petitioner submitted an affidavit the expert wrote post-trial, in which he "rephrased" his opinions such that they "track[ed] the language of the mitigation statute more closely than [did] his [trial] testimony." *Id.* at 991. The state court denied the petitioner's claim without holding an evidentiary hearing to determine how the expert would have testified at sentencing, relying instead on the expert's affidavit. *Id.* at 990.

The Ninth Circuit affirmed the denial of the petition because the expert's post-trial affidavit was "cumulative of the evidence that was already before the sentencing court," so the state court's decision was not unreasonable, even in the absence of an evidentiary hearing. *Id.* at 990. *Gulbrandson* reaffirmed that "[w]here there is no likelihood that an evidentiary hearing would have affected the determination of the state court, its failure to hold one does not make such determination unreasonable." *Id.* at 991 (internal quotation marks and citation omitted).

The Seventh Circuit here and the Ninth Circuit in

Gulbrandson did not apply different legal principles—they applied the same law, but the outcomes were different because the facts were different. Here, unlike in *Gulbrandson*, there was no concern the five witnesses would present testimony that was duplicative of their prior testimony because they did not testify at Mr. Lee's trial. Also, unlike the expert affidavit in *Gulbrandson*, the affidavits here have limited detail about the witnesses knowledge of relevant events. Moreover, although the state courts in both cases made assumptions about how the witnesses would testify, the state court in *Gulbrandson* made a reasonable assumption based on the witness's prior trial testimony and extensive affidavit, while the State Court here made an unreasonable assumption that the five witnesses, who were not investigated by Trial Counsel, who never previously testified and who submitted affidavits with limited detail, "would have parroted their affidavits and refused to say another word." (App. 5a.)

Additionally, *Pappas v. Miller*, 750 F. App'x 556 (9th Cir. 2018), demonstrates that the Ninth Circuit has not adopted the State's theory that state courts have broad discretion to assume how witnesses will testify based on affidavits alone. In *Pappas*, a *habeas* petitioner convicted of second-degree murder in connection with a drunk driving incident claimed he had been denied his right to an impartial jury at trial. *Id.* at 558-59. The state post-conviction court did not hold an evidentiary hearing to determine whether "one of the jurors might have been a member of Mothers Against Drunk Driving ('MADD')" after the petitioner presented "evidence that a juror may have dishonestly concealed an affiliation

with MADD, including declarations from two jurors." *Id.* at 559. The Ninth Circuit held the "state court's factual determination was unreasonable under § 2254(d)(2)" due to its failure to "properly develop the record" at an evidentiary hearing. *Id.* at 560. As a result, the Ninth Circuit remanded the case to the district court for an evidentiary hearing on the petitioner's juror bias claim. *Id.* at 560-61.

There is no circuit split between the Seventh and Ninth Circuits.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

Respectfully submitted,

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