No. 17-___

IN THE

Supreme Court of the United States

JIMMIE GORDON,

Petitioner,

v.

BLAINE LAFLER, WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JENNIFER L. SWIZE
JEFFREY R. JOHNSON
Counsel of Record
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939
jeffreyjohnson@jonesday.com

Counsel for Petitioner

QUESTION PRESENTED

Whether this Court's decisions up through and including *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), clearly establish that a judge presiding over a murder trial must be free from an unconstitutionally high appearance of bias, not just actual bias.

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INTRODUCTION

Petitioner Jimmie Gordon faces life in prison after he was convicted of murder at trial. Under this Court's clearly established precedent, if the judge presiding over Gordon's trial had received ten cents of any fine that he levied upon Gordon, the judge would have been required to recuse as a matter of due process. *See Tumey* v. *Ohio*, 273 U.S. 510 (1927). And under this Court's clearly established precedent, if that judge's electoral campaign had been financed by someone intent on locking Gordon up, the judge's recusal would likewise have been required. *See Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868 (2009). In each instance, there would have been "such *potential* for bias as to require disqualification." *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 466 (1971) (emphasis added).

What happened at Gordon's trial was far worse. Time and again, the judge attacked Gordon's lawyer and played surrogate prosecutor, thwarting Gordon's efforts to challenge the State's case and disrupting his attempt to make his own. Each time, the jury must have come away thinking that the judge had it in for Gordon. Nonetheless, the state post-conviction court held that Gordon had to show the judge was *actually* biased against him, not just that his actions created an unconstitutionally high appearance of bias. The Sixth Circuit then held that that decision was not contrary to clearly established Supreme Court precedent, because this Court had not established an appearance-of-bias standard.

No one in this case—not the State of Michigan, not the district court, and not the Sixth Circuit—has ever explained how that makes any sense. It can't be

done. If clearly established Supreme Court precedent forbids a mayor from adjudicating a traffic dispute because of the small chance that the increase in city funds might skew his decision, then it likewise clearly establishes that a judge cannot preside over a murder trial where *his own actions* create an unmistakable impression of favoritism. The Sixth Circuit's contrary conclusion departs from this Court's precedents and conflicts with other circuits' understanding of those precedents. This Court should grant certiorari or summarily vacate the decision below, as it did in *Rippo* v. *Baker*, 137 S. Ct. 905 (2017) (per curiam).

OPINIONS BELOW

The district court's opinion denying Gordon's request for habeas relief (Pet. App. 24a–69a) is unpublished but may be found at 2015 WL 1600414 (E.D. Mich. Apr. 9, 2015). The Sixth Circuit's amended decision affirming that judgment (Pet. App. 1a–23a) is unpublished but may be found at 710 F. App'x 654 (6th Cir. 2017). The state post-conviction court's decision (Pet. App. 72a–81a) is unreported.

JURISDICTION

The Sixth Circuit entered its original judgment on July 5, 2017. In response to Petitioner's timely petition for rehearing and rehearing en banc, the Sixth Circuit amended its opinion on September 26, 2017. Petitioner timely reiterated his request for rehearing en banc, which was denied on November 8, 2017. Pet. App. 82a. On January 17, 2018, Justice Kagan extended the time to file a certiorari petition to and including April 6, 2018. No. 17A747. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause provides that "[n]o State shall … deprive any person of … liberty … without due process of law." U.S. Const. amend. XIV, § 1.

28 U.S.C. § 2254(d)(1) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim … resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT

1. According to the State of Michigan, about an hour before midnight on October 15, 2004, Ebony Jackson and her cousin Latrice Jackson began accusing Fallon Walker of spreading vicious rumors. R.22-4, at 556-57.[1] Fallon called her mother Latrell Todd to come pick her up, but after Fallon hung up Ebony and Latrice attacked her outside near Latrice's house. *Id.* at 558. Fallon escaped and asked a neighbor to call the police. *Id.* at 560–61. Ebony and Latrice fled toward Latrice's home, while Fallon

[1] Citations beginning with "R." refer to docket entries in *Gordon* v. *Lafler*, No. 08-cv-10771 (E.D. Mich.). The page numbers refer to the continuous "PageID" numbers generated by the district court's filing system.

soon met up with police officers and, immediately thereafter, with her mother and her brother Francois Walker. *Id.* at 561. After first accompanying the police to the scene of the attack, *id.* at 562, Fallon and her family then drove to the home of Jimmie Gordon—Ebony's boyfriend at the time—to "retrieve [Fallon's] purse" from Ebony's vehicle, which all three young women had been riding in earlier that evening, *People* v. *Gordon*, No. 261834, 2006 WL 2924658, at *2 (Mich. Ct. App. Oct. 12, 2006); R.22-4, at 565–66. They arrived around midnight. As they "looked for the purse inside the car," Gordon came out onto the driveway. *Gordon*, 2006 WL 2924658, at *2. Again according to the State, after Francois "demanded to know where Ebony was, [Gordon] ran into his house, returned with a rifle, and fired six shots," one of which killed Francois. *Id.*

Gordon has always insisted he acted in self-defense. Francois, upset by the earlier fight, was clearly looking to revenge his sister's injuries. Outside Latrice's home, Francois was "jumping around" screaming "Fuck you all" and demanding to know where Ebony and Latrice were, all while keeping his "hands underneath his clothing, behind his back." R.22-4 at 719–20. Police later separated Francois and Latrice's mother's boyfriend because Francois kept "steady calling [Latrice and her family] bitches" and screaming for answers. *Id.* at 721.

This behavior continued at Gordon's house. As Francois's mother initially told police, once she parked near Gordon's house she "saw her son walk up to the door," *id.* at 659, yelling at Gordon to hand over the "bitches" that attacked his sister, R.22-3, at

404. Gordon similarly testified that he happened to be outside when Francois and another person ran up the driveway and attacked, trying to get in through the side door. R.22-5, at 915–16. Panicked, Gordon grabbed a rifle, returned outside, heard someone yelling about "bitches" and then, after hearing shots fired, returned fire and later fled the scene. *Id.* at 920–22, 927. Others corroborated Gordon's story, testifying that they saw people approaching the side door and heard a scuffle there. *Id.* at 872–73, 878, 880–81, 893. Even Francois's mother testified that, when she asked Gordon why he shot her son, Gordon shouted "he shouldn't have ran up on me." R.22-3, at 413.

2. Gordon was charged with first-degree murder and related offenses. The central question at trial was whether Gordon acted in self-defense, a question which (given the absence of significant forensic evidence) turned on whether the jurors believed Francois's relatives (his mother and his sister) or instead believed Gordon and his witnesses. But throughout the four days of trial, the jury's consideration of that question was marred by Judge Townsend's repeated, often harsh reprimands to Gordon's counsel, Terry Price, and his frequent interjections on behalf of the prosecution.

Day One: The prosecutor's direct examination of Francois's mother took place without objection, but the judge often intervened sua sponte to cut Price's cross-examination short. *E.g.*, *id.* at 437, 445, 457. These interruptions often occurred at crucial junctures. For instance, Price asked Francois's mother if she recalled testifying at Gordon's bail hearing that she and Francois "ran up the drive"

there, but she said, "I don't know. I told you what I did." *Id.* at 461–62. When asked about what Francois did, she responded: "[W]hat difference do it make what Francois did? My son is dead now." *Id.* at 462.

Price pressed the advantage of this critical testimony, asking: "That's exactly how you feel about it; isn't it? It don't make no difference what he did?" *Id.* The judge, however, intervened, asserting that the question was "argumentative." *Id.* Price asked why, but the court stated that the mother's "feelings [were] not relevant," only "what she saw." *Id.* Price began to explain why counsel may ask a key witness about her apathy toward the truth, but the judge stopped him: "You're arguing with me now. I've asked you, if you have another question, ask her." *Id.* at 463. Price tried to explain that he "ha[d] a right" (presumably to be heard and to make a record), but before he could finish the judge told him that he "ha[d] a right to do one thing right now, [he] ha[d] a right just to sit down." *Id.*

Similar exchanges occurred during the rest of the first day's testimony. Judge Townsend asked Price why he "ha[d] to argue about everything" after Price sought permission to approach the witness with a document that the judge had told him to provide. *Id.* at 504. After Price objected to an ex parte conversation between Judge Townsend and the prosecutor, Judge Townsend asked Price whether there were "[a]nymore accusations [he] wish[ed] to make before the jury comes out?" *Id.* at 509–10. And after Price told the judge that he had a right to make a record after Judge Townsend refused to quiet the courtroom, the judge again told him he "d[idn]'t have any rights to do, except what the Court t[old him he]

ha[d] a right to do." *Id.* at 528. Judge Townsend acted rather differently in response to noise in the gallery during the State's redirect of the same witness: "Hey, anybody wants to go to jail for Contempt of Court, stand in line, or get out. Don't come back." *Id.* at 538.

Day Two: The second day's testimony produced more of the same. For example, during Fallon's turn on the stand, Price asked Fallon whether her mother and brother were upset after the initial fight and, if so, what they were upset about. R.22-4, at 612. The judge sua sponte intervened, explaining that Fallon could not testify as to "what somebody else felt, or what they were excited about." *Id.* Price highlighted this unusual judicial intervention by noting (for the second time) that the judge had treated similar questions from the prosecutor differently. *Id.* Judge Townsend responded: "You do that one more time, and you're going to be held in Contempt of Court." *Id.* at 613. "Don't you ever, ever accuse the Court of being biased in any way. You know better than to do that, and I don't know if anybody else tolerates it, but I won't. Don't you ever do that again." *Id.*

The trial court interrupted Price's inquiry of other witnesses as well. During Price's cross-examination, Wanda Jackson testified about Francois's violent behavior at her home. She explained that he was "[j]umping around" and, when asked to elaborate, stated: "He actually got his hands underneath his clothing, behind his back, as if he had a [sic] item—." *Id.* at 719. The court jumped in: "Well, you can't—no. All you can say is what you saw. The 'as if' is a conclusion." *Id.*; *see also id.* at 720 (sua sponte stopping questions about whether

Francois's mother encouraged his outbursts); *see also id.* at 679, 683 (sua sponted blocking questions aimed at corroborating Gordon's claim that Francois ran up to him); *id.* at 669–70 (same).

Day Three: The third day of testimony mirrored the first two. For example, after a back-and-forth with Price about potential objections to an exhibit, Judge Townsend again scolded Price before the jury:

> The Court: Am I being chastised, Mr. Price?
>
> Mr. Price: No, Judge. After —
>
> The Court: Well, then why don't you just be a little more diplomatic in your tone.
>
> Mr. Price: You're correct, sir.
>
> The Court: I appreciate that. Thank you. And don't they teach you legal courtesy in law school these days?
>
> Mr. Price: They teach you how to —
>
> The Court: Will you please observe a little bit, because I'm trying to be patient and courteous with you.
>
> Mr. Price: Thank you, sir.

R.22-5, at 799. Judge Townsend also again raised unprompted concerns during Price's cross-examinations. *E.g.*, *id.* at 844–45, 848 (stopping Price's efforts to anticipatorily rehabilitate testimony suggesting Francois attacked Gordon).

Judge Townsend's fights with Price and frequent intervention also marred the presentation of the defense's case. During Gordon's own testimony, for example, the judge gave unsolicited help to the prosecutor. During her cross-examination, she

questioned Gordon about the shots he heard, asking whether "a shot [went] by [him]." *Id.* at 932. Gordon said he didn't "get hit," and the prosecutor moved on. *Id*. The court intervened: "Well, wait a minute. Wait a minute. Just answer the question. No fencing." *Id.* Later, the prosecutor asked Gordon whether he saw the people shooting at him. *Id.* at 933. Gordon explained that the shots could only have come from them, but the court (again sua sponte) instructed the prosecutor to "[a]sk the question again" because Gordon could "answer it yes or no." *Id*. Other defense testimony featured similar events. *E.g.*, *id.* at 885–87 (telling Price to "sit down and shut up" after a dispute over one of the judge's sua sponte questions to a defense witness); *id.* at 887 (again instructing Price to sit down after refusing to hear his explanation for his objection).

Day Four: Closing arguments took place on the fourth and final day. Each side delivered its principal argument without objection. The prosecutor's rebuttal, however, gave rise to the most explosive moments of the trial. During Price's lengthy argument, he had briefly alluded to the prosecution's witness order: "[Y]ou notice through the progression of the trial here, the last witness the Prosecutor called was the evidence tech. Because what they're saying … is not supported by the evidence." R.22-6, at 979. Halfway into her rebuttal, the prosecutor circled back to this point:

> I didn't put the evidence tech on last because I'm just trying to hide it. … I put the evidence tech on last …. [b]ecause I couldn't get him at four. Because every day I tried, and when I was saying, "Judge, can we have a moment?"

> I was calling, and trying to find the evidence tech.

Id. at 1009.

Price objected; the prosecutor was "testifying" and her explanation was "not part of any record." *Id.* The judge said:

> The Court: Okay, Mr. Price, since you brought that up, we did adjourn early one day because—
>
> Mr. Price: How dare you, Judge.
>
> The Court: Don't you—
>
> Mr. Price: How dare you do that.
>
> The Court: Listen, don't you ever say that to me again. Now, I'm going to tell the jury because you brought it up and made a false statement. That person—
>
> Mr. Price: I mad [sic] what?
>
> The Court: Mr. Price, that gentleman—
>
> Mr. Price: I can't believe you, Judge.
>
> The Court: Don't, you don't have to. You brought it up.
>
> Mr. Price: I object.

Id. at 1009–10.

The judge excused the jury. He castigated Price as "one of the most obnoxious, overbearing attorneys [he had] ever had the displeasure to try a case with." *Id.* at 1010. He told Price that Price "kn[e]w darn well that we adjourned court one day because that witness was in another courtroom and was not available." *Id.* Since Price "brought it up" and "left

that hanging there," the judge would "tell the jury the truth of the matter." *Id.*

The judge then found Price in contempt and ordered him to pay a $100 fine. *Id.* "[F]rom this point on you will sit down and you will be quiet, and you will shut up. The record is clear. If you want to appeal me, you can. But from this point on you are silent; you have nothing else to say." *Id.* at 1011. Price tried to explain that the prosecution could have had the witness testify earlier and that the judge simply "believe[d] what [the prosecutor] told [him]," but the judge reminded him that he was in contempt, threatened him with additional fines if he "d[id] it again," and added: "As I said before, you're not only lying, but you are the most obnoxious attorney I've ever had the displeasure to try a case with." *Id.* at 1012–13. The judge further warned Price that he would "put the record straight" whenever Price "ma[de] a mistake." *Id.* at 1013.

After the jurors returned, the judge told them that the "truth of the matter" was that the "evidence technician was testifying elsewhere" and that, although they sent an officer to look for him, that was "time consuming, so the Court decided to call the testimony to an end for that day …" *Id.*[2]

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[2] Judge Townsend was wrong. There was no evidence addressing whether the prosecution sought to have the relevant officers testify earlier, any efforts it made to secure their presence, or its motives in determining the order of its case.

In fact, the record indicates that the court never went hunting for these witnesses. There was no discussion of evidence technicians on the first day, which ended at 4:02 pm because (as the judge joked) "[s]lave regulations" prevented the

Later, the judge rescinded Price's contempt fine. *Id.* at 1040. The jury convicted Gordon of first-degree murder and three other counts. *Id.* at 1045. At sentencing, Price raised the issue of Judge Townsend's conduct during trial, but never filed the motion on the subject that Judge Townsend requested. R.22-7, at 1053–59. Judge Townsend sentenced Gordon to life in prison. *Id.* at 1067.

3. Every court to consider Gordon's case has questioned the propriety of the conduct described above. *E.g.*, Pet. App. 76a (state post-conviction court noted that Judge Townsend was "clear[ly]" "frustrated and angry" with Gordon's lawyer and that the judge's conduct "may well be considered rude under other circumstances"); Pet. App. 41a (the district court acknowledged that it was "troubl[ed]" by some of the judge's behavior); Pet. App. 21a (the Sixth Circuit said the judge's statements "could

(continued…)

court from keeping the jurors longer. R.22-3, at 540. Around 3:30 pm on the second day, the court asked the prosecution whether it had any more witnesses for the day. The State mentioned one, who briefly testified. R.22-4, at 740–43. The court then dismissed the jury and the prosecutor ran through her remaining witnesses. *Id.* at 743–44. "I could call either [Officer] Jenkins or [Officer] Firchau, if Mr. Price desires. [Officers] Soli and Andrews, I intend to call tomorrow, I hope. They're the—we've been looking for them all day." *Id.* at 744. She informed the court that they were "Evidence Technicians" and agreed with the court's speculation that they were "probably testifying somewhere else." *Id.* With respect to Officer Jenkins (the last witness) in particular, Price asked that he testify the next day. The prosecutor responded: "Jenkins is at the 13th now, we'll do the best we can on him." *Id.* at 746.

certainly be considered inappropriate and lacking in tact"). Nonetheless, each court rejected Gordon's claim because Gordon could not show Judge Townsend was actually, subjectively biased.

State Post-Conviction Proceedings: Gordon sought to set aside his conviction on two grounds: that Judge Townsend's conduct violated due process, and that Price had provided ineffective assistance by failing to raise the issue in a post-trial motion as Judge Townsend had requested.

The state post-conviction court denied the first claim. Notwithstanding this Court's decision in *Caperton* (and other cases), it held that those alleging judicial bias "must prove actual personal bias against either a party or the party's attorney." Pet. App. 75a. Per the court, Gordon could not do so because Price supposedly "precipitated" Judge Townsend's actions and because Judge Townsend did not "direct his comments to the defendant or the defendant's witnesses or comment on the weight or substance of the proffered defense." Pet. App. 76a. The state post-conviction court did not address Gordon's related ineffective-assistance claim.

District Court Proceedings: Gordon then returned to federal court, where his habeas petition had been stayed pending exhaustion of state remedies. Pet. App. 27a. The district court acknowledged that those claiming judicial bias need only show "'there was bias, or such a likelihood of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused,'" to prevail under "clearly established federal law." Pet. App. 32a–34a (quoting *Ungar* v. *Safarite*, 376 U.S. 575, 588 (1964)).

Nonetheless, the district court believed it was "required to defer" to the state court's decision because some of Judge Townsend's actions were appropriate courtroom management and others, while questionable, were "tempered" by his other conduct. Pet. App. 41a, 44a, 45a. The district court did not separately address Gordon's ineffective-assistance claim.

Sixth Circuit Proceedings: The Sixth Circuit appointed pro bono counsel and affirmed the district court's decision.[3] It held that the post-conviction court's decision "did not conflict with clearly established federal law" because this Court has not clearly established a "mere-appearance-of-bias standard." Pet. App. 13a. To reach that conclusion, it divided this Court's cases into two groups—everything before *Caperton*, and *Caperton* itself. With respect to the former, the panel was bound by the Sixth Circuit's (pre-*Caperton*) decision in *Railey* v. *Webb*, 540 F.3d 393 (6th Cir. 2008), which held that this Court's precedents up to that point had not clearly established an appearance-of-bias standard. Pet. App. 10a–11a. With respect to the latter, the panel acknowledged that "the Court in *Caperton* at times used broad language in reaching its conclusion," but nonetheless held that the Court "did not intend to extend broadly the circumstances under which an individual can establish a Due Process violation by proving something less than actual bias." Pet. App. 13a.

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[3] Before addressing the merits, the Sixth Circuit rejected the State's contention that Gordon had procedurally defaulted his claims. Pet. App. 6a.

Because it held that the state post-conviction court did not apply the wrong legal standard, the panel reviewed Gordon's claims with AEDPA deference. Pet. App. 13a. Through that lens, it concluded that it "c[ould not] be said that the judge treated the defense unfairly or was too one-sided" so as to show actual bias. Pet. App. 21a.

The panel also rejected Gordon's ineffective-assistance claim. Pet. App. 22a–23a. Because the state post-conviction court had not addressed that claim, the panel reviewed it de novo. However, it then applied the same actual-bias standard it had used to reject Gordon's judicial-bias claim, reasoning that "the judge's conduct [wa]s more reflective of a frustration with defense counsel's overzealous advocacy rather than any bias against him or Gordon." Pet. App. 23a.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S ACTUAL-BIAS STANDARD CONFLICTS WITH THIS COURT'S PRECEDENTS

1. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Of course, that constitutional floor requires at least a trial "before a judge with no actual bias against the defendant." *Bracy* v. *Gramley*, 520 U.S. 899, 905 (1997). But for decades, this Court has recognized that "justice must [also] satisfy the appearance of justice," *Offutt* v. *United States*, 348 U.S. 11, 13 (1954); it must "not only be done but must manifestly be seen to be done," *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 172 n.19 (1951) (Frankfurter, J., concurring) (quoting *Rex* v. *Justices of Bodmin*, (1947) 1 K.B. 321, 325).

Under this principle, "[n]ot only is a biased decisionmaker constitutionally unacceptable[,] but our system of law has always endeavored to prevent even the probability of unfairness." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975) (internal quotation marks omitted). Every situation which "offer[s] a possible temptation to the average … judge" "not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law," *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927), because the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," *Withrow*, 421 U.S. at 47.

Accordingly, the Court routinely found due process violations where the judge may not have been "actual[ly] bias[ed]." *Murchison*, 349 U.S. at 136. For example, a judge subjected to "highly personal aspersions" may not preside over the contemnor's contempt trial, because such comments create "such potential for bias as to require disqualification." *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465–66 (1971). Similarly, judges have long had to recuse where they have "direct, personal, substantial pecuniary interest" in the case. *Tumey*, 273 U.S. at 523 (fees and costs recovered only upon conviction); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (mayor may not hear cases where fines go into the municipality's coffers). "[D]oubtless" many adjudicators "would not allow" these small sums "to affect their judgment," "but the requirement of due process of law … is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of

injustice." *Tumey*, 273 U.S. at 532; *see also Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 825 (1986).

These principles have also long applied to claims of bias stemming from a judge's conduct. A judge may demonstrate actual "bias and lack of impartiality" through "excessive injection of [himself] into the examination of witnesses" or through "numerous," "hostil[e]" comments to defense counsel. *Offutt*, 348 U.S. at 16. But such actions can also create an unconstitutionally high *possibility* of bias. For example, while "[a] judge's ordinary efforts at courtroom administration" generally cannot give rise to due process problems, they "will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky* v. *United States*, 510 U.S. 540, 555, 556 (1994) (emphasis omitted); *see also Quercia v. United States*, 289 U.S. 466 (1933) (overturning a conviction because the judge's interjections were "of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence"). That is so even if the judge lacks actual bias: a judge who warns that it takes a "very judicial mind, indeed," to preside over those whose "hearts are reeking with disloyalty" must recuse, *Liteky*, 510 U.S. at 555 (quoting *Berger* v. *United States*, 255 U.S. 22 (1921)), even if he possesses such a mind.

2. Whatever doubt there may have been about a general appearance-of-bias standard was eliminated by *Caperton*. "Under [the Court's] precedents there are *objective* standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally

tolerable.'" 556 U.S. at 872 (quoting *Withrow*, 421 U.S. at 47) (emphasis added). That test makes sense: rather than rely on "[t]he judge's own inquiry into actual bias," "objective standards" allow for a "realistic appraisal" of "psychological tendencies and human weakness" to determine whether the risk of bias is too high. *Id.* at 883–84. Applying this objective test, the Court held that a judge should have recused because of a businessman's contributions toward his electoral success, even though it took no issue with the judge's conclusion that he was not actually biased. *See id.* at 886.

This Court has since emphatically reiterated this approach. In *Rippo* v. *Baker*, the Nevada Supreme Court rejected a judicial-bias claim because the defendant's allegations did not suffice to show "actual[] bias[]." 137 S. Ct. 905, 906 (2017) (per curiam). This Court summarily vacated that decision because "[t]he Nevada Supreme Court did not ask the question [this Court's] precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Id.* at 907. In other words, by focusing on actual bias rather than the unconstitutionally high appearance of it, the Nevada Supreme Court "applied the wrong legal standard." *Id.*; *see also Williams* v. *Pennsylvania*, 136 S. Ct. 1899 (2016).

3. The Sixth Circuit's contrary understanding of this Court's precedent cannot be defended. As an initial matter, the panel *could not* consider whether cases before *Caperton* had clearly established an unconstitutional-risk-of-bias standard. In *Railey*, the Sixth Circuit had already (erroneously) held that they did not. *See* 540 F.3d at 413. This Court,

however, is free to acknowledge what *Withrow* said decades ago: due process demands recusal where the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." 421 U.S. at 47.

The Sixth Circuit's attempt to distinguish *Caperton* fares no better. It reasoned that, despite the Court's "broad language," the Court "did not intend to extend broadly the circumstances under which an individual can establish a Due Process violation by proving something less than actual bias," because the Court highlighted the case's "extreme" facts. Pet. App. 13a. But the panel confused the *standard for adjudicating* bias claims set forth in *Caperton* with the kinds of facts needed to *satisfy* that standard. *Caperton* is clear that, in the context of judicial elections, only "extreme" facts will create an unconstitutionally high likelihood of bias. But it is equally clear that the Due Process Clause has been "implemented by objective standards that do not require proof of actual bias" as a general matter, 556 U.S. at 883, not just in cases involving West Virginia judicial elections.

The summary reversal in *Rippo* proves conclusively that Gordon is right about *Caperton* and its predecessors. The Sixth Circuit brushed *Rippo* aside on the grounds that it was decided after the state post-conviction court's decision. Pet. App. 10a n.3. While it is true that clearly established law for AEDPA purposes turns on the law at the time of the state court's decision, subsequent decisions may nonetheless indicate what earlier cases had plainly set forth. Summary reversals do exactly that—they "reflect[] the feeling of a majority of the Court that

the lower court result is so *clearly erroneous*, particularly if there is a *controlling Supreme Court precedent to the contrary*, that full briefing and argument would be a waste of time." S. Shapiro et al., Supreme Court Practice § 5.12(b), p. 344 (10th ed. 2013) (emphasis added). By summarily vacating, the Court reiterated that, in all cases, "[r]ecusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Rippo*, 137 S. Ct. at 907 (quoting *Withrow*, 421 U.S. at 47).

II. THE SIXTH CIRCUIT'S ACTUAL-BIAS STANDARD IS AN OUTLIER AMONG THE CIRCUITS

1. Other circuits have recognized that this Court's precedents clearly established a general unacceptable-risk-of-bias standard long ago. In *Hurles* v. *Ryan*, a judge presided over the defendant's capital murder trial after having personally and forcefully responded to his lawyer's attempt to reverse her refusal to appoint co-counsel. 752 F.3d 768 (9th Cir. 2014), *cert. denied*, 137 S. Ct. 710 (2014) (mem.). In assessing the defendant's judicial-bias claim under AEDPA, the Ninth Circuit cited the bevy of pre-*Caperton* precedent discussed above to demonstrate that a habeas petitioner "need not prove actual bias to establish a due process violation, just an intolerable risk of bias." *Id.* at 789. Because Hurles had brought forth evidence that "suggest[ed] strongly that the average judge in [the state judge's] position could not … hold[] 'the balance nice, clear, and true,'" the Ninth Circuit remanded for an evidentiary hearing that might turn up conclusive

proof of "an unconstitutional risk of actual bias." *Id.* at 792 (quoting *Tumey*, 273 U.S. at 532).

The Seventh Circuit reached a similar conclusion in *Alston* v. *Smith*, 840 F.3d 363 (7th Cir. 2016). There, local law enforcement officials identified Alston and others as "serious, assaultive offenders" and told judges that violations by them "should be treated as sort of a last straw." *Id.* at 366. Alston's probation was then revoked by one of the judges who had attended the meeting. *Id.* In assessing his judicial-bias claim, the court explained that, under clearly established law, "due process is violated not only where an adjudicator is biased in fact, but also where a situation presents a particularly high probability of bias." *Id.* at 368 (citing *Caperton* and *Withrow*). It rejected Alston's claim only because the state court reasonably concluded that there was "no impermissible risk of bias" in the case. *Id.* at 369.

2. Indeed, in claims *identical* to Gordon's—ones predicated on the judge's intervention at trial—other circuits have recognized the appearance-of-bias standard as clearly established. In *Jones* v. *Luebbers*, the defendant asked the judge to recuse because the judge had previously sought sanctions against one of the defendant's lawyers. 359 F.3d 1005, 1008 (8th Cir. 2004). At the hearing on the unsuccessful motion, the judge was visibly upset and expressed hostility toward another of the defendant's lawyers, and then at trial continued some of that hostility toward the lawyer against whom he had previously sought disciplinary action. *See id.* at 1008–09.

In assessing Jones's judicial-bias claim, the Eighth Circuit held—again citing this Court's cases laid out above—that "'clearly established Federal

law, as determined by the Supreme Court of the United States,' recognizes not only actual bias, but also the appearance of bias, as grounds for disqualification." *Id.* at 1012 (quoting 28 U.S.C. § 2254(d)(1)). Indeed, the court upheld Jones's conviction only because the state court "reasonably determined that the influences upon [the judge] were not such as would offer 'a possible temptation to the average man as a judge not to hold the balance nice, clear, and true between the State and the accused.'" *Id.* at 1015 (quoting *Murchison*, 349 U.S. at 136); *see also, e.g.*, *Alidani* v. *Dooley*, 365 F.3d 635, 640 (8th Cir. 2004) (clearly established law prohibits judges from "so far inject[ing] [themselves] into the trial as to give the jury the *impression* that [they] favor[] the prosecution" (emphasis added)).

The Eighth Circuit is not unusual in this regard. In *United States v. Saenz*, the defendant's trial was marred by precisely the kind of interjections and criticism present here. 134 F.3d 697, 703–13 (5th Cir. 1998) (per curiam). Even though counsel never objected, the Fifth Circuit vacated his conviction as plainly erroneous. It held that the judge "appeared partial," *id.* at 702, because "the court's questioning could have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor," *id.* at 714 (internal quotation marks omitted). The Fourth Circuit has reached a similar conclusion, citing some of this Court's decisions discussed above. *See United States* v. *Godwin*, 272 F.3d 659, 677, 679 (4th Cir. 2001) (applying under plain-error review the "long settled" rule that the court "must not create an appearance of partiality by continued intervention on the side of one of the

parties or undermine the effective functioning of counsel through repeated interruption of the examination of witnesses"); *cf. United States* v. *Brown*, 352 F.3d 654, 665 n.10 (2d Cir. 2003) ("As a general rule, we reserve a finding of plainness to situations where a trial court's ruling contravenes clearly established precedent.").

3. The Sixth Circuit nonetheless concluded here that the state post-conviction court's decision was not contrary to Supreme Court precedent even though that court considered only actual bias in assessing Gordon's claim. Pet. App. 13a. Neither the State nor the Sixth Circuit identified any other circuit that shares that cramped reading of clearly established law since *Caperton*.

III. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THIS IMPORTANT QUESTION

1. Whether clearly established federal law precludes an unconstitutionally high appearance or probability of bias as well as actual bias is an important, frequently recurring question worthy of this Court's time. In the Sixth Circuit alone, there are a host of decisions addressing judicial-bias claims brought by habeas petitioners. *See, e.g.*, *Coley* v. *Bagley*, 706 F.3d 741 (6th Cir. 2013); *Bailey* v. *Smith*, 492 F. App'x 619 (6th Cir. 2012); *Johnson* v. *Bagley*, 544 F.3d 592 (6th Cir. 2008); *Railey*, 540 F.3d at 413–44; *Getsy* v. *Mitchell*, 495 F.3d 295 (6th Cir. 2007) (en banc); *Lyell* v. *Renico*, 470 F.3d 1177 (6th Cir. 2006); *Brandt* v. *Curtis*, 138 F. App'x 734 (6th Cir. 2005); *Billingslea* v. *Jackson*, 83 F. App'x 33 (6th Cir. 2003); *Allen* v. *Hawley*, 74 F. App'x 457 (6th Cir. 2003); *Lewis* v. *Robinson*, 67 F. App'x 914 (6th Cir. 2003); *Alley* v. *Bell*, 307 F.3d 380 (6th Cir. 2002);

Maurino v. *Johnson*, 210 F.3d 638 (6th Cir. 2000), *abrogated by Williams* v. *Taylor*, 529 U.S. 362 (2000); *McBee* v. *Grant*, 763 F.2d 811 (6th Cir. 1985). As the decisions from other circuits discussed above illustrate, *see supra* pp. 20–22, the Sixth Circuit is not alone in regularly confronting judicial-bias claims brought in federal post-conviction review. Making clear what this Court has already clearly established would foster the resolution of these many cases.

This case is a good vehicle for providing that guidance. *First*, the Sixth Circuit's decision turned on the question presented. As it acknowledged, if Gordon were right about clearly established law forbidding more than just actual bias, the state post-conviction court's decision would have been "contrary to" this Court's precedent, and AEDPA deference would not have applied. Pet. App. 8a–9a.

And AEDPA deference made all the difference in Gordon's case. Under AEDPA deference, Gordon faced an almost impossible task: proving that the state post-conviction court unreasonably determined that Gordon had "failed to establish" actual, subjective bias in Judge Townsend's heart. *Cf. Caperton*, 556 U.S. at 883 (noting the "difficulties of inquiring into actual bias"). And because of AEDPA deference, the Sixth Circuit refused to even engage with Gordon's strongest precedent, such as the Sixth Circuit's prior decision in *Lyell*, which granted the writ in similar factual circumstances under de novo review. *See* 470 F.3d at 1186–89. Thus, like the district court before it, Pet. App. 45a, the Sixth Circuit could not have ruled as it did without AEDPA's forgiving standard, but that standard

should never have applied given the true scope of this Court's clearly established precedents.

Second, there are no procedural hurdles standing in the way of this Court's review. As is typical in habeas cases, the State threw up a number of obstacles in an attempt to block review of Gordon's claims on the merits. The Sixth Circuit, however, mowed all of those obstacles down, carefully explaining that the state post-conviction court did not hold any procedural default against Gordon and that Gordon fairly presented his claims to the state courts. Pet. App. 6a–7a & n.1. Accordingly, nothing would hinder this Court from resolving Gordon's claims on the merits.

In a similar vein, it does not matter that the Sixth Circuit rejected Gordon's related ineffective-assistance claim under de novo review. In its three-sentence discussion of that issue, the Sixth Circuit again focused—erroneously—on actual bias: it asked whether the judge's conduct was "more reflective of a frustration with defense counsel's overzealous advocacy" or "bias against" Gordon or his lawyer. Pet. App. 23a. Indeed, if the Sixth Circuit's truncated discussion on this score were read to mean that the court believed Gordon's underlying judicial-bias claim would fail under either standard, the rest of its opinion would make no sense. For example, there would have been no need for the court to explain that, contrary to the State's argument, "when the state court applies an improper standard, [the federal habeas court] appl[ies] *de novo* review rather than AEDPA deference." Pet. App. 9a. Similarly, there would have been no need to discuss this Court's precedent to determine "whether the state

court actually applied the wrong standard" in focusing on "actual bias." Pet. App. 9a.

It also does not matter that the Sixth Circuit tried to bury its departure from this Court's and other circuits' precedent in an unpublished decision. Of course, that choice didn't make the Sixth Circuit's decision any easier for Gordon to swallow; an unpublished decision is "as important to the parties concerned" as a published one. *Smith* v. *United States*, 502 U.S. 1017, 1020 n.* (1991) (mem.) (Blackmun, J., dissenting from denial of certiorari).

More importantly, "[n]onpublication must not be a convenient means to prevent review." *Id.* The Sixth Circuit's decision should have been published—it "[c]reate[d] … a conflict of authority … between [the Sixth Circuit] and another" circuit, and it involved a "legal … issue of continuing public interest." 6th Cir. I.O.P. 32.1(b)(1). It is therefore "hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit," which is just "another reason to grant review." *Plumley* v. *Austin*, 135 S. Ct. 828, 831 (2015) (mem.) (Thomas, J., dissenting from denial of certiorari).

2. For the reasons given above, this Court could grant plenary review to resolve whether its clearly established precedent forbids more than just actual bias. It could also, however, summarily vacate the decision below, as it did in *Rippo*. If this Court's decisions up to and including *Caperton* clearly establish anything, it is this: a criminal defendant may not be sentenced to life in prison after a trial presided over by a judge whose own actions

inevitably created an unmistakable appearance of bias in the minds of the jurors.

CONCLUSION

The petition should be granted, or the decision below should be summarily vacated.

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Respectfully submitted,

JENNIFER L. SWIZE
JEFFREY R. JOHNSON
Counsel of Record
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939
jeffreyjohnson@jonesday.com

Counsel for Petitioner