No. 21-___

In the Supreme Court of the United States

TIM SHOOP, Warden,

Petitioner,

v.

JERONIQUE D. CUNNINGHAM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE - NO EXECUTION DATE

QUESTIONS PRESENTED

1. AEDPA generally prohibits courts from awarding habeas relief to state prisoners. It lifts that prohibition with respect to prisoners in custody because of a state-court ruling that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). Did the Sixth Circuit err by granting habeas relief based on an alleged misapplication of its own circuit precedent?

2. If the requirements for a federal evidentiary hearing are otherwise satisfied, but Federal Rule of Evidence 606(b)(1) forbids considering the only evidence supporting an evidentiary hearing, must a court hold the hearing regardless?

LIST OF PARTIES

The Petitioner is Tim Shoop, the Warden of the Chillicothe Correctional Institution.

The Respondent is Jeronique Cunningham, an inmate imprisoned at the Chillicothe Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State v. Cunningham*, No. CR2002 0010 (Ohio Ct. Common Pleas, Allen Cnty., judgment entered June 24, 2002 and June 25, 2002)

2. *State v. Cunningham*, No. CR2002 0010 (Ohio Ct. Common Pleas, Allen Cnty., judgment entered Feb. 11, 2004)

3. *State v. Cunningham*, No. 2-04-29 (Ohio Ct. App., 3d Dist., judgment entered Nov. 8, 2004)

4. *State v. Cunningham*, No. 2002-1377 (Supreme Court of Ohio, judgment entered Dec. 29, 2004)

5. *Cunningham v. Ohio*, No. 04-10428 (certiorari denied Oct. 3, 2005)

6. *State v. Cunningham*, No. 2004-2017 (Supreme Court of Ohio, judgment entered March 16, 2005)

7. *Cunningham v. Hudson*, No. 3:06 CV 167 (N.D. Ohio, judgment entered Dec, 7, 2010)

8. *Cunningham v. Hudson*, No. 11-3005 (6th Cir., judgment entered June 24, 2014)

9. *State v. Cunningham*, No. CR2002 0010 (Ohio Ct. Common Pleas, Allen Cnty., judgment entered Sept. 9, 2015)

10. *State v. Cunningham*, No. 1-15-61 (Ohio Ct. App., 3d Dist., judgment entered May 23, 2016)

11. *State v. Cunningham*, No. 2016-0990 (Supreme Court of Ohio, judgment entered July 5, 2017)

12. *Cunningham v. Shoop*, No. 3:06 CV 167 (N.D. Ohio, judgment entered April 6, 2020)

13. *Cunningham v. Shoop*, Nos. 11-3005/20-3429 (6th Cir., judgment entered Jan. 10, 2022; *en banc* review denied March 28, 2022)

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INTRODUCTION

Criminal defendants are entitled to a fair and impartial jury. U.S. Const. amend. VI; *see also Warger v. Shauers*, 574 U.S. 40, 50 (2014). *Voir dire*—the pre-trial questioning of prospective jurors—is the principal means for protecting this right. *Morgan v. Illinois*, 504 U.S. 719, 729–30 (1992) (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality op.)). Courts will rarely allow defendants to develop evidence of juror bias after the trial has ended. Understandably so. When a trial ends, jurors return to their everyday lives. Not many citizens would be willing to serve as jurors in their peers' cases if they could later be chased down and harassed by lawyers eager to find something—anything—that might secure a client's release from custody.

But while it is *hard* to develop evidence of juror bias post-trial, it is not impossible. Defendants who show that jurors were exposed to an external influence may be entitled to a "*Remmer* hearing" regarding the effect of that influence. *Remmer v. United States*, 347 U.S. 227 (1954). And, in federal habeas cases, petitioners alleging juror bias may secure an evidentiary hearing under 28 U.S.C. §2254(e)(2), where they can develop evidence supporting their claim. But defendants who want either type of hearing—a *Remmer* hearing or a §2254(e)(2) hearing—must support their requests with evidence. And, generally speaking, they may not prove their entitlement to these hearings using evidence about what happened in jury deliberations. That is because Rule 606(b) of the Federal Rules of Evidence—with exceptions not relevant here—bars federal courts from

even receiving evidence related to jury deliberations. *See* Fed. R. Evid. 606(b)(2).

This dispute about juror bias began after Jeronique Cunningham murdered three people, including a three-year-old girl. Pet.App.2a. A jury convicted Cunningham. But he claims one juror was biased. Pet.App.2a–3a. That juror, Nichole Mikesell, worked for the county children-services agency in the community where Cunningham committed his crimes. *Id.* Cunningham gives two reasons for thinking Mikesell was biased. First, after Cunningham's trial ended, Mikesell told an investigator that social workers who worked with Cunningham were afraid of him. *See id.* Second, two jurors claimed Mikesell said during deliberations that she had, or would likely develop, a relationship with the victims' families because of her job. *See id.*

Ohio state courts, without holding an evidentiary hearing, declined to award relief on either of Cunningham's two juror-bias theories. The last state court to address Cunningham's first claim rejected it on the merits. Pet.App.176a–77a. It held that Cunningham had not provided any evidence about *when* Mikesell learned of that extraneous information. That is, Cunningham did not indicate whether Mikesell learned about the other social workers' experiences before, during, or after trial. *Id.* Absent evidence that Mikesell was exposed to extraneous information before or during trial, there was no need to conduct a *Remmer* hearing to determine whether that information had affected the jury's deliberations. *See* Pet.App.177a. As for Cunningham's second bias claim, the last Ohio court to address that claim rejected it on timeliness grounds. *State v.*

Cunningham, 65 N.E.3d 307, 312–16 (Ohio Ct. App. 2016).

After failing in state-postconviction proceedings, Cunningham sought federal habeas relief. And the Sixth Circuit, over the dissent of Judge Kethledge, ruled in his favor. It held that Cunningham was entitled to habeas relief on his first theory, reasoning that the state courts improperly denied the juror-bias claim without holding a *Remmer* hearing. It further held that Cunningham was entitled to a §2254(e)(2) hearing on his second theory—this despite the fact that the only evidence supporting that theory concerned juror statements about deliberations covered by Rule 606(b).

The Sixth Circuit erred. Start with Cunningham's first claim. After state courts adjudicate a claim on its merits, federal courts may grant habeas relief only if the state courts' resolution of that claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). This Court has never addressed "the showing necessary to mandate a *Remmer* hearing," however. *See* Pet.App.85a (Kethledge, J. dissenting). Thus, as Judge Kethledge explained, the Ohio court's determination that Cunningham's evidence of bias was insufficient to justify a *Remmer* hearing could not have contradicted or unreasonably applied *Remmer* or any other Supreme Court case. *Id.* The Sixth Circuit granted relief anyway based on the state court's alleged misapplication of *circuit* precedent. But, as this Court has told the Sixth Circuit at least twice before, circuit precedent "cannot form the basis for habeas relief under AEDPA." *Par-*

ker v. Mathews, 567 U.S. 37, 48–49 (2012) (*per curiam*); *White v. Woodall*, 572 U.S. 415, 420 n.2 (2014).

The Sixth Circuit's basis for ordering an evidentiary hearing on Cunningham's second claim is perhaps even more egregious. Certainly its holding will prove more consequential if allowed to stand. Rule 606(b) bars federal courts from receiving the only evidence of juror bias that Cunningham was able to identify. This Court has rejected calls to hold evidentiary hearings under such circumstances, *Tanner v. United States*, 483 U.S. 107, 115, 121 (1987), as have other circuits, *see, e.g.*, *Crowe v. Hall*, 490 F.3d 840, 848 (11th Cir. 2007). The Sixth Circuit's contrary ruling will cause jurors to be "'harassed and beset'" by defendants hoping to secure "'evidence of facts which might establish misconduct sufficient to set aside a verdict.'" Pet.App.87a (Kethledge, J., dissenting) (quoting *Tanner*, 483 U.S. at 120). This very case proves the point: as part of the investigation that spurred this case, Cunningham's investigator "showed up uninvited at Mikesell's home while she was playing outside with her kids." Pet.App.80a (Ketheldge, J., dissenting).

Because the Sixth Circuit's decision directly conflicts with decisions from this Court and from other circuits, the Court should summarily reverse. Alternatively, it should grant the petition for a writ of certiorari and decide the case after full briefing on the merits. This case creates or entrenches two separate circuit splits, including a recognized split over whether, post-AEDPA, "evidentiary hearings are still mandatory in some circumstances, or whether they are simply within the district court judge's discretion when not prohibited." *See Teti v. Bender*, 507 F.3d 50, 61 (1st Cir. 2007).

OPINIONS BELOW

The District Court's decision is published at *Cunningham v. Shoop*, 3:06-cv-167, 2019 WL 6897003 (N.D. Ohio, Dec 18, 2019), and reproduced at Pet. App.96a. The Sixth Circuit's decision is published at *Cunningham v. Shoop*, 23 F.4th 636 (6th Cir. 2022), and reproduced at Pet.App.1a. The Sixth Circuit's order denying *en banc* review is published at *Cunningham v. Shoop*, Nos. 11-3005/20-3429, 2022 WL 1072876 (6th Cir. Mar. 28, 2022), and reproduced at Pet.App.182a.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction to decide this habeas case under 28 U.S.C. §§1331, 2241(a), 2254(a). The Sixth Circuit had jurisdiction to hear an appeal of the District Court's ruling under 28 U.S.C. §1291. The Circuit issued its judgment on January 10, 2022. On March 28, 2022, it denied rehearing *en banc*. This petition timely invokes the Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

The Fourteenth Amendment provides, in relevant part: "No State shall … deprive any person of life, liberty, or property, without due process of law."

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides in relevant part:

> (d) 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—
>
> > (1) 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; or
> >
> > (2) 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.

28 U.S.C. §2254(d).

STATEMENT OF THE CASE

1. Jeronique Cunningham and his half-brother, Cleveland Jackson, Jr., decided to rob a man from whom Cunningham had previously purchased crack. Pet.App.78a (Kethledge, J., dissenting), 148a. Cunningham's dealer was not home when the two arrived, but the dealer's friends and family were. Cunningham and Jackson waited. And when the dealer returned home, Jackson robbed him. Pet.App.148a–49a.

Cunningham and Jackson then herded all the home's occupants into the kitchen at gunpoint. This included the dealer Jackson had just robbed, his friends, and his family. *Id.* As the frightened occupants huddled together, Cunningham and Jackson fired into the group. They stopped only after they ran out of bullets; "witnesses heard clicking sounds as Cunningham and Jackson continued pulling the triggers of their guns" even after they expended their ammunition. Pet.App.149a; *see also State v. Cunningham*, 105 Ohio St. 3d 197, 199 (2004).

Cunningham and Jackson shot everyone in the house and killed two, both children. Pet.App.150a. They shot seventeen-year-old Leneshia Williams in the back of the head, killing her instantly. Pet.App. 80a (Kethledge, J., dissenting). They also fatally shot three-year-old Jala Grant, who was in the house only because she and her father stopped by to borrow a vacuum cleaner. Pet.App.79a–80a (Kethledge, J., dissenting). Leneshia's father, James Grant, was shot five times while trying to shield her from the barrage. Pet.App.80a. Despite James's brave efforts, Leneshia sustained two shots to the head and died on the kitchen floor. *Id.*

A jury convicted Cunningham of murder and the court sentenced him to death. Pet.App.151a.

2. Cunningham appealed. *Id.* While his direct appeal was pending, Cunningham sought postconviction relief in state court. *Id.* He alleged in his postconviction petition that one of his jurors, Nichole Mikesell, was biased. Pet.App.176a. Mikesell worked as a child-abuse investigator and crisis counselor in the community where Cunningham committed the murders. Pet.App.4a. Following Cunningham's trial, an investigator working for Cunningham showed up to Mikesell's home and questioned her while she played with her children. Pet.App.80a (Kethledge, J., dissenting). She told the investigator that "some social workers worked with [Cunningham] in the past and were afraid of him." Pet.App. 176a. This comment formed the basis for the juror-bias claim that Cunningham raised in his petition for postconviction relief. *See id.*

The Ohio courts rejected Cunningham's juror-bias claim on the merits. The last state court to consider the claim held that Cunningham was not entitled to relief because there was no evidence as to *when* Mikesell had learned about the social workers' interactions with Cunningham. Pet.App.176a–77a. In other words, it was entirely speculative "whether Mikesell obtained this information from the social workers prior to, during, or subsequent to Cunningham's trial." Pet.App.177a. The state court determined that Cunningham could not prove juror bias by speculating that Mikesell was improperly influenced before or during trial. *Id.*

3. Having failed to obtain relief in state court, Cunningham turned to the federal courts. He sought

habeas relief in the Northern District of Ohio. Cunningham again raised a juror-bias claim based on Mikesell's alleged communication with the social workers. *See Cunningham v. Hudson*, No. 3:06 CV 0167, 2010 WL 5092705 *17–21 (N.D. Ohio Dec. 7, 2010). And he sought to conduct discovery on that claim. *See* Notice of Discovery Letter & Ex., R.65, 65-1. Even though the state courts had already denied Cunningham's bias claim on the merits, the District Court allowed Cunningham to depose several individuals, including Mikesell and the other jurors. *Cunningham*, 2010 WL 5092705 at *20–21. Discovery confirmed that Mikesell was not subjected to impermissible outside influence. She testified that she had never discussed Cunningham with any of her social-worker colleagues. *Id.* at *20. She had read his files, but only *after* the trial was over. *Id.*

Discovery did, however, unearth a different issue. Two jurors provided affidavits discussing comments that Mikesell made during deliberations. According to one affidavit, Mikesell said that members of the victims' families were her clients. *See* Order Granting Mtn. to Am., R.120 at PageID#2320. The second affidavit was similar, but differed in at least one significant respect. It did not say that Mikesell had an existing relationship with the victims' families. Instead, it said that Mikesell had mentioned during deliberations that she might work with the victims' families in the future. *Id.*

Based on these two affidavits, the District Court allowed Cunningham to amend his juror-bias claim to include a theory that Mikesell was biased because she had a relationship with the victims' families. *See id.* The District Court also allowed Cunningham to depose the two jurors, *id.* at PageID#2321–22, who

confirmed the statements in their affidavits, *see Cunningham*, 2010 WL 5092705 at *21.

The District Court ultimately rejected both of Cunningham's juror-bias theories and denied his request for habeas relief. *Id.* at *1, 17–21. It held that the state court's rejection of Cunningham's first juror-bias theory, which was based on allegations that the jury was influenced by extra-judicial information, was not contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. *Id.* at *20. And it held that Cunningham's second juror-bias theory, which was based on Mikesell's alleged relationship with the victims' families, was unexhausted and procedurally defaulted. *Id.* at *21.

The Sixth Circuit vacated the District Court's rejection of Cunningham's second juror-bias theory. It held that Cunningham's claim was not procedurally defaulted because it was "at least debatable" that a state court might still consider that claim. *Cunningham v. Hudson*, 756 F.3d 477, 485 (6th Cir. 2014). The Sixth Circuit remanded to the District Court, which in turn stayed the federal proceedings so that Cunningham could seek relief on his new claim in state court. *Cunningham v. Hudson*, No. 3:06 CV 0167, 2014 WL 5341703 (N.D. Ohio Oct. 20, 2014).

4. Cunningham filed a new petition for postconviction relief in state court. *State v. Cunningham*, 65 N.E.3d 307, 310 (Ohio Ct. App. 2016). The last state court to consider that petition held that it was untimely and that Cunningham could not satisfy the state-law requirements governing untimely requests for postconviction relief. *Id.* at 312–16. Cunningham could not evade the bar on untimely filings because

the basis for his second juror-bias theory "could have been uncovered if 'reasonable diligence' had been exercised." *Id.* at 314 (quotation and citation omitted).

Cunningham returned to federal court, where he continued to pursue his juror-bias claims. As it had done before, the District Court denied relief on both claims. It again held that Cunningham's second juror-bias claim was procedurally defaulted. Pet.App. 124a. And it reiterated its earlier holdings, including its determination that the state court had not unreasonably applied clearly established federal law when it rejected Cunningham's first juror-bias claim. Pet. App.111a; *see also Cunningham*, 2010 WL 5092705 at *17–20.

5. Cunningham appealed again, and the Sixth Circuit reversed again. In a 2–1 decision, the Sixth Circuit granted Cunningham relief on both of his juror-bias theories. Pet.App.3a, 16a.

The panel majority first addressed Cunningham's claim that Mikesell was biased because she was influenced by the statements that some social workers had made about their interactions with Cunningham. Pet.App.16a–26a. More precisely, the majority considered whether the state courts had violated Cunningham's constitutional rights by rejecting that theory without holding a *Remmer* hearing. And it held that the state courts had indeed unreasonably applied *Remmer*, entitling Cunningham to habeas relief. Pet.App.26a.

Remmer held that, if a juror is exposed to outside influence during a trial, a criminal defendant is entitled to a hearing "to determine whether the incident complained of was harmful." 347 U.S. at 230. Neither *Remmer* nor any subsequent Supreme Court

case provides any details on what a defendant must show to prove his entitlement to a hearing. So the panel majority looked to circuit precedent, under which defendants are entitled to a *Remmer* hearing whenever they present a "colorable claim" that the jury encountered an extraneous influence. Pet.App. 18a (quoting *United States v. Herndon*, 156 F.3d 629, 635 (6th Cir. 1998)). The majority concluded that Cunningham had at least a "colorable claim," and that the state courts therefore unreasonably applied *Remmer* when they denied his juror-bias claim without holding a *Remmer* hearing. Pet.App.17a–18a. Thus, the majority claimed, Cunningham was entitled to habeas relief even under AEDPA's demanding standards. *See* 28 U.S.C. §2254(d)(1).

The panel majority turned next to Cunningham's claim that Mikesell was biased because she had a relationship with the victims' families. The panel majority held that Cunningham had demonstrated cause to excuse any procedural default, Pet.App.35a–36a, and that Cunningham was entitled to an evidentiary hearing on the claim under 28 U.S.C. §2254(e)(2), Pet.App.28a. That statute ordinarily restricts the ability of federal habeas courts to hold evidentiary hearings. But it lifts that bar and permits the development of evidence a diligent habeas petitioner could not have developed in state court. *See Williams v. Taylor* (*Michael Williams*), 529 U.S. 420, 437 (2000). The state court had found that Cunningham was *not* diligent in pursuing his second juror-bias theory. *Cunningham*, 65 N.E.3d at 314–15. The District Court deferred to that conclusion, Pet.App123a. The majority did not: it held that the diligence required in state court and the diligence required by §2254(e)(2) are distinct. Pet.App.33a–35a.

And it found that Cunningham was sufficiently diligent. Then, the majority held that the other jurors' testimony about jury deliberations was sufficient to require an evidentiary hearing under §2254(e)(2). Pet.App.28a, 35a–36a. It did not matter that the evidence was inadmissible. Even "'vague'" allegations, the majority held, entitle a defendant to a §2254(e)(2) evidentiary hearing. Pet.App.38a–41a.

The panel majority remanded to the District Court with instructions to hold a hearing—a single hearing satisfying *Remmer* and §2254(e)(2). Pet.App. 42a–43a. The majority recognized the oddity of this relief. If a federal court awards habeas relief, the proper remedy is generally to issue a writ of habeas corpus ordering the State to either release the defendant or to hold state proceedings free from constitutional error. *See id.* But the majority reasoned that, because it was remanding for a §2254(e)(2) hearing regardless, the District Court could kill two birds with one stone by resolving the *Remmer* issue, too. *Id.* The majority encouraged Cunningham to appeal if he found the hearing "deficient and practically pointless." Pet.App.43a.

6. Judge Kethledge dissented. Unlike the majority, he would have deferred to the state court's rejection of Cunningham's first juror-bias claim. The only relevant decision from this Court was *"Remmer* itself," he explained, and *Remmer* "made no attempt to describe qualitatively or quantitatively the showing necessary to mandate" an evidentiary hearing. Pet. App.83a–84a. Thus, the state court did not contradict or unreasonably apply Supreme Court precedent when it determined that Cunningham's evidence was too weak to support a juror-bias claim. Judge Kethledge faulted the majority for ordering habeas relief

"based on" the Circuit's "own precedents, rather than those of the Supreme Court." Pet.App.78a. In relying on circuit precedent, he noted, the majority committed an error "for which the Court has already reversed [the Circuit] more than once." *Id.*

Judge Kethledge agreed that Cunningham had demonstrated diligence for purposes of seeking an evidentiary hearing on his second juror-bias theory. Pet.App.86a. He would have rejected Cunningham's request for a hearing, however, on the ground that the only evidence supporting that claim came from other jurors and involved the substance of deliberations. That evidence, Judge Kethledge wrote, "ran directly into the headwinds" of Federal Rule of Evidence 606(b), which bars federal courts from even receiving evidence involving jury deliberations. Pet. App.88a (citing Rule 606(b)). Judge Kethledge criticized the majority for "not only recev[ing] all that evidence," but "order[ing] a hearing based upon it." *Id.*

7. The Warden moved for *en banc* review and the Sixth Circuit denied his motion. Pet.App.182a. The Warden also asked the panel to stay its mandate pending the filing of this petition for a writ of certiorari. The panel granted that request. Pet.App.181a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit may not like "the harsh standards of AEDPA as elaborated by" this Court. *See* Pet.App.63a. But those standards "bind [it] nonetheless." Pet.App.78a (Kethledge, J. dissenting). To make that clear, the Court should either summarily reverse the Sixth Circuit or grant certiorari and reverse after full briefing and argument.

I. This Court should summarily reverse the Sixth Circuit.

The Sixth Circuit ordered a district court to provide Cunningham with an evidentiary hearing relating to two theories of juror bias. The Sixth Circuit gave different reasons for embracing these theories. But its reasoning as to both theories exhibits an identical flaw: it ignores AEDPA and this Court's precedent. The Court has reversed the Sixth Circuit for similar errors nearly two dozen times. *Cassano v. Shoop*, 10 F.4th 695, 696 (6th Cir. 2021) (Griffin, J., dissenting). Of those many "rebukes, twelve … were by per curiam decision on petitions for writs of certiorari." *Id.* at 697; *see, e.g., Mays v. Hines*, 141 S. Ct. 1145 (2021) (*per curiam*); *Shoop v. Hill*, 139 S. Ct. 504 (2019) (*per curiam*). This case should be next. The Court should summarily reverse.

A. The Sixth Circuit improperly ordered habeas relief based on a supposed misapplication of circuit precedent.

The first question presented in this case asks whether the Sixth Circuit erred by granting habeas relief in connection with Cunningham's first juror-bias theory. More precisely: Did the Circuit err when it awarded habeas relief on the ground that the state courts failed to hold a *Remmer* hearing? Yes. The Sixth Circuit erred, and flagrantly so.

1. AEDPA "prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. 766, 779 (2010). One provision in particular is especially relevant here. Section 2254(d)(1) allows federal courts to

order habeas relief on a claim that a state court already adjudicated on the merits *only if* the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

"Clearly established Federal law" includes only this Court's precedent—circuit precedent does not count. AEDPA asks whether a state court unreasonably applied the law as determined by *the Supreme Court of the United States*. §2254(d)(1). Because circuit courts are not the Supreme Court, circuit precedent "cannot form the basis for habeas relief under AEDPA." *Parker*, 567 U.S. at 48–49; *see also White*, 572 U.S. at 420 n.2. Further, "clearly established Federal law" includes only "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor* (*Terry Williams*), 529 U.S. 362, 412 (2000). To qualify as clearly established, those holdings must unambiguously address a legal question. "'[I]f a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White*, 572 U.S. at 426 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)). "A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (*per curiam*).

What makes a ruling "contrary to" or an "unreasonable application of" federal law? These two phrases address distinct types of errors. *Terry Williams*, 529 U.S. at 405–06. A state court's decision is

"contrary to" this Court's holdings only if it "applies a rule that contradicts the governing law set forth in [this Court's] cases," or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [its] precedent." *Id.* "Avoiding these [two] pitfalls does not require citation of [the Court's] cases—indeed, it does not even require awareness of [those] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*).

In contrast, a state court unreasonably applies this Court's holdings when it reaches a decision that "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). This "difficult to meet" standard stops just short of "imposing a complete bar on federal-court relitigation of claims already decided in state court proceedings." *Id.* at 102. A state court does not unreasonably apply clearly established federally law simply because a federal court might disagree with its decision. *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (*per curiam*). A federal court may not override a state court's decision even when a "petitioner offers a 'strong case for relief.'" Instead, federal courts may grant relief only if there was an "'extreme malfunction'" in the state's criminal-justice system. *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (*per curiam*) (quoting *Harrington*, 562 U.S. at 102–03).

2. Because the Sixth Circuit adjudicated Cunningham's first juror-bias theory on its merits, Cunningham could win habeas relief only by satisfying AEDPA's high bar. *See* §2254(d). He attempted to

clear that bar by arguing that the state courts contradicted or unreasonably applied *Remmer* when they failed to hold an evidentiary hearing on his first juror-bias theory. But he did not come close to making the requisite showing.

a. Consider first the governing law. All defendants are entitled to a "fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The Due Process Clause of the Fourteenth Amendment guarantees them "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). But while a "juror who has formed an opinion cannot be impartial," the Due Process Clause does not require that "the jurors be totally ignorant of the facts and issues involved" in a case. *Irvin*, 366 U.S. at 722 (quotation and citation omitted). It is enough that a juror be able to "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 723.

Because jurors must decide cases based on the evidence presented, the Court has held that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury" raises significant concerns about juror impartiality. *Remmer*, 347 U.S. at 229. But the Court has also held that a new trial is not required "every time a juror has been placed in a potentially compromising situation." *Smith*, 455 U.S. at 217. Instead, "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith*, 455

U.S. at 215; *see also Remmer*, 347 U.S. at 230; *but see Parker v. Gladden*, 385 U.S. 363 (1966) (*per curiam*) (ordering a new trial based on comments overheard by jury members).

Remmer was a short, five-paragraph-long decision that left many questions unanswered. It did not, for example offer any "specific guidance on what constituted 'the matter pending before the jury.'" *Joyner v. Barnes*, 576 U.S. 1065, 1069 (2015) (Thomas, J. dissenting from the denial of certiorari). Nor did it make any "attempt to describe qualitatively or quantitatively, the showing necessary to mandate" a hearing. Pet.App.83a–84a. (Kethledge, J. dissenting). It did not need to; there was no question that someone had attempted to bribe one of the jurors during the trial in that case. *Remmer*, 347 U.S. at 228. As Judge Kethledge observed below, *Remmer*'s "holding provided not a rule but a data point: the Court said that a hearing was necessary on the facts of that case, but did not state a principle of general application as to why." Pet.App.84a.

The Court has never revisited the questions *Remmer* failed to answer. Most significantly for present purposes, it has never addressed the threshold evidentiary showing that petitioners must make to win a *Remmer* hearing. One of the only decisions to address *Remmer* in any significant detail—*Smith v. Philips*, 455 U.S. 209—involved undisputed evidence that one of the jurors had outside contacts that could call his impartiality into question. The juror in *Smith* had applied for a job with the same district attorney's office that was prosecuting the defendant. *See* 455 U.S. at 212. So *Smith* provided no occasion for this Court to determine what evidentiary showing might warrant a *Remmer* hearing. Indeed, the Court

was not even called upon to decide whether the trial court should have held a hearing, because the trial court *had* held a hearing. *See id.* at 217. The only question in *Smith* was whether the remedy *Remmer* called for in federal proceedings applied to state proceedings as well. *Id.* at 218.

In sum, this Court's holdings regarding evidentiary hearings relating to actual bias amount to this: when undisputed evidence *proves* a juror was subjected to outside influences, a *Remmer* hearing may be appropriate. The Court has never, however, announced a standard that would guide courts in deciding when to hold a *Remmer* hearing otherwise.

b. This sparse precedent is all Ohio's state courts had to work with when they confronted Cunningham's claim that Mikesell was biased against him. Cunningham alleged that Mikesell was biased because, following trial, she told an investigator that Cunningham was "an evil person" and that "some social workers worked with [Cunningham] in the past and were afraid of him." Pet.App.176a. Her comments, Cunningham claimed, were evidence of bias and suggested that Mikesell had been influenced by outside information. *See id.* The last state court to consider that claim rejected it. There was no evidence "Mikesell obtained this information … prior to" Cunningham's trial—it was equally (perhaps more) plausible that she obtained it later. Pet.App.177a. And the court concluded that Mikesell's comments about Cunningham being an evil person were "likely shaped during the trial." *Id.* So it rejected the claim without holding a *Remmer* hearing.

The state court's decision was not "contrary to" any of this Court's decisions. Again, the Court has

never addressed the type or amount of evidence that is required to trigger *Remmer*'s hearing requirement. So the state court did not—and could not have—applied "a rule that contradicts the governing law set forth in" *Remmer*, or in any other decision from this Court. *Terry Williams*, 529 U.S. at 405. Nor did it "confront[] a set of facts that are materially indistinguishable from" a decision of this Court "and nevertheless arrive at a result different from [that] precedent." *Id.* at 406. On the handful of occasions that the Court has addressed *Remmer*'s hearing requirement, there was undisputed evidence of an impermissible outside influence on the jury. *See above* at 19. There was no such evidence here; even the panel majority was unable to say with any confidence *when* Mikesell became aware of the social workers' opinions of Cunningham. It said only that Cunningham's arguments "plausibly" gave rise to "an inference" that Mikesell may have received outside information during trial. *See* Pet.App.23a n.4.

The state court's decision did not unreasonably apply this Court's holdings, either. *Remmer* announced a general rule. None of this Court's subsequent decisions have provided any more-specific guidance about that rule or when it applies. The rule's generality gave the state courts "maximum leeway" to decide Cunningham's juror-bias claim. Pet.App.83a. (Kethledge, J. dissenting). After all, the "more general the rule at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—the more leeway state courts have in reaching outcomes in case-by-case determinations." *Renico*, 559 U.S. at 776 (internal quotation marks and citation omitted; alteration accepted). Such is the case here. *Remmer*, because it con-

tains almost no reasoning, can be read to require a hearing only when it is certain or highly likely that a juror was subject to outside influence. Certainly nothing in *Remmer* compels a fairminded jurist to conclude that courts must hold a hearing about juror bias whenever allegations give rise to a "plausibl[e] … inference" of bias. Pet.App.23a n.4. All told, the state court's ruling was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. A "lawful resolution" of Cunningham's first juror-bias claim under that standard would have required deferring to the state court. Pet.App.83a. (Kethledge, J. dissenting).

3. The panel majority did not defer to the state court. It instead did two things that this Court has told the Sixth Circuit not to do.

First, it granted habeas relief based on a supposed misapplication of its own precedent. Citing *Herndon*, *Garcia v. Andrews*, 488 F.3d 370 (6th Cir. 2007), and *Ewing v. Horton*, 914 F.3d 1027 (6th Cir. 2019), the panel majority held that a *Remmer* hearing is required whenever "a colorable claim of extraneous influence has been raised." Pet.App.18a. It "was plain and repetitive error for the Sixth Circuit to rely on its own precedents in granting habeas relief." Pet.App.83(a) (Kethledge, J., dissenting) (quoting *Parker*, 567 U.S. at 49) (alteration accepted). Indeed, for "this particular trespass the Supreme Court has already reversed" the Sixth Circuit "at least twice." *Id.*

The Circuit also faulted the state court for failing to *extend* this Court's reasoning in *Remmer* in the

same way the Sixth Circuit has. The panel majority acknowledged that this Court had never used the term "colorable claim" in discussing when to hold a *Remmer* hearing. But it held that requiring "only a prima facie (i.e., colorable) claim of prejudice … is the only sensical interpretation of *Remmer*, which is Supreme Court precedent." Pet.App.18a. While that may be a reasonable reading of *Remmer*, this Court has never endorsed it. So this expanded reading is not "clearly established law as determined by the Supreme Court of the United States." §2254(d)(1). The Court has reversed the Sixth Circuit for precisely the same sort of error in the past. *White*, 572 U.S. at 426–27.

B. The Sixth Circuit improperly ordered relief based on evidence that Rule 606(b) did not allow it to receive.

Cunningham's second theory sought to protect the same right as his first: the right to a fair and impartial jury. *See* Pet.App.2a–3a. Unlike Cunningham's first juror-bias theory, no state court ever addressed the merits of his second theory. Instead, the last state court to consider that claim held that it was untimely. *Cunningham*, 65 N.E.3d at 312–16.

Cunningham thus procedurally defaulted the claim for purposes of federal habeas review. *See Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) (a petitioner defaults a claim if he "failed to meet the State's procedural requirements" for presenting that claim) (citation omitted). But while the panel majority and the dissent in this case disagreed about many things, they agreed that Cunningham had not "failed to develop" his claim in state court. Cunningham,

they both held, had been sufficiently diligent in pursuing his second juror-bias claim in state court. That, they held, meant both that Cunningham could show cause to excuse his procedural default and that §2254(e)(2)'s limits on evidentiary hearings did not apply. Pet.App35a; Pet.App86a (Kethledge, J. dissenting); *see also Williams v. Taylor* (*Michael Williams*), 529 U.S. 420, 433–35 (2000). Both the majority and the dissent therefore reviewed Cunningham's request for an evidentiary hearing on his second juror-bias claim *de novo*, and the majority ordered that he receive a hearing.

The Warden will not challenge the decision to excuse any default. But even setting that issue aside, the majority still committed an error deserving of summary reversal.

1. With few exceptions, "once the jury has heard the evidence and [a] case has been submitted, the litigants must accept the jury's collective judgment." *United States v. Powell*, 469 U.S. 57, 67 (1984). This rule carries particular weight when a party seeks to challenge a jury's verdict using testimony about the jury's deliberations. For centuries, courts have held that once a verdict "has been entered, it will not later be called into question based on the comments or conclusions [the jurors] expressed during deliberations." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017). This rule promotes "the finality of verdicts and [insulates] the jury from outside influences." *Warger v. Shauers*, 574 U.S. 40, 45 (2014). Without the rule, "it is not at all clear … that the jury system could survive." *Tanner v. United States*, 483 U.S. 107, 115, 120 (1987). The ability to challenge a verdict on the basis of juror testimony about deliberations would undermine "full and frank dis-

cussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople." *Id.* at 120–21. Permitting jurors to impeach their own verdicts would also incentivize bad behavior. "Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *McDonald v. Pless*, 238 U.S. 264 267 (1915). That is precisely what happened in this case. After the jury returned its verdict, one of Cunningham's investigators "showed up uninvited at Mikesell's home while she was playing outside with her kids," and interrogated her about the jury's deliberations. Pet.App.80a (Kethledge, J., dissenting).

In light of these concerns, Federal Rule of Evidence 606(b)(1) prevents jurors from testifying "about any statement made … during the jury's deliberations." And it bars federal courts from even receiving "a juror's affidavit or evidence of a juror's statement" about anything that occurred during deliberations. *Id.* The rule is, in that respect, the codification of the centuries-old common-law rule that preceded it. *See Warger*, 574 U.S. at 45–48. And these principles, just like the Federal Rules of Evidence generally, apply in habeas cases. Fed. R. Evid. 1101 & advisory committee notes; accord *Loliscio v. Goord*, 263 F.3d 178, 186 (2d Cir. 2001) (Sotomayor, J, for the court); *Garuti v. Roden*, 733 F.3d 18, 25 (1st Cir. 2013).

Although Rule 606(b) bars most evidence about jury deliberations, that does not mean that defendants who believe that a juror might have been biased are without recourse. Rule 606(b)(2) contains several exceptions that allow federal courts to receive juror evidence in limited circumstances. As relevant here,

it permits courts to receive evidence that "extraneous prejudicial information was improperly brought to the jury's attention" or that "an outside influence was improperly brought to bear on any juror." Fed. R. Evid. 606(b)(2)(A), (B). Like Rule 606(b) itself, these exceptions have their roots in the common law. *See Mattox v. United States*, 146 U.S. 140, 149 (1892).

2. The Sixth Circuit ignored Rule 606(b), this Court's precedents, and the common-law history on which the rule was based. Cunningham, recall, alleged that Mikesell was biased because she claimed during deliberations either that she had, or that she might later have, a relationship with the families of some of Cunningham's victims. *See* Pet.App.3a. The trouble for Cunningham is that Rule 606(b) barred the courts from receiving the only evidence of that relationship. Cunningham provided affidavits and testimony from two jurors, in which the jurors asserted that Mikesell had made comments during deliberations about her relationship with the victims' families. Pet.App.7a–8a. Rule 606(b) barred the receipt of that evidence and, as the panel majority conceded, it was not admissible under any of the rule's exceptions. *See* Pet.App.39a.

This Court has rejected calls to hold an evidentiary hearing under similar circumstances. In *Tanner*, a pair of convicted defendants sought a new trial, alleging that jurors were intoxicated during the trial. 483 U.S. at 110. As evidence of alleged juror misconduct, the defendants in that case presented statements from one of the jurors, who indicated that, on several occasions, some of the jurors consumed alcohol during lunch and then slept through the trial during the afternoons. *Id.* at 113. A second

juror later confirmed that the jurors had consumed alcohol and added that others had used, and even sold, illegal drugs during trial. *Id.* at 115–16. A district court declined to hold a hearing on the allegations of misconduct and denied a request for a new trial. *Id.* at 113, 115. The only evidence of misconduct, the district court held, was inadmissible under Rule 606(b). *Id.* at 113. The Eleventh Circuit affirmed, and this Court granted review to determine whether the district court should have held an evidentiary hearing. *Id.* at 116. The Court concluded that the district court was right to decline to hold a hearing. *Id.* at 126–27. Rule 606(b) and "long-recognized and very substantial concerns" about protecting "jury deliberations from intrusive inquiry" supported the denial of a hearing. *Id.* at 127. A "postverdict evidentiary hearing was unnecessary" the court held, in light of the "inadmissibility of juror testimony and the clear insufficiency of the nonjuror evidence." *Id.*

The Court in *Warger* further clarified the scope of Rule 606(b)'s evidentiary bar—and the rule's exceptions. It held that a party seeking a new trial may not use "one juror's affidavit of what another juror said in deliberations to demonstrate the other juror's dishonesty during *voir dire*." *Warger*, 574 U.S. at 42. And it held that Rule 606(b) bars the receipt of affidavits or testimony suggesting that, during *voir dire,* a juror had not been honest about the "juror's personal experiences." 574 U.S. at 44 (citation omitted). Although Rule 606(b)(2) allows federal courts to receive juror testimony and affidavits for the purpose of showing that "extraneous prejudicial information was improperly brought to the jury's attention," or that "an outside influence was improperly brought to

bear on any juror," *see* Fed. R. Evid. 606(b)(2)(A) & (B), the Court in *Warger* clarified these exceptions do not apply to a juror's personal experiences. Experiences are internal, not external, the Court held, because internal matters "include the general body of experiences that jurors are understood to bring with them to the jury room." 574 U.S. at 51.

Under any faithful application of *Tanner*, *Warger*, and Rule 606(b), the Sixth Circuit should have denied Cunningham's request for an evidentiary hearing. *Tanner*, it is true, did not involve a petition for a writ of habeas corpus. But that does not matter. A district court's decision about whether to hold an evidentiary hearing under §2254(e)(2) is reviewed for abuse of discretion. *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007). And *Tanner* held that it is not an abuse of discretion to deny a hearing when the only evidence supporting a hearing request is inadmissible under Rule 606(b). 483 U.S. at 127. If anything, the case for a hearing was far stronger in *Tanner* than it was here. In *Tanner*, there was at least *some* non-juror evidence of misconduct. *See id.* In this case there was none at all. The only evidence of potential bias was provided by the other jurors, and that evidence was inadmissible.

This Court's decision in *Warger* should put to rest any lingering doubts about whether the panel majority erred by granting Cunningham's request for an evidentiary hearing. As in *Warger*, the only evidence of bias that Cunningham provided was evidence of *internal* bias—the panel majority conceded that much. *See* Pet.App.39a (Cunningham's second claim "[did] not involve allegations of extraneous influences"); *see also* Pet.App.90a–93a (Kethledge, J., dissenting). Therefore, the exceptions in Rule

606(b)(2)(A) and (B) did not apply. Just as this Court held that it would be improper to hold a new trial in *Warger*, the panel majority should have denied Cunningham's request for an evidentiary hearing here. In both this case and that one, a party sought to call into question the validity of a verdict on the basis of evidence barred by Rule 606(b).

3. The panel majority did not reject Cunningham's request, however. Ignoring *Warger*, it appeared to suggest that Rule 606(b) did not apply because Cunningham's second juror-bias theory presented an issue "more akin" to "the line of cases addressing juror omissions during *voir dire*." *See* Pet. App.40a (discussing *McDonough Power Equip. Inc. v. Greenwood*, 464 U.S. 548 (1984)). It drew that distinction for the apparent purpose of avoiding Sixth Circuit precedent, under which Rule 606(b) governs requests for evidentiary hearings when those requests are based on allegations of extraneous influence. *See* Pet.App.39a–40a; *see also Smith v. Nagy*, 962 F.3d 192, 200 (6th Cir. 2020). But if that was indeed the majority's goal, then it jumped from the frying pan into the fire. The panel majority might have avoided the Sixth Circuit's precedent in *Nagy*, but it ran headlong into this Court's precedent in *Warger*.

The panel majority also contradicted this Court's decision in *Tanner*. The Court in that case held that a district court was not required to hold an evidentiary hearing when the only evidence of juror misconduct was barred by Rule 606(b). *Tanner*, 483 U.S. at 127. But rather than reckon with *Tanner*, the panel majority held that the lack of admissible evidence did not matter. Pointing to this Court's decision in *Michael Williams*, the majority held that

there was no need for any evidence at all. "[V]ague allegations," it held, sufficed to support a request for an evidentiary hearing under §2254(e)(2). *See* Pet. App.41a–42a.

The majority erred. A request for an evidentiary hearing under §2254(e)(2) must be supported by more than vague allegations. There must, at the very least, be sufficient factual allegations that, if believed, would show the petitioner's entitlement to relief. *See Schriro*, 550 U.S. at 474; *cf. King v. United States*, 576 F.2d 432, 438 (2d Cir. 1978) (under pre-AEDPA standards "weakly authenticated, vague, and speculative material" did not justify an evidentiary hearing). *Michael Williams* did not hold otherwise. *Contra* Pet.App.41a–42a. It did not even address the type or amount of evidence that must accompany a request for a §2254(e)(2) evidentiary hearing. *Michael Williams* was focused on a different question: whether, for purposes of §2254(e)(2), a petitioner who makes only "vague allegations" about an issue in state court can be said to have diligently pursued that issue. *See* 529 U.S. at 442; *See also Cullen v. Pinholster*, 563 U.S. 170, 184 (2011) (noting that the only question in *Michael Williams* was "whether the lower court had correctly determined that § 2254(e)(2) barred the petitioner's request for a federal evidentiary hearing"). The panel majority erred by conflating the two issues.

II. Alternatively, the Court should grant review to resolve two separate circuit splits.

The panel majority's decision ordering the District Court to conduct an evidentiary hearing on Cunningham's second juror-bias theory created or

exacerbated two circuit splits. *First*, it created a split over whether evidentiary-hearing requests may be based exclusively on evidence that is barred by Rule 606(b). *Second*, it exacerbated a split regarding whether and when district courts have discretion not to hold evidentiary hearings. If the Court does not summarily reverse the Circuit's decision, it should grant the Warden's petition for a writ of certiorari and reverse after full briefing. Doing so would allow the Court to resolve these conflicts.

1. Consistent with *Tanner*, the majority of circuits have held that, when the only evidence supporting allegations of juror misconduct would be barred by Rule 606(b), a "district court [does] not abuse its discretion in declining to investigate [those allegations] further." *United States v. Brown*, 934 F.3d 1278, 1303 (11th Cir. 2019); *see also United States v. Baker*, 899 F.3d 123, 130–34 (2d Cir. 2018); *United States v. Ford*, 840 F.2d 460, 465–66 (7th Cir. 1988); *United States v. Moses*, 15 F.3d 774, 778–79 (8th Cir. 1994); *United States v. Shiu Lung Leung*, 796 F.3d 1032, 1036 (9th Cir. 2015); *United States v. Miller*, 806 F.2d 223, 225 (10th Cir. 1989); *cf. United States v. Morris*, 570 Fed. App'x 151, 153 (3d Cir. 2014) (no evidentiary hearing on alleged jury mistake); *United States v. Jackson*, 549 F.3d 963, 984 (5th Cir. 2008) (same).

As these cases reflect, questions about the scope and effect of Rule 606(b)'s evidentiary bar arise most frequently on direct review. But the same question—whether a district court abused its discretion in denying an evidentiary hearing on the ground that the only relevant evidence would be barred by Rule 606(b)—arises on collateral review as well. At least one circuit (aside from the Sixth) has confronted that

question in the habeas context, and it strictly applied Rule 606(b). Specifically, the Eleventh Circuit denied habeas relief, as well as a request for a federal evidentiary hearing on the question of juror misconduct, where a habeas petitioner had "not alleged extrinsic contacts with the jury" and the only evidence of misconduct "was inadmissible to invoke the presumption of prejudice in federal court." *Crowe*, 490 F.3d at 848 (citing Fed. R. Evid. 606(b)).

The Fifth Circuit, when confronted with a similar question, also strictly applied Rule 606(b). It denied habeas relief in a case where the only evidence supporting a claim of juror misconduct was inadmissible under Rule 606(b). *Austin v. Davis*, 876 F.3d 757, 786–91 (5th Cir. 2017). But because the petitioner did not request an evidentiary hearing on the juror-bias question, the court had no occasion to consider whether one should have been held. *See id.* at 787.

The Fourth Circuit has enforced Rule 606(b) less strictly than the Fifth and Eleventh Circuits. On at least one occasion, it ordered an evidentiary hearing on a juror-bias claim based in part on an affidavit recounting a juror's statements. *See Porter v. Zook*, 898 F.3d 408 (4th Cir. 2018). But even in that case, the habeas petitioner did not rely *exclusively* on evidence that would be barred by Rule 606(b). *See id.* at 429 (noting that the request for an evidentiary hearing was supported by "other nonjuror evidence").

The panel majority in this case, by comparison, did not enforce Rule 606(b) at all. The rule prohibited the only evidence supporting an evidentiary hearing. *See* Pet.App.88a (Kethledge, J. dissenting). And while the panel majority speculated about non-juror evidence that Cunningham *might* be able to present

to support his juror-bias claim, Cunningham did not present any of that evidence. The panel majority's decision clearly conflicts with the Fifth and Eleventh Circuits' decisions. And, to the extent the Fourth Circuit has implicitly recognized that an evidentiary hearing request must be supported with at least some non-juror evidence, the Sixth Circuit's decision conflicts with that holding too.

2. The panel majority's decision implicates a second circuit conflict, this one regarding whether and when a federal habeas court *must* order an evidentiary hearing under §2254(e)(2). *See Teti v. Bender*, 507 F.3d 50, 61 (1st Cir. 2007) (recognizing a circuit split); *see also Torres v. MacLaren*, No. 2:14-12331, 2018 U.S. Dist. LEXIS 174051, at *4–5 (E.D. Mich. Oct. 10, 2018) (same).

Before AEPDA, this Court held that habeas courts must sometimes hold evidentiary hearings. *Townsend v. Sain*, 372 U.S. 293, 313 (1963). It later limited that decision without overruling it entirely. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5–6, 11 & n.2 (1992). The circuits are now divided as to whether, when the other requirements of §2254(e)(2) are met, *Townsend* (as limited by *Keeney*) still mandates hearings. The Third and Fifth Circuits have treated *Townsend* as being no longer good law. *Palmer v. Hendricks*, 592 F.3d 386, 392–93 (3d Cir. 2010); *McDonald v. Johnson*, 139 F.3d 1056, 1060 (5th Cir. 1998). The Fourth, Seventh, Ninth, and Tenth Circuits disagree. They have held that pre-ADEPA precedent still requires district courts to hold an evidentiary hearing in at least some cases. *Conaway v. Polk*, 453 F.3d 567, 589–90 (4th Cir. 2006); *Ward v. Jenkins*, 613 F.3d 692, 698–99 (7th Cir. 2010); *Insyxiengmay v. Morgan*, 403 F.3d 657, 670–71 (9th Cir.

2005); *Bryan v. Mullin*, 335 F.3d 1207, 1214–16 (10th Cir. 2003) (*en banc*).

The Sixth Circuit's decision further entrenches this split. This case falls within a category of cases with respect to which *Townsend* required a hearing: Cunningham says he wants a hearing because, for reasons "not attributable to" his own "inexcusable neglect," evidence "crucial" to his claim "was not developed" in state court. *Townsend*, 372 U.S. at 317. In the Third and Fifth Circuits, the fact that the case falls within a *Townsend* category might have *empowered* the District Court to hold a hearing. But it would not have *required* a hearing, since *Townsend*'s hearing mandate no longer applies in those courts. This case came out differently. Even though the Circuit concluded that the "federal courts *may* … hold an evidentiary hearing" on Cunningham's second juror-bias claim, Pet.App.42a (emphasis added), it remanded with instructions that the District Court hold such a hearing. It assumed, in other words, that the Fourth, Seventh, Ninth, and Tenth Circuits are correct and that the District Court *had to* hold a hearing. If the Court does not summarily reverse, it should grant the Warden's petition for a writ of certiorari so that it can decide whether that assumption was correct.

CONCLUSION

The Court should grant the petition for certiorari and reverse.

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