*****THIS IS A CAPITAL CASE*****

No. _____

In the Supreme Court of the United States

RAY DANSBY,

Petitioner

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

To secure Ray Dansby's conviction and death sentence, the State relied heavily on the testimony of a jailhouse informant to whom Dansby purportedly confessed. The informant told the jury a highly aggravated and uncorroborated version of the crime. When the informant approached the police with his story, he had felony charges pending—indeed, he was jailed on those charges because he had refused to help the police apprehend another suspect. He went free shortly after informing on Dansby. At the time of Dansby's trial, the felony charges remained unresolved, and the informant remained free on bond. In the months before Dansby's trial, police picked up the informant twice—once for stabbing a bar patron. The informant was nonetheless allowed to remain free. The trial court precluded Dansby from cross-examining the informant about these matters or from introducing materials that would establish the informant's favorable treatment after his arrests.

The questions presented are:

1. Whether preclusion of cross-examination about an informant's propensity for bias violates the Confrontation Clause.
2. Whether the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence to impeach a witness for bias.
3. Whether a state court adjudicates a federal constitutional claim on the merits when it cites no federal constitutional provision, no state constitutional provision parallel to the federal constitutional provision, and no case that interprets the federal constitutional provision.

PARTIES

The caption contains the names of all parties.

DIRECTLY RELATED CASES

- *Dansby v. State*, No. 70CR-92-360, Circuit Court of Union County, Arkansas, trial proceedings, judgment entered June 11, 1993.

- *Dansby v. State*, No. CR 94-30, Arkansas Supreme Court, direct appeal from conviction and sentence, judgment entered February 20, 1995.

- *Dansby v. State*, No. 70CR-92-360, Circuit Court of Union County, Arkansas, state postconviction, judgment entered July 30, 2000.

- *Dansby v. State*, No. CR 00-1218, Arkansas Supreme Court, appeal from denial of state postconviction, judgment entered January 31, 2002.

- *Dansby v. Norris*, No. 03-cv-1146, United States District Court for the Western District of Arkansas, federal habeas, judgment entered July 22, 2008.

- *Dansby v. Norris*, No. 10-1990, United States Court of Appeals for the Eighth Circuit, petitioner's appeal from order denying habeas relief, judgment affirmed in part and vacated and remanded in part, judgment entered June 21, 2012.

- *Dansby v. Hobbs*, No. 12-8582, United States Supreme Court, petition for a writ of certiorari, petition granted, judgment vacated, and case remanded for further consideration in light of *Trevino v. Thaler*, 569 U.S. 413 (2013), June 3, 2013.

- *Dansby v. Hobbs*, No. 10-1990, United States Court of Appeals for the Eighth Circuit, on remand from the United States Supreme Court, affirming in part and vacating and remanding for further proceedings, judgment entered September 5, 2014.

- *Dansby v. Kelley*, No. 14-8782, United States Supreme Court, petition for a writ of certiorari, petition denied October 5, 2015.

- *Dansby v. Kelley*, No. 03-cv-1146, United States District Court for the Western District of Arkansas, federal habeas, judgment entered August 21, 2019.

- *Dansby v. Payne*, Nos. 19-3006/3105, respondent's appeal from sentencing-phase relief and petitioner's cross-appeal from denial of guilt-phase relief, United States Court of Appeals for the Eighth Circuit, judgment entered August 25, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Ray Dansby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 47 F.4th 647 (8th Cir. 2022), is at Appendix A (App. 1a). The order of the United States District Court for the Western District of Arkansas, unofficially reported at 2019 WL 3947922 (Aug. 21, 2019), is at Appendix B (App. 19a). The order of the court of appeals denying rehearing is at Appendix C (App. 50a).

JURISDICTION

The Eighth Circuit entered judgment on August 25, 2022. App. A. The Eighth Circuit denied a timely rehearing petition on November 2, 2022. App. C. On January 19, 2023, Justice Kavanaugh extended the time to file a petition for a writ of certiorari until March 31, 2023. No. 22A659. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

28 U.S.C. § 2254(d)(1): 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 OF THE CASE

At Dansby's capital murder trial, the jury heard testimony from a jailhouse informant who professed to have heard Dansby confess to a malicious crime without the slightest justification. Though Dansby's identity as the killer was never in doubt, the informant's testimony rendered the circumstances of the offense—which arose during an altercation at which all parties were armed—unambiguously aggravating. But the informant had good reason to fabricate this testimony. For one, he had a felony charge hanging over his head. Though he expected to receive probation on that charge, he continued to be arrested before he was sentenced, which would normally call any plea deal into doubt. The informant's need to maintain favor with the prosecuting authorities offered strong motive for him to fabricate testimony against Dansby. Moreover, the informant received favorable treatment on the arrests themselves, suffering no consequences even for a stabbing. That information, too, would have suggested to a jury that the informant did not testify out of the good of his heart, as he professed at trial.

The jury heard none of this evidence because the trial court blocked it from coming in. Ultimately, the courts determined that preclusion of this cross-examination did not violate the Confrontation Clause.

A. State proceedings.

This case arises from Dansby's killing of his wife, Brenda Dansby, and Brenda's friend, Ronnie Kimble, on August 24, 1992. Trial was in June 1993. The evidence showed that Dansby came to Brenda's house on the morning of the offense to speak with her about dropping charges she had pressed against him. Dansby was due in court that day to enter a plea on the charges. The evidence further showed that Dansby, Brenda, and Kimble were all armed. Eyewitness testimony came from Justin Dansby, the Dansbys' prepubescent son, and Greg Riggins, a neighbor who observed events from across the street. Though they differed in some respects, these accounts showed that Dansby and Brenda engaged in a struggle over her gun, after which Dansby shot Brenda twice with that gun. The proof also showed that Dansby shot Kimble in the chest, that Kimble attempted to discharge his gun but it jammed, and that Dansby pursued Kimble inside the house and shot him several more times. Kimble identified Dansby as the shooter before he died. Dansby flagged down a police officer and gave himself up the same morning.

The jury also heard from Larry McDuffie, who claimed to have received a jailhouse confession from Dansby soon after Dansby was detained. McDuffie was a police informant who had previously contracted with law enforcement to provide information in narcotics cases. Soon after coming to the police with Dansby's purported confession, McDuffie began to receive curiously favorable treatment from law enforcement:

- When Dansby arrived in jail, McDuffie was there on a felony charge for possession of cocaine. Tr. 373.[1] McDuffie had recently been rearrested on this felony charge due to failure to uphold his part in a cooperation agreement. Tr. 404. Three days after informing on Dansby, he was released. Tr. 397. Before providing information against Dansby, McDuffie believed he had a deal for five years' probation on the cocaine charge, but the charge remained pending. *Id.* The cocaine charge remained pending through Dansby's trial.
- On March 6, 1993, a Saturday, McDuffie was arrested for disorderly conduct, public intoxication, and violating his conditions of release on the cocaine charge. He was booked at the jail with a notation that he be held for detectives. He was released on his own recognizance the following Monday. Tr. 403, Def.'s proffered exh. 2.
- On May 22, 1993, just weeks before trial, McDuffie was arrested for public intoxication and third-degree battery. The arrest stemmed from an incident in which McDuffie stabbed another patron at a bar. Though he was taken to the local sheriff's office, he was not booked into the jail and did not appear in court on the charge before Dansby's trial. Tr. 296–97, Tr. 971–88, Def.'s proffered exhs. 1 & 2.

Two days before trial, the State filed a motion asking that "the Defendant be prohibited from mentioning or attempting to elicit testimony from any witness

[1] Citations are to the trial record in state court.

regarding the reason for McDuffie's incarceration, and pending charges or attendant matters." Tr. 275. The trial court made three rulings on this motion.

First, it held that Dansby could ask McDuffie whether he had worked as a confidential informant and could impeach him with extrinsic evidence if he denied having done so. Tr. 248, 636.

Second, it held that Dansby could not bring up "any charges that have been filed in the past against Mr. McDuffie that have not resulted in convictions." Tr. 636.

Third, the court addressed whether Dansby could question McDuffie about "preferential treatment which has to do with periods of detention and being released as you contend, alleged violations of conditions of release, and treatment differentially than others." Tr. 636. The court stated that it would be "perfectly proper" to question McDuffie about "evidence of guaranties of immunity or promises of leniency" and to present extrinsic evidence on those matters if McDuffie "denies or does not fully admit facts which might show a bias." Tr. 636–37. However, the court qualified its ruling by stating that "you cannot call upon the jury to perform a feat of speculation or conjecture in order to relate it to your alleged bias." Tr. 637. The court was skeptical that McDuffie's arrests after his initial statement to the police were relevant: "This is not a recent statement, a recent matter which he brought to the attention of the authorities, but it's something that was brought up a long time ago shortly after this incident." Tr. 638. The court informed counsel that they would be in the realm of speculation or conjecture without direct evidence that McDuffie had a deal to testify against Dansby:

> [U]nless there's some proof that you have available, direct evidence of a promise of immunity or something along that nature, I think that you're in the realm of speculation and conjecture because these things may have happened as you say, the events themselves. Absent direct evidence that there's some relationship between those things happening and the witness testimony in court, I think it's not appropriate.
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> *****
>
> Now, as far as how you want to handle your argument or your statement to the jury as to your contentions about bias, I am not going to grant a motion in limine preventing you from stating in your opening statement that you believe that the evidence will show that there's bias or some sort of promise of immunity or something such as that. But I would remind you that I would think you would need to be very careful in your statement that you make statements that will eventually be backed up by evidence. From what you've told me thus far I have not heard any evidence as to those matters.

Tr. 637–39. Defense counsel then admitted that they had not developed evidence of "a bargain or a deal or a promise of immunity or some sort of quid pro quo arrangement." Tr. 639. Without such evidence, the ruling limited counsel from confronting McDuffie about propensity for bias against Dansby because of favorable treatment by the police or prosecuting authorities. The defense later proferred testimony and records establishing that McDuffie's pre-trial arrests had not resulted in adverse consequences. Tr. 971–88, Def.'s proffered exhs. 1–3.

At trial, McDuffie's testimony included vivid detail that no other witness supported. According to McDuffie, Dansby confessed to shooting Kimble first, then to shooting Brenda, then to pursuing Kimble back into the house to shoot him again, then to returning outside to administer a *coup de grâce* to Brenda. In McDuffie's account, Dansby methodically killed Kimble:

> He walked up to [Kimble], he kicked him once. He heard him make a moan. He shot him. He kicked him twice. He moaned again, he shot him again. As he shot him again he said, "You gotta die motherfucker."

Tr. 897. Then, according to McDuffie's account, Dansby left the house and made Brenda beg for her life:

> And that's when he went outside to Brenda and he told me she said, "Well, Ray, please don't kill me." He said, "Well, bitch, you done fucked up cause I'm not gonna leave you out here in these streets when I done killed this man inside." So he put the pistol to her head and blowed her brains out.

Id. McDuffie emphasized that this is what Dansby said "word for word." *Id.*

McDuffie also stressed that any claim of self-defense was fabricated:

> [Dansby] indicated that after he had got arrested that he should've took Mr. Kimble's gun and fired it five times at the door to make it seem like it was self defense but he didn't remember that until too late.

Tr. 897–98. Asked about Dansby's attitude toward his conduct, McDuffie testified that Dansby "made the statement he was just glad she was dead." Tr. 898.

> He didn't stop saying this once. I mean, this was like an everyday occurrence, over and over, and over and over. I mean, he would be sleeping and he'd wake up and would say the same thing over and over again. . . . I guess the devils had him or something, you know. I'm glad she's dead. He'd just be cursing in his sleep.

Tr. 899. McDuffie's motive for sharing this information?

> It's the right thing to do. Somebody had to hear her side, you know. It's just right. That's all I mean. That's the only reason I could see. I'm not getting anything out of this. It's just the right thing to do.

Tr. 901.

As permitted by the trial court's ruling, on cross-examination defense counsel asked, and McDuffie admitted, that he had worked as a police informant before. Tr.

906. Counsel also broached the topic of whether McDuffie had received any "special favors" for giving his statement against Dansby to the police. Tr. 907. McDuffie denied that he had. *Id.* When defense counsel then asked, "Why were you being held in jail?" the trial court did not permit an answer. Defense counsel was allowed to establish that McDuffie was let out of jail three days after giving the police his statement against Dansby. Tr. 907. But without any direct evidence of a quid pro quo for his statement, counsel was unable to further delve into "conjecture" about whether McDuffie was biased by favorable handling of his pending felony charge and pre-trial arrests.

At the guilt-phase closing argument, the prosecutor took great pains to bolster McDuffie's credibility, pointing out each item of corroborated testimony. Tr. 1014–17. This compendium did not, of course, contain the uncorroborated material discussed above. At the penalty-phase closing argument, the prosecutor relied heavily on McDuffie's testimony—especially its most sensational parts—to establish that the murders were cruel and depraved, one of the aggravating factors:

> And please don't forget Larry McDuffie's testimony. Larry McDuffie's testimony, I believe you found to be credible or we would not be at this point in the trial. And Larry McDuffie told you that Ray, the defendant, told him that he shot Brenda and that he went inside the house to kill Ronnie, and after he thought he had accomplished that he came back outside. Brenda was still alive and she asked him, "Ray, don't kill me." And Ray said, and please forgive my language, but according to Mr. McDuffie, Ray said, "Bitch, you think I'm gonna let you live now after I done killed that man inside? Let you live and be out on the street?"

Tr. 1158. McDuffie's "credible" testimony, the prosecutor argued finally, showed that Dansby was remorseless:

> He took two lives, ladies and gentlemen, and according to Larry McDuffie, he bragged about it right here in this detention facility. He took two lives and it didn't mean anything to him. No remorse. None whatsoever.

Tr. 1159.

The jury returned a sentencing verdict in just under three hours. For each murder, it found that the State had established three aggravating circumstances: that Dansby had previously committed another violent felony, that Dansby knowingly created a great risk of death to a person other than the victim, and that the capital murder was committed in an especially cruel or depraved manner. The jury found no mitigating circumstances and found that the "aggravating circumstances justify beyond a reasonable doubt a sentence of death." Tr. 1166–79.

In pretrial briefing, Dansby had argued that restrictions on cross-examination "must be weighed against the defendant's confrontation rights guaranteed by the Sixth Amendment of the United States Constitution." Tr. 298. On appeal, he repeated that the "right to limit testimony must be weighed against the defendant's confrontation rights and fair trial rights guaranteed by the Sixth Amendment." Br. at 304.

The Arkansas Supreme Court rejected this claim under the heading "Credibility of state's witness—McDuffie." *Dansby v. State*, 893 S.W.2d 331, 338 (Ark. 1995). It deemed the trial court's ruling "right on the mark" based on its recent ruling in *Biggers v. State*, 878 S.W.2d 717 (Ark. 1994). More specifically, the court explained that, per *Biggers*, "Arkansas Rule of Evidence 608(b) governs the credibility question." *Id.* It concluded:

> We agree with the trial court's assessment that the proffered testimony falls short of direct evidence of an agreement or promise of immunity, and that the admission of McDuffie's subsequent arrests on misdemeanor charges through booking cards and jail records "would call upon the jury to perform a feat of speculation or conjecture in order to relate it to [the] alleged bias." In sum, Dansby's proffered evidence was not relevant to show bias, and the trial court's well-reasoned ruling was correct.

Id. at 339 (alteration in original).

An unsuccessful round of state postconviction review followed.

B. Federal habeas proceedings.

Dansby filed his federal habeas petition in 2003 and amended that petition twice. In 2008, the district court held that Dansby failed to present his Confrontation Clause claim to the Arkansas Supreme Court and that the claim was thus procedurally defaulted. *Dansby v. Norris*, No. 03-cv-1146, ECF No. 65, Order at 8–10 (W.D. Ark. July 22, 2008). The Eighth Circuit disagreed and remanded for further consideration. *Dansby v. Hobbs*, 766 F.3d 809, 823 (8th Cir. 2014).

Upon remand, the district court granted penalty-phase relief on the Confrontation Clause claim. It began by addressing the standard of review. It correctly explained that a state court is presumed to have adjudicated a federal claim on the merits when a defendant presents it with that claim. App 28a (citing *Harrington v. Richter*, 562 U.S. 86, 99 (2011)). It also correctly explained that this presumption is rebuttable. App. 28a–29a (citing *Johnson v. Williams*, 568 U.S. 289, 301 (2013)). It then concluded that the presumption had been rebutted here and that *de novo* review applies. It noted that "the Arkansas Supreme Court quoted Arkansas Rule of Evidence 608(b)" and that "[w]ith respect to the issue of bias, the

Arkansas Supreme Court cited to state law . . . ." *Id.* at 13. The court also noted precedent stating that "the Confrontation Clause may require the admission of certain evidence otherwise excluded by the rules of evidence." App. 32a n.1 (citing *United States v. Frederick*, 683 F.3d 913, 918 (8th Cir. 2012)). It found the presumption of merits adjudication rebutted because "the Arkansas Supreme Court did not address any federal or constitutional laws in reviewing the merits of Dansby's impeachment claim" and because "the state law cited is *not* on par with the protections provided by the Confrontation Clause." App. 31a–32a.

On the merits, the district court found that the trial court's restrictions on cross-examination violated the Confrontation Clause. The district court noted that jailhouse informant testimony is notoriously unreliable—and, indeed, that McDuffie later recanted his testimony. App. 35a. The trial court's restrictions "prohibited Dansby's counsel from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness.'" *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). The court continued:

> The rulings prevented the jury from hearing the serious charges pending against McDuffie; and, the fact that despite the serious charges and repeated violations of his pretrial release, McDuffie had often avoided jail time and possibly received "special treatment" during the time leading up to his trial testimony. Had the proposed line of cross-examination been allowed, the jury certainly could have concluded that McDuffie had reason to be biased for the prosecution in an effort to secure favorable treatment with respect to his pending charges. . . . Additionally, although the trial court found that none of the extraneous evidence Dansby's counsel sought to introduce to show possible bias took place prior to McDuffie's report of Dansby's confession to the authorities, the evidence *is* relevant to McDuffie's potential bias because it occurred prior to his trial testimony.

App. 35a–36a (citing *Davis v. Alaska*, 415 U.S. 308, 318 (1974)) (footnote omitted). The court concluded that the Confrontation Clause error was harmless as to Dansby's conviction but that it had a substantial and injurious effect on the death verdict. App. 38a–39a. The district court thus granted the writ and vacated the death sentence while denying the petition in other respects.

The Eighth Circuit reversed the grant of penalty-phase relief. Unlike the district court, it concluded that Dansby had not rebutted the presumption of a merits adjudication:

> Nothing in the opinion of the Arkansas Supreme Court suggests that it disposed of Dansby's confrontation claim on procedural grounds. Nor is it likely that the court simply overlooked the claim. In his brief before the state supreme court, Dansby argued that the trial court did not give adequate weight to his confrontation rights when it limited the scope of his cross-examination. The Arkansas Supreme Court then affirmed the trial court's decision, stating with approval that the ruling left Dansby free to explore guarantees of immunity or promises of leniency as well as the area of bias. We think it highly unlikely that the court overlooked whether the trial court's order adequately protected Dansby's confrontation rights when it considered the precise limitations that Dansby challenged as unconstitutional.
>
> The materials cited by the Arkansas Supreme Court reinforce our conclusion. The court framed parts of its discussion in terms of Arkansas Rule of Evidence 608(b). Rule 608(b) provides that a party may not prove specific instances of conduct through extrinsic evidence and may inquire into them on cross-examination only if probative of truthfulness or untruthfulness. But the court then discussed *Biggers v. State*, 317 Ark. 414, 878 S.W.2d 717 (1994), which held that a particular application of Rule 608(b) did not violate a defendant's constitutional right to confrontation. *Id.* at 722. By relying on *Biggers*, the court in Dansby's case demonstrated that it was addressing a question with federal constitutional dimensions.

App 8a (citations and internal quotation marks omitted).

Applying AEDPA review, the Eighth Circuit then concluded that the Arkansas Supreme Court's ruling did not unreasonably apply clearly established Supreme Court precedents—*Olden v. Kentucky*, 488 U.S. 227 (1988), *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), and *Davis v. Alaska*, 415 U.S. 308 (1974)—in which the Court held that "the trial court violated a defendant's right to cross-examination by excluding evidence relatively likely to show a prototypical form of bias on the part of a critical witness." App. 9a (internal quotation marks omitted). Because the Supreme Court "has never held that the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for impeachment purposes," the state court ruling was not unreasonable insofar as it restricted the use of extrinsic evidence. App. 10a (citing *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam)). As for the prohibition on inquiring into McDuffie's pending criminal matters, the Eighth Circuit held that the trial court's ruling actually *did* allow Dansby to probe McDuffie's bias, but that he failed to do so:

> Dansby asked no questions concerning McDuffie's treatment by law enforcement in the time between his release from jail and his trial testimony. Within the limits of the trial court's ruling, Dansby was allowed to explore whether McDuffie continued to cooperate with law enforcement, whether he received preferential treatment in exchange, and whether he hoped to receive favorable treatment in return for his testimony. That Dansby did not question McDuffie on these matters is not attributable to the court's ruling.

App. 11a.

REASONS FOR GRANTING THE PETITION

This Court's precedent is clear:

> [A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.

Van Arsdall, 475 U.S. at 680 (internal quotation marks omitted) (ellipsis in original). There are few more "prototypical" forms of bias than the incentive of a jailhouse informant to curry favorable treatment of his criminal activity and pending charges. Yet the trial court blocked questioning on McDuffie's pending criminal charges and would allow inquiry into McDuffie's favorable treatment by the police only upon production of evidence that McDuffie had a deal to testify. That ruling violated Dansby's constitutional rights, regardless of whether AEDPA's standard of review applies. Unfortunately, the Eighth Circuit and some state courts have routinely veered from the Court's precedents on this issue. The Court should thus take the petition on Question 1 to correct the Eighth Circuit's departure from its decisions and to reinforce defendants' entitlement to cross-examine informants for bias.

Questions 2 and 3 concern inconsistent application of this Court's precedents. Because "this Court has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes," *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam), the lower courts have reached conflicting positions on that issue. Though the Eighth Circuit

understandably held, in light of *Jackson*, that Dansby could not succeed on the extrinsic evidence portion of his claim under AEDPA review, it wrongly concluded, in a manner contrary to the approach of other circuits, that the Arkansas Supreme Court adjudicated the claims on the merits. Ten years after *Johnson v. Williams*, 568 U.S. 289 (2013), additional guidance is needed on the circumstances in which a presumption of a state-court merits adjudication is rebutted.

A. The opinion below contradicts the Court's established Confrontation Clause precedents on cross-examination for bias.

A defendant's right to cross-examine informants for bias has a long pedigree in this Court—since at least the nineteen-thirties, when it decided *Alford v. United States*, 282 U.S. 687 (1931). There, the government obtained conviction in a mail-fraud case much as it obtained a conviction and death sentence here: through "uncorroborated conversations of the defendant of a damaging character." *Alford*, 282 U.S. at 692. Defense counsel sought to elicit on cross-examination that the witness who conveyed the defendant's statements was currently in federal custody. This Court held that he was entitled to "show by such facts as proper cross examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution." *Id.* at 693. "Even if the witness were charged with some other offense by the prosecuting authorities, petitioner was entitled to show by cross examination that his testimony was affected by fear or favor growing out of his detention." *Id.*

Notably, the Court did not require proof of a deal between the witness and the government before the defendant could conduct this cross-examination. Rather, cross-examination is "necessarily exploratory"; "reasonable latitude [must] be given the cross-examiner, even though he is unable to state in court what fact a reasonable cross-examination might develop." *Id.* at 690.

This holding found grounding in other precedents of the era. For example, in 1924, the Sixth Circuit explained that, as explicit promises of immunity are "rarely made," it is

> entirely proper, either by cross-examination of the witness himself, or otherwise, to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such a belief or hope. The fact that despite a plea of guilty long since entered, the witness had not yet been sentenced, is proper evidence tending to show the existence of such hope or belief.

Farkas v. United States, 2 F.2d 644, 647 (6th Cir. 1924); *see also King v. United States*, 112 F. 988, 995–96 (5th Cir. 1902).

The Court has continued to adhere to this line in the modern era. For example, in *Davis v. Alaska*, 415 U.S. 308 (1975), the Court found Confrontation Clause error in refusal to permit questioning on an informant's probationary status to show bias. The Court explained that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* at 317. "While counsel was permitted to ask [the witness] *whether* he was biased, counsel was unable to make a record from which to argue *why* [the

witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." *Id.* at 318.

The Court has also been clear that informants pose the sort of "prototypical bias" that requires cross-examination. *Van Arsdall*, 475 U.S. at 680. The use of informants is "dirty business" and "may raise serious questions of credibility." *On Lee v. United States*, 343 U.S. 747, 757 (1952). "[A] defendant is entitled to broad latitude to probe [an informant's] credibility by cross-examination." *Id.* The Court has consistently refused to bar such testimony as a categorical matter; rather, it has emphasized the critical role of cross-examination in bringing out the credibility problems it inherently poses. For example, in *United States v. Hoffa*, 385 U.S. 293, 311 (1966), the Court approved of informant testimony because on cross-examination the defendant "was permitted to explore matters that are normally excludable, for example, whether [the witness] had been charged with a crime in 1942, *even though that charge had never been prosecuted*." *Id.* at 311 n.12 (emphasis supplied). And in *Kansas v. Ventris*, 556 U.S. 586, 594 n. (2009), the Court rejected the suggestion that uncorroborated jailhouse snitch testimony should be categorically excluded because "it is the province of the jury to weigh the credibility of competing witnesses."

Certainly, the Court has held that the Confrontation right is not limitless, and that a court may restrict testimony "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679. What a

court may not do is prohibit "*all* inquiry" into a circumstance that "a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." *Id.* But that is precisely what the trial court did here when it completely precluded Dansby from inquiring about McDuffie's pending felony charge and required him to prove a "quid pro quo" *before* he could ask whether McDuffie's favorable treatment on his pretrial arrests indicated that he was trying to help the prosecuting authorities. As a result, McDuffie was able to tell the jury, without defense challenge, that he was just doing the right thing.

The Eighth Circuit did not deny that exclusion of this cross-examination violated clearly established Supreme Court precedent. Rather, in holding that the Arkansas Supreme Court did not unreasonably adjudicate the Confrontation Clause claim, it concluded that the trial court did not exclude the evidence at all, and that Dansby was at fault for failing to inquire into McDuffie's bias. That conclusion comports neither with common sense nor the record of the trial court's ruling.

Defense counsel understood the importance of McDuffie's testimony and litigated no issue harder than the need to exclude it or impeach it. In light of this litigation history, it is implausible that counsel simply shrunk from the cross-examination or neglected to conduct it, as the Eighth Circuit infers. Rather, counsel was acting upon the trial court's very strong orders.

Those orders, while nuanced in some regards, were reasonably clear. First, it was absolutely clear that counsel was not to ask about McDuffie's pending felony charge. Without having had that charge resolved, and having already gotten

himself arrested two more times, McDuffie had every reason to give the prosecutors strong testimony against Dansby. Indeed, he had previously learned the consequences of non-cooperation when he was rearrested after failing to help the police per his cooperation agreement.

Second, while the trial court said counsel could ask into "evidence of guaranties of immunity or promises of leniency," it was also clear that this questioning could not get into "speculation or conjecture"—which it would unless counsel had "direct evidence of a promise of immunity or something along that nature." Counsel had no such direct evidence, and thus could not inquire, among other things, into why McDuffie had gotten immediately released after stabbing a man in a bar a few weeks before trial. Most jurors would think twice about the self-professed altruism and credibility of a witness after learning he has three charges hanging over his head.

In short, the trial court's limitations on cross-examination of McDuffie created a square Confrontation Clause violation, regardless of whether the claim is reviewed *de novo* or under 28 U.S.C. § 2254(d)(1). The Court should grant certiorari to correct a clear conflict with its precedents.

B. Lower courts require clarity on how cross-examination for bias may be limited.

Though many courts adhere to this Court's direction to permit wide exploration of an informant's propensity to derive personal benefit from testimony, a minority require, like the trial court here, the existence of a concrete cooperation agreement to impeach a witness on her pending charges. These courts have held that absent a

concrete agreement, a witness cannot possibly have any real belief in favorable treatment, and thus any evidence of bias is too removed to have its relevancy outweigh any potential confusion of the jury.

While a handful of state courts require concrete agreements or admissions of bias, the Eighth Circuit is the only federal circuit that has handled this issue to hold that pending charges are not relevant for the purposes of impeaching a witness for bias. Compare *United States v. Haskell*, 468 F.3d 1064, 1073 (8th Cir. 2006), with *Stephens v. Hall*, 294 F.3d 210, 224 (1st Cir. 2002); *United States v. Towne*, 870 F.2d 880, 886 (2d Cir. 1989); *United States v. Zemba*, 59 Fed. Appx. 459, 464–65 (3d Cir. 2003); *Hoover v. Maryland,* 714 F.2d 301, 305 (4th Cir. 1983); *United States v. Landerman*, 109 F.3d 1053, 1061–62 (5th Cir. 1997); *Wright v. Dallman*, 999 F.2d 174, 179 (6th Cir. 1993); *United States v. Martin*, 618 F.3d 705, 730 (7th Cir. 2010); *Burr v. Sullivan*, 618 F.2d 583, 588 (9th Cir. 1980); *United States v. Sutton*, 732 F.2d 1483, 1490 (10th Cir. 1984); *United States v. Lankford*, 955 F.2d 1545, 1548–49 (11th Cir. 1992); *United States v. Anderson*, 881 F.2d 1128, 1136–39 (D.C. Cir. 1989). Specifically, the Eighth Circuit has held that pending charges, in and of themselves, do not prove bias when there was "no deal with the government and [the defendant] had been offered no consideration for his testimony." *Haskell*, 468 F.3d at 1073. Thus, the Eighth Circuit found "information about the pending charges was irrelevant and an improper subject for cross-examination." *Id.*; *see also United States v. Farid*, 733 F.2d 1318, 1320 (8th Cir. 1984); *United States v.*

Dennis, 625 F.2d 782, 798 (8th Cir. 1980); *United States v. Madden*, 482 F.2d 850, 852 (8th Cir. 1973).

Like the Eighth Circuit, Louisiana's State Supreme Court has held that, absent a concrete agreement or an explicit statement by the witness that she hopes for leniency, pending charges are improper grounds for cross-examination. *State v. Grace*, 643 So.2d 1306, 1308 (La. 1994). However, the District Court for the Eastern District of Louisiana recently granted habeas relief on this case, holding, in part, that the fear of additional—as of yet, uncharged—charges can motivate a witness to testify favorably for the prosecution. *Grace v. Cain*, 2021 WL 57118942, *12–13 (E.D. La. December 2, 2021). Moreover, failure to be charged itself illustrates favorable treatment, which "unquestionably bears on his credibility and motivation for testifying." *Id* at *12. Thus, a failure to allow for questioning on this matter violated the petitioner's Sixth Amendment right to confrontation. *Id.*

Defendants should not have to rely on federal habeas review to correct state-court violations of their clearly established right to cross-examine for bias. Additional guidance is needed for the minority of courts that continue to depart from the Sixth Amendment.

C. The circuits are split on whether the Confrontation Clause entitles a defendant to introduce extrinsic evidence to show bias.

The Eighth Circuit's opinion also implicates a circuit split on whether the Confrontation Clause entitles a defendant to use extrinsic evidence to support impeachment for bias. A majority of circuits have held that it may. *See United States v. Harvey*, 547 F.2d 720, 722 (2d Cir. 1976) ("The law is well settled in this

Circuit, as in others, that bias of a witness is not a collateral issue and extrinsic evidence is admissible to prove that a witness has a motive to testify falsely."); *United States v. DeLaurentis*, 47 Fed. Appx. 170, 172 (3d Cir. 2002); *Taylor v. Molesky*, 63 Fed. Appx. 126, 133-34 (4th Cir. 2003); *United States v. Lay*, 644 F.2d 1087, 1090 (5th Cir. 1981); *United States v. Battaglia*, 394 F.2d 304, 314 n.7 (7th Cir. 1968); *Manlove v. Tansy*, 981 F.2d 473, 478 (10th Cir. 1992); *United States v. Robinson*, 530 F.2d 1076, 1079–80 (D.C. Cir. 1976).

In these circuits, while the trial courts retain "wide latitude" to curtail the use of extrinsic evidence, "a cross-examiner is not required to 'take the answer' of a witness concerning possible bias." *Harvey*, 547 F.2d at 722 (citing McCormick, Evidence, § 41 (2d Ed. 1972)); *see also Van Arsdall*, 475 U.S. at 680; *Robinson*, 530 F.2d at 1079–80. The test is twofold. First is whether the impeachment is "probative of bias." *Robinson*, 530 F.2d at 1080. Second, the probative value must outweigh the prejudice that may occur from admission of the evidence. *See id.* Moreover, the right to present extrinsic evidence is not unlimited. A foundation must be laid to admit the extrinsic evidence; essentially, the witness must be given a chance to explain or deny the basis for the biases. *DeLaurentis*, 47 Fed. Appx. at 172. Thus, these circuits have managed to balance the right of a party to prove biases of witnesses with the interests of the trial court in avoiding trials within trials.

The reason for allowing extrinsic evidence is simple: while a witness may deny biases as a matter of course, extrinsic evidence can be used to illustrate "emotional partiality" that is always relevant in assessing credibility of witnesses. *Robinson*,

530 F.2d at 1079. Thus, extrinsic evidence is necessary in these situations to present the trier with the information required for them to "in light of his experience . . . determine whether a mutation in testimony could reasonably be expected as a probable human reaction." *Id.*

The minority of courts either do not allow extrinsic evidence or have yet to rule on whether it should be allowed. *See United States v. Catalan-Roman*, 585 F.3d 453, 465 (1st Cir. 2009) ("Although the ability to pursue an impeaching line of inquiry with the introduction of extrinsic evidence supporting that inquiry might be viewed as part and parcel of the right to cross-examination, this circuit has yet to decide whether the Confrontation Clause provides defendants a right to impeach witnesses through extrinsic evidence."); *Drivers v. Landers*, 444 Fed. Appx. 934, 936 (9th Cir. 2011) ("The Supreme Court has never held that the Confrontation Clause requires, in addition to cross-examination, the admission of extrinsic evidence for the purpose of establishing a witness's motive to lie."). Additionally, at least one circuit has an intra-circuit split on the use of extrinsic evidence. *See Harrington v. Jackson*, 1 Fed. Appx. 367, 372 (6th Cir. 2001) ("We remain unconvinced that unearthing bias by extrinsic evidence is 'particularly significant' or a 'fundamental element of the accused's defense.'"); *compare United States v. Phillips*, 888 F.2d 38, 41 (6th Cir. 1989) ("Though the Federal Rules of Evidence do not specifically so state, prior misconduct of a witness which is probative of the bias of that witness may be proved by extrinsic evidence.").

D. The Eighth Circuit's finding of a merits adjudication is wrong, and its approach to this issue is inconsistent with that of other circuits.

A claim is adjudicated on the merits only if the court "heard and *evaluated* the evidence and the parties' substantive arguments." *Johnson*, 568 U.S. at 302 (quoting Black's Law Dictionary 1199 (9th ed. 2009)). A state court is presumed to have adjudicated the merits of a federal claim if the petitioner presented that claim and the state court denied it. For example, if the petitioner asserted a federal constitutional claim and the state court explicitly adjudicated only a parallel state constitutional claim, there is little reason to think the state court did not reject the federal claim. *See id.* at 301. But sometimes the presumption can be rebutted. Perhaps the state court relied on a "state standard [that] is *less* protective" than the federal standard. *Id.* Or perhaps the "provision of the Federal Constitution or a federal precedent was simply mentioned in passing in a footnote." *Id.*

In this case, the district court correctly concluded that the presumption was rebutted. It is easy to see why. The Arkansas Supreme Court's opinion does not contain the phrase "Confrontation Clause," does not contain the term "federal constitution," does not cite the Sixth Amendment, and does not cite a federal case relying on the Sixth Amendment, or any federal case at all. Rather, it finds that the trial court did not err in its application Arkansas Rule of Evidence 608(b). *Dansby*, 893 S.W.2d at 338. It is axiomatic that the Confrontation Clause is more protective than evidence rules. *See Crawford v. Washington*, 541 U.S. 36, 61 (2004) ("Where testimonial statements are involved, we do not think that the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence.").

And the entire thrust of the Court's precedents in this specific application of the Confrontation Clause is that the defendant's right to cross-examine trumps the rules of evidence. *See Van Arsdall*, 475 U.S. at 676 (requiring admission of cross-examination despite its prohibition under Delaware Rule of Evidence 403).

In reversing the district court on this point, the Eighth Circuit stretched the meaning of merits adjudication well beyond its limits. The court rested its conclusion on essentially three grounds.

First, the Arkansas Supreme Court did not "dispose[] of Dansby's confrontation claim on procedural grounds." App. 8a. That is certainly true, and a claim decided on a procedural ground is obviously not adjudicated on the merits, but the presumption might still be rebutted for other reasons.

Second, Dansby presented his federal claim in his brief and the "Arkansas Supreme Court then affirmed the trial court's decision," stating some relevant procedural facts in the process. App. 8a. Whether a state court affirmed the trial court's ruling is the beginning of the inquiry, not the end. This aspect of the Eighth Circuit's ruling does nothing to acknowledge relevant questions such as whether the federal standard is more protective than the state standard or whether the state-court opinion cites relevant federal authority.

With no federal authority from the state-court opinion to cite, the Eighth Circuit turned to a third reason to "reinforce" its conclusion: the opinion discussed *Biggers v. State*, 878 S.W.2d 717 (1994), "which held that a particular application of Rule 608(b) did not violate a defendant's constitutional right to confrontation." App. 8a.

"By relying on *Biggers*, the court in Dansby's case demonstrated that it was addressing 'a question with federal constitutional dimensions.'" *Id.* (citing *Johnson*, 558 U.S. at 304–06).

Examination of *Biggers* shows that this is a thin reed upon which to rest a finding of a merits adjudication. First, *Biggers* is primarily an evidence case, not a constitutional case, as most of the opinion interprets Arkansas Rules of Evidence 404 and 608. *See Biggers*, 878 S.W.2d at 721–22. That explains why the Arkansas Supreme Court cited it for its evidence holding, not for a constitutional holding. *See Dansby*, 893 S.W.2d at 338. Though *Biggers* does cite the confrontation clause—in a list of other constitutional rights the appellant apparently cited as an alternative to his evidence argument—it does not interpret that clause or cite any federal case law doing so. Most importantly, *Biggers* does not decide a Confrontation Clause issue relevant to Dansby's claim. In *Biggers*, the appellant "wished to prove [the witness's] character in order to establish that he acted in conformance therewith in the reporting and testifying about his purchase of cocaine from appellant." *Id.* at 722. Dansby did not want to cross-examine for a general attack on character. He wanted to cross-examine on a prototypical form of bias. The latter form of cross-examination is constitutionally protected under this Court's precedents. The former is not. *See Davis*, 415 U.S. at 311 (discussing distinction between character and bias attacks).

In short, it is difficult to see how the Arkansas Supreme Court in Dansby's case "understood itself to be deciding a question with federal constitutional dimensions."

Johnson, 538 U.S. at 305. And other circuits would not have reached the same conclusion as the Eighth Circuit here, given their process for determining whether the presumption of merits adjudication has been rebutted.

For example, the Seventh Circuit has suggested that there is no merits adjudication if the state court relied "solely" on a state statute and "made no mention of the federal constitutional right." *See Ashburne v. Korte*, 761 F.3d 741, 751 (7th Cir 2014). In the Third Circuit, there is no merits adjudication if the state court relied on "state cases . . . which do not have federal constitutional underpinning." *Bennett v. Superintendent Graterford State Corr. Inst.*, 886 F.3d 268, 284 n.14 (3d Cir 2014). In neither of these circuits would Dansby's Sixth Amendment claim have been deemed adjudicated on the merits. The Arkansas Supreme Court's opinion relies only on less protective state evidence rules and does not cite the constitution. And its citation to a state case that does not consider a relevant federal constitutional question does not create a merits adjudication of the federal claim.

CONCLUSION

The trial court violated the Confrontation Clause when it precluded Dansby from questioning a jailhouse informant on a prototypical form of bias. The petition for a writ of certiorari should be granted.

MARCH 31, 2023

Respectfully submitted,

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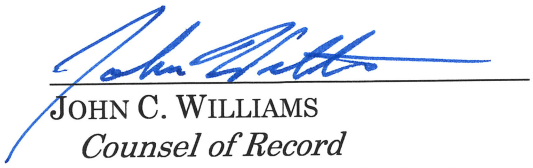

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