No. 22-7222

In the Supreme Court of the United States

RAY DANSBY,

Petitioner,

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION

TIM GRIFFIN
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General
Counsel of Record

DYLAN L. JACOBS
Deputy Solicitor General

ASHER STEINBERG
Senior Assistant Solicitor General

JOSEPH KARL LUEBKE
Assistant Attorney General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

QUESTIONS PRESENTED

1. Whether requiring proof of a cooperation agreement before permitting a criminal defendant to impeach a witness with her pending charges is contrary to, or an unreasonable application of, clearly established federal law as determined by this Court; alternatively, whether that requirement 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 only cites state cases addressing that constitutional claim.

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STATEMENT

1. Over thirty years ago, on August 24, 1992, Petitioner Ray Dansby murdered his ex-wife Brenda Dansby and her boyfriend, Ronnie Kimble. Pet. App. 2a-3a. Two people witnessed the shootings. One was Ray and Brenda Dansby's eight-year-old son, Justin. Pet. App. 2a. That morning, Justin was home sick from school, and his mother had gone out to buy him orange juice. *Id.* When she returned home, Justin saw his father, Ray Dansby, confront her as she pulled into the driveway. *Id.* After Ray Dansby repeatedly ordered her to get out of the car, she complied. Dansby then, in Justin's words, held "my mother like a shield" and "shot [her] in the arm and then in the neck." *Dansby v. State*, 893 S.W.2d 331, 333-34 (Ark. 1995).

Then, Justin testified, Dansby came into the home and shot Kimble in the chest. *Id.* at 334. He testified that it was only after Dansby shot Kimble that Kimble got his gun from beneath the couch. *Id.* Kimble's gun, however, would not fire; it only made "clicking noises." *Id.* Dansby chased Kimble to the back of the house, and Justin heard five more shots. *Id.* He then saw his father stand over Kimble and kick him twice. *Id.* After Justin got away from his father, he called the police. *Id.*

A neighbor, Greg Riggins, also saw Dansby shoot Brenda. *Id.* Riggins testified that he went to his door after hearing gunfire and saw Dansby and Brenda struggling with a revolver. *Id.* Dansby then got the gun away from Brenda, moved two to three feet away from her, and shot her twice, knocking her to the ground. *Id.* When she tried to get up, Dansby shot again. *Id.* Dansby then paused for five or six seconds and shot Brenda in the head. *Id.* Riggins then saw Dansby fire another shot towards the house before entering it; he saw no shots coming out. *Id.*

Later that day, a police officer found Dansby on a nearby street. *Id.* Dansby flagged him down, saying "I'm Ray Dansby, ya'll are looking for me." *Id.* He was then taken to the police station, where he made a Mirandized statement. *Id.* He said that he went to Brenda's residence, where he claimed Kimble met him at the front door with a handgun "pointed down." After an argument began, he said "I just pulled my gun and started shooting." *Id.*

2. Dansby was charged with two counts of capital murder. In addition to Justin Dansby's and Greg Riggins's eyewitness testimony, a medical examiner testified that Brenda was shot in the chest and ear, and that Kimble had six different gunshot wounds, including in the back. *Id.* at 335. The medical examiner testified that Kimble was probably bent over when he was shot in the back. *Id.* The State also offered testimony about a possible motive: on the morning of the murders, Dansby was scheduled to appear in court on charges of assaulting Brenda. *Id.*

In addition to the eyewitness testimony, the testimony of the medical examiner, and Dansby's own statement, the State offered testimony from Dansby's jail cellmate, Larry McDuffie. Pet. App. 4a. McDuffie testified that Dansby described the shootings to him in jail. *Id.* The sequence of events McDuffie described diverged strikingly from that recounted by the eyewitnesses. According to McDuffie, Dansby told him he shot Kimble first, twice, around the doorway to the house. *Id.* Then, when Brenda reached into her purse, he shot her. *Id.* He then followed Kimble into the house, shot him several more times, and left the house to find Brenda still alive outside. *Id.* When she pled for mercy, he shot her.

Dansby sought to impeach McDuffie in several different ways. He sought leave to ask McDuffie about his previous work for the local police department as a confidential informant. Pet. App. 6a. He wanted to ask about McDuffie's release from jail after making his statement, and he wanted to ask about subsequent violations of his conditions of release and show he had received preferential treatment for those violations. Pet. App. 6a-7a. The trial court allowed Dansby to ask about McDuffie's history as a criminal informant. Pet. App. 6a. It further ruled Dansby could ask whether McDuffie had received promises of leniency or guarantees of immunity. Pet. App. 7a. But it ruled Dansby could not inquire about charges that had not yet resulted in convictions, or introduce extrinsic evidence to impeach McDuffie unless he denied or failed to admit facts that tended to show bias. *Id.*; 8th Cir. App. 276.

On cross-examination, McDuffie admitted that he had previously worked as a confidential informant and reached a signed agreement with law enforcement. Pet. App. 10a. He admitted that after giving his statement, he was released from jail three days later. 8th Cir. App. 538. When asked why, he testified that he was given a signature bond. 8th Cir. App. 541. The only question Dansby asked that the trial court disallowed was why McDuffie was in jail at the time he was held with Dansby. Pet. App. 11a.

A jury convicted Dansby of two counts of capital murder and sentenced him to death on both. Pet. App. 4a. It found three aggravating circumstances: that he previously committed a violent felony; that he created a risk of death or injury to a third

party during the murders; and that the murders were committed in an especially cruel or depraved manner. Pet. App. 17a. It found no mitigating factors. *Id.*

3. Dansby appealed his conviction, and the Arkansas Supreme Court unanimously affirmed. *Dansby*, 893 S.W.2d at 344. On appeal, Dansby challenged the trial court's rulings on his cross-examination of McDuffie. The Arkansas Supreme Court held that ruling was correct. It understood Dansby's impeachment evidence as going to two separate issues: McDuffie's credibility generally, and his bias. *See id.* at 338-39.

On credibility, it said a state rule of evidence that barred the use of extrinsic evidence to attack a witness's credibility "govern[ed] the credibility question," *id.* at 338, citing a decision that upheld enforcement of that rule against a Confrontation Clause challenge, *id.* (citing *Biggers v. State*, 878 S.W.2d 717 (Ark. 1994)). Turning to "the issue of proof to show bias," *id.*, it acknowledged that in that context, "if a witness denies or does not fully admit the facts claimed to show bias, the attacker has a right to prove those facts by extrinsic evidence," *id.* at 338-39. But it explained that "Dansby was allowed to explore the area of bias in his cross-examination of McDuffie," pointing to McDuffie's admission that he had previously served as a confidential informant for police. *Id.* at 339. And it held that McDuffie's arrest record after he gave his statement to the police was more prejudicial than relevant. *Id.*

After the Arkansas Supreme Court affirmed the denial of postconviction relief on ineffective-assistance claims in 2002, *see Dansby v. State*, 84 S.W.3d 857 (Ark. 2002), Dansby petitioned for a writ of habeas corpus in 2003, claiming, among other things,

that the trial court's rulings on the McDuffie cross-examination deprived him of his rights under the Confrontation Clause. *See Dansby v. Norris*, No. 03-CV-1146, 2008 WL 2859070, at *4 (W.D. Ark. July 22, 2008). The district court denied relief on all of Dansby's claims, holding, in relevant part, that Dansby never presented a Confrontation Clause claim in state court, but "relied solely upon state law" in appealing the trial court's rulings. *Id.*

The Eighth Circuit vacated the denial of the Confrontation Clause claim, holding that a reference in Dansby's state-court brief to "the defendant's confrontation rights . . . guaranteed by the Sixth Amendment," and citations to state cases that applied the Confrontation Clause, were sufficient to put the Arkansas Supreme Court on notice that he was raising a Confrontation Clause claim. *Dansby v. Norris*, 682 F.3d 711, 723 (8th Cir. 2012). It also vacated the district court's denial of a *Brady* claim concerning allegedly withheld material discrediting McDuffie, holding that while the district court permissibly raised that claim's procedural default sua sponte, it was required to give the parties an opportunity to brief procedural default before dismissing the claim on that ground. *Id.* at 724. It otherwise affirmed the district court. *Id.* at 730.

After this Court vacated the Eighth Circuit's judgment and remanded the case for further consideration in light of *Trevino v. Thaler*, a decision on the procedural default of ineffective-assistance claims, *see Dansby v. Hobbs*, 569 U.S. 1015 (2013), the Eighth Circuit reinstated its rulings on Dansby's Confrontation Clause and *Brady* claims, thus remanding those claims to the district court. *See Dansby v. Hobbs*, 766

F.3d 809, 823-25 (8th Cir. 2014). Applying *Trevino*, that court held Dansby could not satisfy its exception to procedural default and again affirmed the district court's denial of Dansby's ineffective-assistance claims. *See id.* at 833-40.

4. On remand, the district court held in the alternative that Dansby's *Brady* claim was procedurally defaulted and that he could not excuse the default, and that the claim lacked merit. Pet. App. 41a-48a. It particularly noted that McDuffie's testimony was unnecessary to prove Dansby's guilt. Pet. App. 45a-46a.

As to the Confrontation Clause claim, the district court began with the standard of review. Having previously held that Dansby did not present a Confrontation Clause claim to the Arkansas Supreme Court, the district court now held, citing its prior reversed ruling, that the Arkansas Supreme Court had not addressed that claim. Pet. App. 31a-32a. The court reasoned that the Arkansas Supreme Court "cited to state law" and rules of evidence, Pet. App. 31a, and "did not address any federal or constitutional laws" by name, Pet. App. 31a-32a.

On de novo review of Dansby's Confrontation Clause claim, the district court held that the trial court's rulings violated Dansby's Confrontation Clause rights because the jury might have inferred McDuffie was biased had Dansby been permitted to ask about arrests after McDuffie gave his statement. Pet. App. 36a. It did not acknowledge that Dansby was allowed to ask McDuffie how soon he was released from jail after he gave his statement, and why he was released. Rather, asserting

that "[t]he question, usually, is not whether an informant will recant his or her testimony, but when," it speculated that McDuffie "*may* have even altered his testimony" had Dansby been allowed an even broader cross-examination. Pet. App. 35a.

Finally, turning to prejudice, the district court held "the Confrontation Clause error was harmless with respect to the guilt phase of Dansby's trial," Pet. App. 37a, because "much of McDuffie's testimony . . . was cumulative" and abundant evidence supported Dansby's guilt, Pet. App. 38a. But it reached a different conclusion as to the sentence, reasoning that McDuffie's testimony "was the only evidence that supported the aggravating circumstance that Dansby committed the murders in an especially depraved manner." Pet. App. 38a-39a. Yet in a footnote, the district court acknowledged that aggravating circumstance actually asked whether the murders were "committed in an especially cruel *or* depraved manner." Pet. App. 39a n.6 (emphasis added). It did not address whether other evidence besides McDuffie's testimony supported the cruel-manner alternative. Nor, though it acknowledged that the jury unanimously found two other aggravating circumstances, *id.*, and no mitigating factors, Pet. App. 39a, did it explain why testimony affecting at most only one of three aggravating factors against no mitigating factors likely affected Dansby's sentence. Instead, with no explanation, it said it found "grave doubt" as to whether the jury would have found mitigating circumstances had McDuffie's testimony been more thoroughly impeached. *Id.* It thus granted Dansby relief as to his sentence. Pet. App. 48a.

5. Both Dansby and the State appealed. Pet. App. 5a. In an opinion by Judge Colloton, the Eighth Circuit unanimously reversed the district court's grant of relief on Dansby's Confrontation Clause claim and affirmed its denial of relief on Dansby's *Brady* claim. Pet. App. 18a. That court first held that the district court erred with respect to the standard of review of Dansby's Confrontation Clause claim. It reasoned that the Arkansas Supreme Court's detailed discussion of "the precise limitations that Dansby challenged as unconstitutional" made it "highly unlikely that the court overlooked" Dansby's Confrontation Clause argument. Pet. App. 8a. And it noted that while the Arkansas Supreme Court may have only cited its own decisions and an Arkansas rule of evidence, the decision it cited in connection with that rule held that the rule's application did not violate the Confrontation Clause. *Id.* It therefore concluded that Dansby had "not rebutted the presumption" that the Arkansas Supreme Court decided his Confrontation Clause claim. *Id.*

Applying the Antiterrorism and Effective Death Penalty Act (AEDPA) standard of review, the Eighth Circuit held that the Arkansas Supreme Court's decision affirming the trial court's rulings was not contrary to or an unreasonable application of clearly established federal law as determined by this Court's decisions. First, on the matter of whether Dansby had a right to introduce extrinsic evidence to impeach McDuffie, it noted that this Court "has never held that the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for impeachment purposes." Pet. App. 10a (quoting *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam)). The Arkansas Supreme Court's approval of the trial court's limitations on the

use of extrinsic evidence, therefore, was not contrary to or an unreasonable application of clearly established federal law. *Id.*

As to the scope of the cross-examination, the Eighth Circuit held that the Arkansas Supreme Court's decision was a reasonable application of this Court's Confrontation Clause precedents. Pet. App. 11a. Rather than bar Dansby from cross-examining on bias, the ruling the Arkansas Supreme Court affirmed "permitt[ed] Dansby to inquire into the sources of McDuffie's potential bias so long as he did not ask about past charges that did not result in convictions." *Id.* The trial court allowed Dansby, for example, to elicit testimony that McDuffie "had worked as an informant and reached a signed agreement with law enforcement," Pet. App. 10a, and absent inquiring into specific charges, it allowed Dansby to ask whether McDuffie "received preferential treatment in exchange [for his cooperation], and whether he hoped to receive favorable treatment in return for his testimony," Pet. App. 11a. That balance between permitting Dansby to cross-examine on bias and curbing prejudicial inferences from unadjudicated charges was not, the Eighth Circuit held, an unreasonable application of this Court's decisions. *Id.*

Turning to Dansby's *Brady* claim, the Eighth Circuit agreed with the district court that it was procedurally defaulted. Pet. App. 14a-15a. It then turned to whether Dansby could show cause and prejudice to excuse the procedural default, and held he could show neither. Pet. App. 16a-18a. As the *Brady* claim, like the Confrontation Clause claim, concerned McDuffie's testimony, the Eighth Circuit's

discussion of prejudice is particularly relevant here. The court assumed that the allegedly withheld evidence "would have allowed [Dansby] to undermine the credibility of McDuffie's trial testimony." Pet. App. 16a. But it held that undermining that testimony would not have affected Dansby's conviction or sentence.

The Eighth Circuit agreed with the district court that as to Dansby's guilt McDuffie's testimony was not "unique," *id.*, but "cumulative," Pet. App. 17a. As to the sentence, it concluded that his testimony "was not as significant" as Dansby, or the district court, suggested. *Id.* It noted that the jury found three aggravating factors, two of which were "undisputed and unrelated to McDuffie's testimony." *Id.* Unlike the district court, it acknowledged that McDuffie's testimony "bore only on the disjunctive alternative of depravity" of the third aggravating factor the jury found, *id.*, and that testimony from other witnesses established that Dansby committed his murders in a cruel manner, *id.* Finally, the court saw "no material connection between McDuffie's testimony" and the mitigating factors Dansby suggested. *Id.* It concluded that, "[w]here an error is alleged to have impacted only one of multiple aggravating factors, the absence of any mitigating factors strongly suggests that any error was harmless." Pet. App. 17a-18a.

The Eighth Circuit denied Dansby's petition for rehearing without dissent. Pet. App. 50a.

DISCUSSION

I. This case is governed by Section 2254(d) of AEDPA, and review of the third question presented should be denied.

Dansby's first two questions presented concern the meaning of the Confrontation Clause. Yet those questions are in the main not truly presented if Section 2254(d) of AEDPA applies.[1] In a habeas case governed by Section 2254(d), a federal court may not grant relief unless the state court's decision rejecting the petitioner's claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court at the time of the state court's decision. 28 U.S.C. 2254(d)(1). If that provision applies, new law from this Court on the meaning of the Confrontation Clause, as the first and second questions presented seek, has no bearing on—and cannot be made in—this case. Dansby eventually recognizes this by seeking certiorari in his third question presented on whether Section 2254(d) applies. It plainly does apply, and there is no conflict on how to decide whether it does.

A. The Eighth Circuit correctly held that Section 2254(d) applies in this case.

Section 2254(d) controls a federal habeas court's adjudication of a claim so long as that claim was "adjudicated on the merits in State court proceedings." 28 U.S.C. 2254(d). And this Court has held that so long as "a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the

[1] Though the first question presented is framed simply as a question about the meaning of the Confrontation Clause, the Petition's argument for granting that question makes clear that in part it asks whether the Arkansas Supreme Court reasonably applied this Court's Confrontation Clause precedents under Section 2254(d) of AEDPA.

state court adjudicated the claim on the merits"—even if the court denies relief summarily. *Harrington v. Richter*, 562 U.S. 86, 99 (2011). That presumption "is not irrebuttable." *Johnson v. Williams*, 568 U.S. 289, 302 (2013). But it "is a strong one that may be rebutted only in unusual circumstances," *id.*, where "the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court," *id.* at 303. It does not suffice to rebut the presumption, for example, "that the state court failed to cite . . . any federal law." *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) (internal quotation marks omitted). Nor, even, does it rebut the presumption if the state court "never expressly acknowledged that it was deciding a [federal] issue" or acknowledged that the petitioner "had invoked a federal basis for her argument." *Johnson*, 568 U.S. at 296. Indeed, this Court has only definitively indicated that the presumption would be rebutted if a petitioner failed to "fairly present" his claim in state court. *Id.* at 302 n.3; *see also id.* at 302 (suggesting the presumption may be rebutted if the petitioner "buried [federal law] in a string cite").

Here, at a minimum, it is not "very clear[]" that Dansby's "federal claim was inadvertently overlooked in state court." *Id.* at 303. To the contrary, the best reading of the Arkansas Supreme Court's opinion is that that court decided Dansby's Confrontation Clause claim. That is so for several reasons.

First, Dansby presented his Confrontation Clause claim to the Arkansas Supreme Court, writing in his brief that the trial court's authority to "limit testimony must be weighed against the defendant's confrontation rights and fair trial rights guaranteed by the Sixth Amendment," and citing state cases that applied the Confrontation

Clause. *See Dansby*, 766 F.3d at 823. That presentation triggers the "strong" presumption that Dansby's Confrontation Clause claim was decided on the merits. *Johnson*, 566 U.S. at 302.

Second, the Arkansas Supreme Court did not overlook Dansby's attack on the trial court's evidentiary ruling, but addressed and upheld the limitations that Dansby argued violated his Confrontation Clause rights at great length. *See Dansby*, 893 S.W.2d at 338-39. As the Eighth Circuit reasoned, it is "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." Pet. App. 8a; *cf. Johnson*, 568 U.S. at 305 (reasoning that "the fact that [two] claims are so similar makes it unlikely that the [state court] decided one while overlooking the other").

Third, at the one point in its analysis where the Arkansas Supreme Court invoked a state rule of evidence, *Dansby*, 893 S.W.2d at 338, it first cited a state case that held the application of that rule to bar extrinsic evidence did not violate defendants' "constitutional rights to . . . confrontation." *Biggers v. State*, 878 S.W.2d 717, 722 (Ark. 1994). And the Arkansas Supreme Court cited that case for the proposition that the rule applied—and thus that it *may be* applied—not for what it said that rule meant. *Dansby*, 893 S.W.2d at 338 ("As we stated recently in *Biggers* . . . Arkansas Rule of Evidence 608(b) governs the credibility question[.]"). In *Johnson*, this Court held that a citation to a state case that itself "did not expressly purport to decide a federal constitutional question" but cited federal cases indicated that a state court

had decided a federal claim. *Johnson*, 568 U.S. at 305. A fortiori, citing a state case that *did* expressly decide a federal constitutional question indicates that the Arkansas Supreme Court "was addressing 'a question with federal constitutional dimensions.'" Pet. App. 8a (quoting *Johnson*, 568 U.S. at 305).

Fourth, and perhaps most critically, the Arkansas Supreme Court's decision did not stop there. After holding that the Arkansas Rules of Evidence permissibly barred the use of extrinsic evidence to generally attack McDuffie's credibility, it turned to "the issue of proof to show bias." *Dansby*, 893 S.W.2d at 338. And on that score, it acknowledged that in some circumstances, the defendant "has a right to prove [bias] by extrinsic evidence"—the very right Dansby claims here—before concluding that "Dansby was allowed to explore the area of bias" adequately and did not have a right to introduce the extrinsic evidence he sought to use. *Id.* at 339. It did not cite a rule of evidence for the parameters of that "right," or otherwise indicate that the right was solely a creature of state law. The Arkansas Supreme Court's decision is at most ambiguous on whether it decided Dansby's Confrontation Clause claim. It does not, as is required to rebut the presumption of merits adjudication, "lead[] very clearly to the conclusion that [Dansby's] federal claim was inadvertently overlooked." *Johnson*, 568 U.S. at 303.

Dansby's arguments that the presumption is rebutted here are unavailing. He first notes that the Arkansas Supreme Court's opinion neither mentions a provision of the Constitution by name nor cites federal cases. Pet. 24. But neither did the state-court opinion in *Johnson*.

He then claims that the Arkansas Supreme Court merely applied a state evidentiary rule. *Id.* But at best, that lops off half of the Arkansas Supreme Court's discussion of the trial court's evidentiary ruling. After holding that a state rule of evidence barred introducing extrinsic evidence to attack McDuffie's credibility generally, it then turned for several paragraphs to Dansby's "right" to prove bias by extrinsic evidence, a "right" it did not say the Arkansas Rules of Evidence circumscribed.

Finally, he says that the state Confrontation Clause precedent the Arkansas Supreme Court cited, *Biggers*, only addressed "a general attack on character," not the attack on bias Dansby also argued the Confrontation Clause entitled him to make. Pet. 26. That is true—but that is why the Arkansas Supreme Court only cited it in rebutting Dansby's argument that he was entitled to generally impeach McDuffie's credibility with extrinsic evidence. It separately acknowledged and addressed "the issue of proof to show bias," *Dansby*, 893 S.W.2d at 338, and concluded Dansby's "right" in that regard was not abridged, *id.* at 339. Dansby has not rebutted the strong presumption that his Confrontation Clause claim was adjudicated on the merits.

B. The Eighth Circuit's decision that Section 2254(d) applies does not conflict with the decisions of any other circuit.

In a single paragraph, Dansby claims that the Eighth Circuit's decision that Section 2254(d) is applicable conflicts with the decisions of two circuits. Pet. 27. It does not conflict with either.

Dansby first claims the Seventh Circuit would have decided the merits-adjudication question differently because it "has suggested," *id.*, that a federal claim is not

adjudicated on the merits if a state court "relied 'solely' on a state statute" and does not mention a federal constitutional right. *Id.* (quoting *Ashburn v. Korte*, 761 F.3d 741, 751 (7th Cir. 2014)). There is no conflict with the Seventh Circuit. To begin with, Dansby uses the verb "suggested" advisedly. The Seventh Circuit indeed only suggested in dicta that the claim in *Ashburn* was not adjudicated for the reason stated, before concluding it need not decide whether that claim was even presented in state court "because even under *de novo* review, Ashburn cannot prevail." *Ashburn*, 761 F.3d at 751. More importantly, the Arkansas Supreme Court did not rely solely on a state statute. It relied on precedent holding that its rule of evidence was constitutional, and then turned from the Arkansas Rules of Evidence altogether to the very "right" to impeach on grounds of bias that Dansby claims today.

Dansby next says the Third Circuit has held there is no merits adjudication so long as "the state court relied on 'state cases . . . which do not have federal constitutional underpinning.'" Pet. 27 (quoting *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 284 n.14 (3d Cir. 2018)). The Third Circuit has not held that, and even if it did it would not pose a conflict. In *Bennett*, the Third Circuit held there was not a merits adjudication because the state court there "expressly declined to rule on Bennett's federal claim," *Bennett*, 886 F.3d at 284, having deemed it defaulted, *id.* at 283. The Third Circuit added in a footnote that the state cases the court cited did not decide federal constitutional claims, *id.* at 284 n.14; it did not say, much less hold, that reliance on state-law cases is alone enough to rebut the presumption. But even

if it had, Dansby would not prevail under that rule because, as discussed, the Arkansas Supreme Court relied in part on state cases that *did* resolve federal constitutional claims. There is no conflict on how to decide whether Section 2254(d) applies, and the Eighth Circuit correctly decided it applies here. Review on the third question presented should be denied.

II. The first question presented does not merit review.

Dansby's first question presented is really two questions. By its terms, it simply asks whether "preclusion of cross-examination about an informant's propensity for bias violates the Confrontation Clause." Pet. i. But as developed in the body of the petition, it raises two distinct and more specific questions. The first is whether the Arkansas Supreme Court's decision affirming the preclusion of cross-examination on McDuffie's pending charges and post-statement arrests was contrary to or an unreasonable application of clearly established law as determined by this Court's Confrontation Clause decisions. Pet. 15-19. The second question is whether the preclusion of cross-examination on pending charges absent evidence of a cooperation agreement violates the Confrontation Clause, Pet. 19-21—a question on which Dansby says "[l]ower courts require clarity," Pet. 19. As that statement suggests, there is no clearly established law on whether trial courts may bar impeaching witnesses for bias by cross-examining them on pending charges. Because this case is governed by Section 2254(d), this is an inappropriate case in which to decide whether they may. And review of the first question presented would be futile because the Eighth Circuit held—to no challenge from Dansby in his petition—that the testimony he was supposedly unable to adequately confront did not affect his trial's outcome.

A. The Eighth Circuit correctly held that the Arkansas Supreme Court's decision was not contrary to or an unreasonable application of clearly established federal law.

Dansby claims that the Arkansas Supreme Court's decision was contrary to, or an unreasonable application of,[2] essentially three of this Court's decisions. Dansby reads these cases as holding that a court may not "prohibit '*all* inquiry'" into a witness's bias. Pet. 18 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). That is an accurate reading of those cases. Where Dansby goes wrong is in claiming that the Arkansas Supreme Court's decision was contrary to them. That is not because, as Dansby caricatures the Eighth Circuit's reasoning, "the trial court did not exclude the evidence [of bias] at all," *id.*; certainly the trial court excluded some. But the trial court did not exclude all—far from it. To the contrary, the trial court allowed Dansby to present the heart of the evidence of McDuffie's possible bias—that he was in jail when he gave his statement to police and was released three days later on a signature bond—and Dansby presented that evidence. So there is no conflict, let alone a clear one, between the Arkansas Supreme Court's decisions and this Court's precedents.

The first decision of this Court Dansby cites is *Alford v. United States*, 282 U.S. 687 (1931). In that 92-year-old case, the defendant in a federal prosecution was precluded from asking a witness against him where he lived. *Id.* at 689 & n.1. The answer, he believed, was that the witness was in federal custody, *id.* at 690, a fact he

[2] Dansby does not specify under which of those two standards he believes he prevails, only saying he would prevail under Section 2254(d)(1). Pet. 19. The two standards are distinct. *See Williams v. Taylor*, 529 U.S. 362, 405-08 (2000).

wanted to bring out to show the witness was biased by "the coercive effect of his detention by . . . the United States, which was conducting" the prosecution, *id.* at 693. This Court reversed that ruling, saying that while "[t]he extent of cross-examination with respect to an appropriate subject of inquiry is within the [trial court's] sound discretion . . . [t]he trial court cut off in limine *all inquiry* on a subject . . . the defense was entitled" to cross-examine on. *Id.* at 694 (emphasis added).

In the next case Dansby invokes, *Davis v. Alaska*, 415 U.S. 308 (1974), the Court addressed a similar fact pattern over forty years later. In that case, the defendant was charged with stealing a safe from a bar. *Id.* at 309-10. The lead witness against him was a juvenile on probation for burglary who lived near where the safe was found, 26 miles away from the bar. *Id.* at 309-11. The defense wanted to ask the witness about his probation on cross-examination, hoping to prove he may have falsely identified the defendant under "undue pressure" or "fear of possible probation revocation." *Id.* at 311. The trial court barred the defense not only from asking the witness about the specifics of his burglary conviction, but even about his simply being on probation, *id.* at 311-12, leaving the jury to view him as "an apparently blameless witness," *id.* at 318. This Court found a Confrontation Clause violation, reasoning that though the trial court allowed the defense to ask the witness "whether he was biased," its ruling left the defense entirely "unable to make a record from which to argue why [the witness] might have been biased." *Id.* at 318.

Finally, in *Van Arsdall*, a prosecution witness to a murder admitted outside the presence of the jury that prosecutors dismissed a charge against him "in exchange for

his promise to speak with the prosecutor about the murder." *Van Arsdall*, 475 U.S. at 676. Nevertheless, "[t]he trial court barred any cross-examination about that agreement," deeming it unfairly prejudicial. *Id.* This Court held that ruling violated the Confrontation Clause. It allowed that trial courts "retain wide latitude" under the Confrontation Clause "to impose reasonable limits" on cross-examination regarding "potential bias." *Id.* at 679. But, echoing *Alford*, the Court said the trial court's ruling impermissibly "prohibited *all* inquiry into the possibility that [the witness] would be biased" due to his agreement. *Id.*

This case is nothing like those cases of total bars on meaningful cross-examination for bias. As the Arkansas Supreme Court explained, "[h]ere, Dansby *was* allowed to explore the area of bias in his cross-examination of McDuffie as a witness." *Dansby*, 893 S.W.2d at 339 (emphasis added). To begin with, as that court noted, Dansby was allowed to elicit, and did elicit, testimony that "McDuffie had been a confidential informant for the police, and . . . had signed a contract with law enforcement." *Id.* That alone distinguishes this case from *Alford*, *Davis*, and *Van Arsdall*, and makes the Arkansas Supreme Court's decision a reasonable application of this Court's precedents. In none of those cases was the defendant allowed to develop *any* substantial line of cross-examination on bias. Instead, the trial courts' rulings in those cases misleadingly cast prosecution witnesses as "apparently blameless" individuals with no connection to law enforcement besides their freely given testimony. *Davis*, 415 U.S. at 318. Even if the trial court's ruling had completely foreclosed questioning on whether McDuffie received favorable treatment for his testimony—which it did not—

this case would present a new question: whether evidentiary rulings that close one avenue for exploring bias but leave open another violate the Confrontation Clause.

But the trial court's rulings were even more favorable to the defense than that. The trial court also allowed Dansby's counsel to cross-examine McDuffie on the best evidence that he received favorable treatment for his testimony. To start, unlike *Alford* and *Davis*, the prosecution was forced to reveal that McDuffie was under the state's power when he gave his statement to police; the circumstances of Dansby's confession made that necessary. So before cross-examination even began, the jury learned that McDuffie was incarcerated in county jail when he spoke to Dansby, 8th Cir. App. 524, and that the day McDuffie gave his statement, he "was supposed to go to court that day anyway," 8th Cir. App. 532. Then on cross-examination, defense counsel got McDuffie to admit to what the jury could view as favorable treatment in exchange for that statement. The jury learned that McDuffie had been in jail for "[a]bout a week and a half" before Dansby arrived, 8th Cir. App. 533, but that after he gave his statement to police, he was released three days later, 8th Cir. App. 538. When asked why he was released just three days after his statement, McDuffie could only answer that he was released on a no-cost signature bond. 8th Cir. App. 541. As defense counsel summarized his answers, "You gave the police the statement and you got out of jail just because you had a signature bond." 8th Cir. App. 542.

To be sure, Dansby was not able to offer *all* of the evidence suggesting favorable treatment he wanted to introduce. Because the trial court barred reference to charges that had not resulted in convictions, Dansby could not ask about McDuffie's post-

statement arrests. Nor was he allowed to ask *why* McDuffie was in jail—though it is doubtful that eliciting testimony that McDuffie was in jail for non-violent drug possession, rather than some more serious charge, would have strengthened the defense's theory that he was released in exchange for his statement.

But this Court has never held a defendant is entitled to present all his evidence of bias. It has only held defendants are entitled to present at least some—or in other words, that trial courts may not preclude "all inquiry" into an area of bias. Absent going that far, it has said, in the very cases on which Dansby relies, that "[t]he extent of cross-examination" on bias "is within the sound discretion of the trial court." *Alford*, 282 U.S. at 693; *see also Van Arsdall*, 475 U.S. 679 (acknowledging trial courts' "wide latitude . . . to impose reasonable limits" on bias cross-examination).

Moreover, this Court has never addressed the precise kind of bias impeachment Dansby claims a constitutional entitlement to: "impeach[ing] a witness on her pending charges" absent evidence of "a concrete cooperation agreement." Pet. 19. In *Davis*, the defense was barred from impeaching a witness with his "juvenile adjudication." *Davis*, 415 U.S. at 311. In *Alford*, the defense was barred from impeaching a witness with the mere fact he was in jail, a fact both sides questioned McDuffie on here. And in *Van Arsdall*, the defense was barred from impeaching a witness on his dismissed charge *even with* an admission to a related cooperation agreement—the precise circumstance in which the state courts here held the use of unadjudicated charges would be allowed. Just as in *Nevada v. Jackson*, 569 U.S. 505 (2013) (per curiam), where this Court held that its decisions' silence on a particular type of bias

impeachment foreclosed a claim that those decisions had already settled defendants' entitlement to use it, *see id.* at 512, this Court's lack of precedent on impeaching witnesses with pending charges absent a related cooperation agreement forecloses Dansby's claim that this Court's decisions have already clearly established the law on his right to impeach in that manner.

In sum, the best reading of this Court's decisions is that the trial court's ruling was constitutional. But at minimum, "fairminded jurists could disagree" on whether the Arkansas Supreme Court's decision affirming that ruling was inconsistent with this Court's decisions. *Richter*, 562 U.S. at 102. And under Section 2254(d), that is all that is required to uphold the state courts' decisions. The Eighth Circuit correctly held Dansby could not prevail under Section 2254(d).

B. The answer to the first question presented would not affect the outcome of Dansby's habeas proceedings.

Below, the Eighth Circuit did not directly address whether any Confrontation Clause violation in Dansby's case was prejudicial, because it held there was no violation. However, were this Court to grant review on the first question presented, find a Confrontation Clause violation, and remand to the Eighth Circuit to address prejudice, there is no doubt that the Eighth Circuit would hold that violation was not prejudicial and deny Dansby relief. That is because that court already has addressed the prejudicial effect of McDuffie's testimony in rejecting Dansby's *Brady* claim and held that its effect on Dansby's conviction and sentence was minimal—a holding on which Dansby declined to seek review. Review of the first question presented, therefore, would be futile.

Were this a direct appeal, finding a Confrontation Clause violation would not automatically entitle Dansby to relief; his conviction would still stand if the State proved the error was harmless beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 684. But in this habeas proceeding, a more stringent harmless-error rule applies: Dansby cannot obtain relief unless he shows that any error in his case "had a substantial and injurious effect" on the outcome. *Brown v. Davenport*, 142 S. Ct. 1510, 1523 (2022). That means he must at least persuade a habeas court there is "grave doubt" about whether the error affected the outcome. *Id.* at 1525.

The Eighth Circuit did not explicitly address whether the trial court's rulings on Dansby's cross-examination of McDuffie were prejudicial, because it found no error in the first place. But it did address the prejudicial effect of McDuffie's testimony in rejecting a different claim—Dansby's *Brady* claim that the prosecution concealed inducements they had allegedly offered to McDuffie in exchange for his testimony. Pet. App. 12a.

Because Dansby procedurally defaulted that claim, the Eighth Circuit addressed whether he could show cause and prejudice to excuse the default. It held there was not even "a reasonable probability" that presenting the allegedly suppressed McDuffie evidence would have affected either Dansby's conviction or sentence. Pet. App. 16a. Critically, it did not reason that the evidence would not have undermined McDuffie's credibility. Rather, it reasoned that undermining McDuffie's credibility, with whatever evidence, would not have affected the outcome.

At the guilt phase, it reasoned that McDuffie's evidence was "cumulative," noting that multiple witnesses testified that Dansby shot Brenda Dansby and Kimble and that he did not act in self-defense, and that Dansby himself told police he "just pulled [his] gun and started shooting" after an argument. Pet. App. 17a. As to the sentence, it concluded any error in connection with McDuffie's testimony was "harmless." Pet. App. 18a. The jury found no mitigating circumstances, and there was "no material connection between McDuffie's testimony" and the mitigating circumstances the defense suggested. Pet. App. 17a. It found two aggravating circumstances that were "unrelated to McDuffie's testimony": that he had committed a prior violent felony and created a risk of death or injury to third parties. *Id.* As to the third aggravating circumstance, that Dansby committed the murders in an especially cruel *or* depraved manner, "McDuffie's testimony bore only on the disjunctive alternative of depravity," and "[c]ruelty was established by [others'] testimony." *Id.* As McDuffie's testimony affected at most "only one of multiple aggravating factors, the absence of any mitigating factors strongly suggest[ed] that any error was harmless." Pet. App. 17a-18a.

Dansby has not sought review on the Eighth Circuit's factbound disposition of his *Brady* claim, and its holding that McDuffie's testimony did not affect Dansby's conviction or sentence. Nor has he asked this Court to address whether the Confrontation Clause violation he claims he suffered was prejudicial—an understandable omission, as the Eighth Circuit did not reach that question. Thus, were the Court to grant review on the first question and reverse, what would follow would be a preordained

remand on prejudice. As the Eighth Circuit has already held that McDuffie's testimony did not affect Dansby's conviction or sentence in rejecting his *Brady* claim, it would necessarily hold that any Confrontation Clause error regarding McDuffie's testimony was not prejudicial. Dansby cannot obtain relief from the review he seeks. The Court should deny the first question presented.

C. Dansby's alternative argument that the first question presented implicates a circuit split does not merit review.

After initially claiming that the Arkansas Supreme Court's disposition of the first question presented was contrary to clearly established law from this Court, Dansby acknowledges that "[l]ower courts require clarity" on the first question presented. Pet. 19. Whether or not he is correct that a shallow split of authority exists on whether trial courts may bar cross-examination on pending charges, Pet. 20-21, this is not the case to address that split, for two reasons.

First, as the Eighth Circuit held and as explained above, this is an AEDPA case, and Dansby may only obtain relief if "clearly established law" from this Court's precedents *already* resolves the first question presented in his favor. 28 U.S.C. 2254(d)(1). Second, in the extremely unlikely event that this Court granted review on the third question presented and held this is not an AEDPA case, this would still be an inappropriate vehicle to resolve any open question of Confrontation Clause law. For the Eighth Circuit below did not resolve any open questions of Confrontation Clause law; it solely addressed whether Dansby could prevail under existing, clearly established law. So to resolve the alleged split of authority on the first question presented, this

Court would need to act as a court of first, not last, review. Review of the first question presented should be denied.

III. The second question presented does not merit review.

The second question presented asks whether the Confrontation Clause entitles criminal defendants to introduce extrinsic evidence to impeach witnesses for bias. Pet. i. Dansby wisely does not claim he can prevail on that question under Section 2254(d). Pet. 21-23. For as this Court itself said a decade ago in summarily reversing a grant of habeas relief under Section 2254(d), "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). Instead, Dansby only claims there is a circuit split on the question.

Review of this question should be denied for many of the same reasons review of the first question presented should be denied. First, this is an AEDPA case, so the Court cannot decide it. All that can be said of the second question presented in this case is what the Eighth Circuit said: that the exclusion of extrinsic evidence was not contrary to clearly established law because this Court has never addressed the question. Pet. App. 10a. Second, even if it were not an AEDPA case, the Eighth Circuit believed it was, and therefore did not address the question, forcing this Court to act as a court of first review were it to take the question up. Indeed, Dansby does not even claim the Eighth Circuit has decided the question in *any* case, let alone his. Pet. 22-23 (collecting cases from nine other circuits). Third, like the first question presented, review of the second question presented would be futile. Whatever this Court might hold on whether limitations on Dansby's cross-examination of McDuffie were

permissible, the Eighth Circuit has already held that McDuffie's testimony did not affect Dansby's conviction or sentence, and Dansby has not sought review of that holding. Review of the second question presented should be denied.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

TIM GRIFFIN
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General
Counsel of Record

DYLAN L. JACOBS
Deputy Solicitor General

ASHER STEINBERG
Senior Assistant Solicitor General

JOSEPH KARL LUEBKE
Assistant Attorney General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

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