THIS IS A CAPITAL CASE

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

PETITIONER'S REPLY BRIEF

LISA G. PETERS
FEDERAL PUBLIC DEFENDER

JOHN C. WILLIAMS
Counsel of Record
STEPHANIE SMITH
Ass't Federal Public Defenders
1401 W. Capitol, Ste. 490
Little Rock, AR 72201
(501) 324-6114
john_c_williams@fd.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

PETITIONER'S REPLY BRIEF

What reason did Larry McDuffie have to lie about Ray Dansby making inflammatory jailhouse statements? Sure, McDuffie had worked as an informant a couple of times in the past. He even had a formal deal once. Tr. 906. But this wasn't one of those times. Though he was released on a signature bond three days after informing on Dansby, that wasn't because he was receiving any "special favors." Tr. 906, 909. McDuffie testified against Dansby because "[i]t's the right thing to do. Somebody has to hear [the victim's] side, you know. It's just right." Tr. 901.

That's what the jury heard, at least. The reality was far different. When McDuffie testified, he was under threat of prosecution for three different incidents. First was a felony cocaine charge carrying a minimum of three years in prison and a maximum of ten. This was the charge for which he was released after informing on Dansby. But there was much more to it than the jurors learned. They certainly didn't learn the nature of the charge itself, as the trial court expressly precluded that question. Tr. 907. For all they knew, McDuffie had relatively minor charges for which he would not have stayed in jail for long anyway. Nor did they learn that this charge *continued* to pend against him as he testified; he was not sentenced until *after* he completed his testimony against Dansby. Nor did they learn that he'd been re-arrested on the charge in the first place—and thus found himself in a position to inform on Dansby—because he'd failed to cooperate with the police. McDuffie's experience with the felony cocaine charge was a powerful lesson in the value of cooperation. So, when he was later arrested for disorderly conduct and again for

stabbing a bar patron—more charges that Dansby was not allowed to raise in cross-examination—he knew what was at stake if he did not testify. The authorities let McDuffie walk free after he accrued those charges. Would they treat him so favorably if he didn't come through on Dansby?

The jury never got to consider these issues because the trial court precluded *all* reference to pending charges and would not allow questions about preferential treatment on his arrests unless the defense could produce direct evidence of a *quid pro quo* agreement between McDuffie and the state. Whether McDuffie had served as a contract informant in other cases was tangential to the question of whether his legal jeopardy created a propensity to bias his testimony against Dansby. Likewise, information that McDuffie had been released from jail on an unspecified charge did not convey the legal peril he faced when he took the stand. The Confrontation Clause does not permit the trial court to block cross-examination on this point. The state court's holding otherwise was not only wrong, but unreasonably so. Nor was the error harmless, as Respondent suggests.

Though Dansby is entitled to relief even under an AEDPA posture, the Court should take the third question presented insofar as it thinks that the standard of review might be dispositive. The Eighth Circuit's opinion stretches the meaning of "adjudicated on the merits," and the rebuttable presumption is not the one-way ratchet that Respondent suggests.

A. Limitation on cross-examination of McDuffie for propensity for bias was both wrong and objectively unreasonable.

"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.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)) (alteration in original). By precluding *any* cross-examination on McDuffie's pending charges, the state court violated this precedent. This was not just an erroneous application of this Court's precedent—it was objectively unreasonable.

To get one thing out of the way, Respondent does not even attempt to defend the Eighth Circuit's reasoning for holding that no Confrontation Clause error arose from limiting the scope of McDuffie's cross-examination (as distinct from limitations on extrinsic evidence). That reasoning is, frankly, indefensible. In finding that Dansby was permitted to "inquire into 'evidence of guaranties of immunity or promises or leniency or any other consideration,'" App. 10a, the Eighth Circuit simply ignored that this permission was conditioned on proof of a *quid pro quo* agreement between McDuffie and the state. *See* Tr. 636–39. No agreement, no cross-examination. And there was no explicit agreement. The trial court, not counsel's ineptitude, prevented Dansby from cross-examining McDuffie about favorable treatment he received on his charges.

Moreover, the Eighth Circuit brushed over the trial court's unequivocal ruling that Dansby could not raise unadjudicated charges—that is, the three key incidents for which McDuffie faced legal jeopardy at the time of his testimony. It held summarily that the trial court had "properly ruled inadmissible" any testimony about "unadjudicated criminal activity." App. 11a. But the Eighth Circuit's opinion has essentially no analysis of the relevant Supreme Court precedent. Whether that precedent prevented the trial court from blocking cross-examination on McDuffie's propensity for bias arising from his legal peril is the very question in issue.

Turning to that question, there is very little daylight between what happened in this case and what happened in *Alford* and *Davis*. In *Alford*, the defendant was unable to cross-examine a witness about his detention at the time of trial, which might have shown the jury that his testimony was affected by "fear or favor." *Alford v. United States*, 282 U.S. 687, 693 (1931). *Davis* also involved a witness, a probationer, who had a propensity for bias because he was subject to government authority. The defendant's inability to question the probationer about his status and thus to "make a record from which to argue *why* [he] might have been biased" violated the Confrontation Clause. *Davis v. Alaska*, 415 U.S. 308, 318 (1974). These cases make clear that a witness has a "prototypical form of bias" when he testifies in the face of legal jeopardy. *Van Arsdall*, 475 U.S. at 680. And they also make clear that preclusion of that prototypical form of bias violates the Confrontation Clause.

Here, McDuffie testified while facing legal jeopardy for possessing cocaine and stabbing someone, not to mention additional misdemeanors. Those charges, as well

as the favorable treatment he'd received on them before his testimony, created powerful reason for him to exaggerate or to flat-out lie. What meaningful difference, really, is there between McDuffie and the witnesses in *Alford* and *Davis*?

Respondent argues that the difference is that *Alford* and *Davis* involved "total bars" on cross-examination for bias. BIO at 20. It is questionable whether Respondent accurately characterizes the cases; in *Davis*, the defendant got to engage in substantial cross-examination (even though he wanted more) and pulled from the witness that it had "crossed his mind" that he might be a suspect. *See Davis*, 415 U.S. at 312–13. In any case, Respondent then contends that Dansby cannot qualify for AEDPA relief, at least, because he got to ask McDuffie whether he had been a confidential informant or had been released from jail. The Court should not be fooled by this interpretive move. The trial court precluded all testimony on the subject that mattered: whether McDuffie's legal jeopardy at the time of trial influenced his testimony.

Whether McDuffie had previously served as a confidential informant had little if anything to do with his propensity for bias at trial. The fact that he had been in jail was an unavoidable feature of his informant status, as Respondent comprehends. The jury learned that McDuffie had been released from jail after informing on Dansby. That's it. For all they knew, he was an otherwise upstanding citizen who had a minor run-in with the law and who would have been released anyway. Their view would have been much different had they learned that McDuffie was providing his testimony in the face of unresolved charges for possessing cocaine and stabbing

a man. The trial court's complete ban on this specific propensity for bias is what draws Dansby's case directly into line with *Alford* and *Davis*. As in those cases, the prosecutor was able to cast McDuffie as "apparently blameless," *Davis*, 415 U.S. at 318—someone who testified because of a moral imperative rather than an expectation of personal favor. Had the truth been raised on cross-examination, "[a] reasonable jury might have received a significantly different impression of [McDuffie's] credibility." *Van Arsdall*, 475 U.S. at 680.

To comprehend the error of Respondent's argument, consider a hypothetical witness who has *two* demonstrable propensities for bias: not only does he face pending charges, but he's the brother of the crime victim. Say that the trial court allowed the defense to bring out that the witness was the victim's brother, but declines, as in Dansby's case, to permit questioning on the pending charges. Under Respondent's rule, there could be no unreasonable application of *Alford*, *Davis*, or *Van Arsdall*. That cannot be right. Those cases prohibit bans on cross-examination into a witness's legal jeopardy, regardless of whether the trial court permits cross-examination on some other fact that might lead to an inference of bias.

Respondent points out that trial courts have wide latitude to impose reasonable limits on cross-examination. BIO at 22. However, as established above, those limits cannot prevent a defendant from cross-examining a witness about whether he is testifying under threat of legal jeopardy. *See also Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (finding that trial court's acknowledged discretion did not "justify

exclusion of cross-examination with such strong potential to demonstrate the falsity of [the witness's] testimony").

Finally, Respondent argues that there can be no unreasonable application of federal law because "this Court has never addressed the precise kind of bias impeachment" Dansby raises. BIO at 22. As the argument goes, earlier cases involved cross-examination about custodial status (*Alford*) and probationer status (*Davis*), not pending charges (this case). Because of that difference, there is no clearly established federal law for the state courts to have unreasonably applied, as in *Nevada v. Jackson*, 569 U.S. 505 (2013) (per curiam).

This argument should fail. The existence of such minute factual distinctions between cases does not mean an absence of clearly established federal law. As explained above, in Dansby's case as in these other cases, the court precluded cross-examination that would have informed the jury of the witness's legal peril, and thus his propensity for biased testimony. And citation to *Jackson* is inapt. *Jackson* held that *Olden*, *Van Arsdall*, and *Davis* concerned cross-examination rather than admission of extrinsic evidence, and thus could not clearly establish that precluding extrinsic evidence violates a prisoner's right to present a complete defense. *Jackson*, 569 U.S. at 511–12. Of course, Dansby's Question 1 concerns limits on cross-examination. The cases discussed above speak directly to that point.

In sum, by preventing Dansby from inquiring into McDuffie's pending charges and favorable treatment on recent arrests, the trial court precluded the very sort of cross-examination to which a defendant is constitutionally entitled under *Alford*,

Davis, and *Van Arsdall*. The trial court's ruling violated the Confrontation Clause, and the Eighth Circuit erred in concluding that the state courts did not unreasonably apply clearly established federal law.

B. The Confrontation Clause error was not harmless as to the death sentence.

Dansby's inability to cross-examine McDuffie on propensity for bias casts grave doubt on the jury's death sentence—contrary to Respondent's argument that the Eighth Circuit has already decided this issue in the context of his *Brady* claim. The manner in which the Eighth Circuit would rule on harmless error after any remand is not as clear cut as Respondent would suggest. The Eighth Circuit's brief analysis of prejudice as it relates to a separate claim does not account for the specific factors this Court has laid out for harmlessness in the context of Confrontation Clause error. Nor does it account for the specific features of the Arkansas sentencing scheme. Nor does it account for specific factors in this record—especially the prosecutor's heavy emphasis on McDuffie's purportedly "credible" tale of Dansby's remorselessness. Moreover, it is within the Court's discretion to find that the error is not harmless now, should it choose to do so. Review of Question 1 is not futile.

The Eighth Circuit's analysis of prejudice as it relates to Dansby's death sentence was limited to one paragraph in relation to a separate *Brady* claim arising out of suppression of unwritten inducements that the prosecutor gave McDuffie for his testimony. *See* App. 11a–12a. The court first found the *Brady* claim defaulted, then found that there was no cause to excuse the default. App. 12a–16a. Though these rulings rendered any comment on prejudice superfluous, the court spent a

paragraph on prejudice as it relates to the sentence. It found that though McDuffie's testimony went to one of the three aggravating factors, the jury might have still found that aggravating factor based on different evidence and under a different theory. App. 17a. It also found that cross-examination of McDuffie would not have established any mitigating factors. *Id.* It then concluded that the absence of mitigating factors in the presence of other aggravators "strongly suggests that any error was harmless." App. 17a–18a. This analysis is flawed and incomplete as it relates to harmlessness of Confrontation Clause error.

Respondent does not acknowledge that this Court has instructed lower courts to consider specific factors when assessing whether a Confrontation Clause error is harmless. Those include "the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684. Understandably, the Eighth Circuit did not consider these factors because it did not assess whether the Confrontation Clause error was harmless.

Analysis of these factors shows that the error is not harmless because there is "grave doubt" about whether the restrictions on McDuffie's cross-examination had a "substantial and injurious effect or influence in determining the jury's [death] verdict." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). McDuffie was incredibly important to the state's case for death. As there were already two eyewitnesses to

the crime, there was little need for the state to present him to establish the facts necessary to the conviction. But without that testimony, the circumstances of the offense were much murkier—an emotional lovers' quarrel where everyone was armed and everyone was on edge. The point of McDuffie's testimony was to not to convince the jury of what Dansby *did*, but rather to convince them of *who he was*: a remorseless killer who made his wife beg for mercy before he shot her.

The importance of McDuffie's testimony is apparent in its timing: the final witness in the guilt phase, a witness who was sure to seal the prosecutor's narrative and to leave an impression on the jurors if only by virtue of recency. It is apparent in the way the prosecutor bolstered McDuffie's credibility and pure motives at both phases of the trial. Tr. 1014–17, 1158. And it is apparent in the prosecutor's summary of why she thought Dansby deserved death:

> 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?"
>
> 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. 1158–59. McDuffie, in short, was the only witness who could portray Dansby's act as a coldblooded murder—the very sort for which the death penalty exists.

Insofar as the Eighth Circuit's single paragraph on sentencing-phase prejudice is relevant to this analysis, it contains several crucial errors.

First, the Eighth Circuit stated that McDuffie's testimony goes only to the "depraved" element of the "cruel and depraved" aggravating factor. App. 17a. That is wrong. McDuffie's testimony was also the prime evidence suggesting that the crime was "cruel" because it established the "victim's uncertainty as to his or her ultimate fate." Ark. Code Ann. § 5-4-604(8)(B)(ii)(a). No one else depicted Ronnie Kimble moaning as Dansby repeatedly kicked and shot him. Tr. 897. No one else depicted Brenda Dansby begging, "Ray, please don't kill me," as Dansby approached her outside. *Id.*

Second, the Eighth Circuit saw no connection between McDuffie's testimony and the proposed mitigating factors, which it catalogued as "Dansby's personal life and characteristics, criminal history, moral culpability, or subsequent cooperation with police." App. 17a. But McDuffie's testimony severely undercut the first mitigating circumstance proposed, which was that Dansby acted "under extreme mental or emotional disturbance." Tr. 314. Presumably this is a key reason the prosecutor relied on McDuffie so heavily to undercut any narrative that Dansby might have been defending himself, even mistakenly or emotionally, from other persons armed: "[Y]ou should believe Larry McDuffie and especially believe Larry McDuffie when he tells you that once in jail he heard Ray [say], "You know, I should've picked up that boy's gun and shot it five times at the door to make it look like self defense. I didn't think about it in time." Tr. 1017.

Finally, the Eighth Circuit failed to recognize that in Arkansas the decision between death and life is not a mechanistic weighing of aggravators against

mitigators. Rather, the law requires the jury (and required Dansby's jury) to determine whether the "[a]ggravating circumstances justify a sentence of death beyond a reasonable doubt." Ark. Code Ann. § 5-4-603(a)(3); Tr. 311. In assessing harmlessness, a federal court must account for the relevant features of the state's sentencing scheme. *See Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020) (per curiam). It was McDuffie's testimony that gave Dansby's crime all the features of death-worthiness and established the factual premises for the cruelty aggravator. The Court should be left in grave doubt that the jury would have found that the aggravators justified death beyond a reasonable doubt had Dansby been permitted to establish McDuffie's propensity for bias through cross-examination.

The Court may decide for itself that the Confrontation Clause error was not harmless because that issue is a "subsidiary question fairly included" in the questions presented. Rule 14.1(a); *cf. Olden*, 488 U.S. at 233 (deciding harmlessness question in the first instance). Regardless of whether the Court does so, the Eighth Circuit's one-paragraph discussion of *Brady* prejudice does not render review futile.

C. The AEDPA question is worthy of review.

Respondent frontloads the AEDPA question, believing that application of 28 U.S.C. § 2254(d) means that review of Question 1 is futile. As argued above, that is not so.[1] The Court could grant review on Question 1 and still provide Dansby relief under the AEDPA standard. Frankly, the Court could dispose of the case by

[1] Dansby concedes that he can succeed on Question 2, concerning extrinsic evidence, only if AEDPA does not apply.

granting the petition and summarily reversing the Eighth Circuit's analysis of the claim under AEDPA. However, if the Court grants plenary review on Question 1, it should also grant review on Question 3. The merits are not particularly close under *de novo* review—there was plainly a Confrontation Clause error—and the Court should address the standard of review if it thinks that standard may make a dispositive difference. Granting review on Question 3 would also provide some needed guidance on the circumstances in which the presumption of a state-court merits adjudication is rebutted.

Dansby agrees with Respondent on one point: that he presented his claim to the Arkansas Supreme Court by arguing that the trial court's restrictions on "testimony" must be weighed against his Confrontation Clause rights. *See* BIO at 12. But Dansby disagrees with Respondent's general statements about the rebuttable presumption and its take on whether the presumption is rebutted here.

Respondent is incorrect that "this Court has only definitively indicated that the presumption would be rebutted if a petitioner failed to 'fairly present' his claim in state court." BIO at 12 (citing *Johnson v. Williams*, 568 U.S. 289, 302 n.2 (2013)). The *Johnson* rule is not a one-way ratchet that applies only to establish procedural default but not to allow for *de novo* review of a fairly presented claim. *Johnson* itself establishes as much: "When the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, § 2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge." *Johnson*, 568 U.S. 289, 303 (2013).

Dansby can make that very clear case here. One piece of the proof is that the Arkansas Supreme Court titled the subheading under which it addressed this challenge as "Credibility of state's witness—McDuffie." *Dansby v. State*, 893 S.W.2d 331, 338 (Ark. 1995). Notably, this heading said nothing to indicate that the Court understood itself to be deciding the relevant constitutional issue—whether Dansby had the right to cross-examine McDuffie on his *propensity for bias* arising from the trouble he faced on his pending charges. On that question, the Arkansas Supreme Court said only that "Dansby was allowed to explore the area of bias" because McDuffie "did not deny that he had been a confidential informant for the police, and further admitted that he had signed a contract with law enforcement." *Id.* at 339. The opinion is silent about whether the Dansby should have been allowed to cross-examine on McDuffie's legal jeopardy or favorable treatment.

The opinion otherwise focuses on whether Dansby should have been allowed to present extrinsic evidence. Phrasing this as the "credibility question," it says nothing about the Confrontation Clause and instead applies a state evidentiary rule prohibiting use of extrinsic evidence to show "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime." *Id.* at 338. Notably, this evidentiary rule is "*less* protective" than the federal constitutional standard. *Johnson*, 568 U.S. at 301. To support its application of that evidentiary rule, the opinion cites a state case, *Biggers v. State*, 878 S.W.2d 717 (Ark. 1994), that likewise focuses on the state evidentiary rule concerning extrinsic evidence. When that case briefly mentions the Confrontation

Clause, it says that the Clause does not require introduction of extrinsic evidence to prove character. *See Biggers*, 878 S.W.2d at 722. It says nothing about the relevant constitutional question here—whether a defendant is entitled to cross-examine on a prototypical form of bias, as opposed to character or general credibility.

Finally, regardless of whether other circuits' statements on the rebuttable presumption amount to holding or dicta, they exhibit a markedly different understanding of *Johnson* than the Eighth Circuit exhibited here. Where a state court relies on state standards that depart from the federal standard governing the petitioner's claim, these courts would find the presumption of a merits adjudication rebutted. And regardless of what the other circuits have said, the Eighth Circuit's handling of the rebuttable presumption here was wrong.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

MAY 19, 2023

Respectfully submitted,

LISA G. PETERS
FEDERAL PUBLIC DEFENDER

JOHN C. WILLIAMS
Counsel of Record
Ass't Federal Public Defender
1401 W. Capitol, Ste. 490
Little Rock, AR 72201
(501) 324-6114
john_c_williams@fd.org

Counsel for Petitioner