

No. 17-1404

In the Supreme Court of the United States

◆◆◆
JIMMIE GORDON, PETITIONER

v.

BLAINE LAFLE, WARDEN

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

BRIEF IN OPPOSITION

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Raina Korbakis
Assistant Attorney General
Criminal Appellate Division

Attorneys for Respondent

QUESTION PRESENTED

Whether the Michigan trial court's denial of relief on Gordon's judicial-bias claims was an "extreme mal-function" where there is no clearly established federal law holding that an appearance of bias alone violates due process, and where Gordon in any event cannot show that probability of actual bias was too high to be constitutionally tolerable.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The petitioner is Jimmie Gordon, a Michigan prisoner. The respondent is Blaine Lafler, warden of a Michigan correctional facility.

TABLE OF CONTENTS

Question Presented.....	i
Parties to the Proceeding	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Introduction	1
Statement of the Case	4
A. Jimmie Gordon is convicted of first-degree murder, felonious assault, and felony firearm.....	4
1. Unarmed Francois Walker is shot in the back, across the street from Gordon’s house.....	4
2. Gordon’s four-day trial was contentious from the start.....	7
B. Gordon unsuccessfully seeks relief in the Michigan trial and appellate courts.....	13
C. The district court and court of appeals deny habeas relief.	15
Reasons for Denying the Petition.....	18
I. The court of appeals’ opinion does not conflict with this Court’s precedent.....	18
A. The court of appeals correctly found that no clearly established federal law holds that an appearance of bias alone violates due process.	19

B. The court of appeals correctly found that even on de novo review Gordon’s judicial-bias claims fail.	24
II. The court of appeals’ decision is not an outlier among the circuits.	28
III. This case would be a poor vehicle to address the questions presented.	33
Conclusion.....	35

TABLE OF AUTHORITIES

Cases

<i>Aetna Life Ins. Co. v. Lavoie</i> , 475 U.S. 813 (1986)	20
<i>Alston v. Smith</i> , 840 F.3d 363 (7th Cir. 2016)	31
<i>Anderson v. Harless</i> , 459 U.S. 4 (1982)	33
<i>Burt v. Titlow</i> , 571 U.S. 12 (2013)	18
<i>Caperton v. A.T. Massey Coal Co.</i> , 556 U.S. 868 (2009)	passim
<i>Davis v. Jones</i> , 506 F.3d 1325 (2007)	21, 29
<i>Del Vecchio v. Illinois Dep’t of Corrections</i> , 31 F.3d 1363 (7th Cir. 1994)	29
<i>Gordon v. Lafler</i> , 710 F. App’x 654 (6th Cir. 2017)	1
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	2
<i>House v. Hatch</i> , 527 F.3d 1010 (10th Cir. 2008)	23
<i>Hurles v. Ryan</i> , 752 F.3d 768 (9th Cir. 2014)	31
<i>In re Murchison</i> , 349 U.S. 133 (1955)	20
<i>Johnson v. Carroll</i> , 369 F.3d 253 (3rd Cir. 2002)	29

<i>Jones v. Luebbbers</i> , 359 F.3d 1005 (8th Cir. 2004)	31
<i>Liteky v. United States</i> , 510 U.S. 540 (1994)	3, 24, 25, 28
<i>Lopez v. Smith</i> , 135 S. Ct. 1 (2014)	23
<i>Mayberry v. Pennsylvania</i> , 400 U.S. 455 (1971)	20
<i>Offutt v. United States</i> , 348 U.S. 11 (1954)	27
<i>People v. Gordon</i> , 808 N.W.2d 767 (Mich. 2012).....	15
<i>People v. Gordon</i> , No. 300247, Order (Mich. Ct. App. July 20, 2011).....	15
<i>Quercia v. United States</i> , 289 U.S. 466 (1933)	26
<i>Rippo v. Baker</i> , 137 S. Ct. 905 (2017)	22
<i>Suh v. Pierce</i> , 630 F.3d 685 (7th Cir. 2011)	30
<i>Trevino v. Thaler</i> , 569 U.S. 413 (2013)	33
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927)	20, 21, 23
<i>Ungar v. Sarafite</i> , 376 U.S. 575 (1964)	26
<i>United States v. Betts-Gaston</i> , 860 F.3d 525 (7th Cir. 2017)	32

<i>United States v. Lanza-Vazquez</i> , 799 F.3d 134 (1st Cir. 2015).....	32
<i>United States v. Laureano-Perez</i> , 797 F.3d 45 (1st Cir. 2015).....	31
<i>United States v. Tipton</i> , 11 F.3d 602 (6th Cir. 1993)	32
<i>Ward v. Monroeville</i> , 409 U.S. 57 (1972)	20
<i>Weeks v. Angelone</i> , 528 U.S. 225 (2000)	28
<i>White v. Woodall</i> , 134 S. Ct. 1697 (2014)	22, 23
<i>Williams v. Pennsylvania</i> , 136 S. Ct. 1899 (2016)	22
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975)	19, 26
<i>Woods v. Donald</i> , 135 S. Ct. 1372 (2015)	18, 23

Statutes

28 U.S.C. § 455(a)	24
28 U.S.C. § 2254(d)(1)	18
28 U.S.C. § 2254(d)(2)	18
Mich. Comp. Laws § 750.227b.....	4
Mich. Comp. Laws § 750.316(1)(a)	4
Mich. Comp. Laws § 750.82.....	4

Rules

Mich. Ct. R. 6.508(D)	15
-----------------------------	----

OPINIONS BELOW

The amended unpublished opinion of the Sixth Circuit, Pet. App. 1a-23a, is reported at *Gordon v. Lafler*, 710 F. App'x 654 (6th Cir. 2017). The Sixth Circuit's decision unanimously denying rehearing en banc is also unpublished. Pet. App. 82a-83a. The district court's opinion and order denying habeas relief, Pet. App. 24a-69a, is not reported, but is available at 2015 WL 1600414.

Gordon first raised the claims before this Court in his state post-conviction motion for relief from judgment. The state court's order denying that motion, which is the last reasoned state-court decision, is unreported. Pet. App. 72a-81a.

JURISDICTION

The State of Michigan accepts Gordon's statement of jurisdiction and agrees that this Court has jurisdiction over the petition.

INTRODUCTION

A Michigan jury convicted petitioner Jimmie Gordon of one count of first-degree premeditated murder and two counts of felonious assault. Gordon argued self-defense but the jury didn't buy it, perhaps because the unarmed murder victim's body was found across the street from Gordon's house with a gunshot wound to the back, or because, rather than call the police, Gordon fled the scene and dumped his assault rifle in the trash. In any event, years later, on post-conviction review, Gordon argued for the first time

that his conviction resulted from bias on the part of the trial judge against his attorney. The state and federal courts denied him relief.

Gordon presents this as an opportunity to resolve whether this Court's decisions "clearly establish" that a judge must be free from not only actual bias but also an appearance of bias. Pet. vii. But this Court's review is unnecessary: the decision below is consistent with this Court's precedents, no circuit split exists, and procedural hurdles make this a poor vehicle in any event.

First, and most importantly, AEDPA applies, and the state court decision does not unreasonably apply, let alone conflict with, any decision of this Court. He attempts to evade his high burden under AEDPA by asserting the state court applied the wrong standard, but that is not correct; this Court has applied a standard under which something less than actual bias could violate due process in only a limited type of circumstances—and Gordon's case implicates none of those circumstances. At best, he alleges only personal bias, which this Court has repeatedly said is alone not enough to rise to a constitutional violation.

Gordon also ignores that this Court's holdings, not dicta, are what matter for determining what is "clearly established" under AEDPA, and that those holdings are narrowly construed. Under AEDPA, he cannot show that the state-court ruling was malfunction, let alone an extreme one. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (federal habeas review exists as a guard against extreme malfunctions in the state criminal-justice systems).

But it gets worse for Gordon. To grant him relief, this Court would also need address an additional question: whether the court of appeals erred in alternatively denying relief on de novo review. And the cases Gordon cites as most factually analogous to his undercut his judicial-bias claims. The burden for showing judicial bias based on judicial rulings and remarks is a high one: they must reflect a “deep-seated favoritism or antagonism as to make fair judgment impossible.” *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis added). “[E]xpressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometime display,” are insufficient to establish bias. *Id.* at 555-56. That’s exactly what occurred in Gordon’s case. Many of the challenged remarks by the trial judge were in response to defense counsel’s obstinate behavior, which included interrupting and arguing with the judge, accusing the judge of being biased in front of the jury, and challenging the court’s authority. The court of appeals correctly concluded that the judge’s remarks—even though at times “inappropriate” or “lacking in tact”—were “outside of the realm of unconstitutional conduct” even on de novo review. Pet. App. 20a-21a.

Gordon has not shown the usual indicia that a case warrants this Court’s review: there is no circuit split; indeed, the unpublished decision will not even control within the circuit. And this case does not present a good vehicle to address the questions presented because there are procedural hurdles this Court must first address. This Court should deny the petition.

STATEMENT OF THE CASE

A. Jimmie Gordon is convicted of first-degree murder, felonious assault, and felony firearm.

Over 13 years ago, a Michigan jury found Jimmie “Pac-man” Gordon guilty of first-degree (premeditated) murder, Mich. Comp. Laws § 750.316(1)(a), two counts of felonious assault, Mich. Comp. Laws § 750.82, and one count of possessing a firearm during the commission of a felony (felony-firearm), Mich. Comp. Laws § 750.227b. The trial court sentenced Gordon to prison for life for the murder conviction, 17 months to 4 years for each assault conviction, and two years for the felony-firearm conviction.

1. Unarmed Francois Walker is shot in the back, across the street from Gordon’s house.

Gordon’s convictions stemmed from the October 16, 2004 fatal shooting of 17-year-old Francois Walker, in Detroit, Michigan. Gordon fired multiple shots at Francois, at Francois’s mother Latrell Todd, and at Francois’s sister Fallon Walker. Gordon missed hitting the women but Francois was not as lucky: he died from a single gunshot to the back.

The shooting took place after an earlier physical confrontation, at another location, between Francois’s sister and Gordon’s girlfriend, Ebony Jackson. When Francois and his mother went to pick his sister up, she was bleeding and her purse and cell phone were missing. They talked to the police. 2/14/05 Trial Tr. 88-92. The trio then went to the house where the

confrontation occurred to retrieve the sister's belongings, and another argument ensued. Francois, his mother, and his sister ultimately left without the sister's purse and cell phone. *Id.* at 92-93.

On their way home, Francois's sister saw a car parked on the street in front of Gordon's house, where she believed her purse may be. She pulled her SUV up next to the car, and the trio began to look for the purse. Gordon came out and said, "I know y'all didn't come to my house with this Ebony bullshit." 2/14/05 Trial Tr. 95-98. Francois's mother then asked him to get Francois's sister's purse, explaining that her keys were in it, and Francois asked, "[w]here those bitches that did this to my sister?" Gordon muttered something and then ran into his house; Francois's mother thought he was going to get the purse.

Instead, Gordon emerged with an assault rifle and began shooting. Francois, unarmed and in the street, was hit in the back. Gordon's multiple shots missed Francois's mother and sister, who were ducking for cover in between the vehicles. *Id.* at 99-105. After realizing that her son was shot, Francois's mother confronted Gordon, demanding to know why he shot Francois when Francois didn't have a gun. Gordon replied, "[h]e shouldn't have ran up on me" and "I'm Pac-Man motherf--er," before running from the scene and throwing his rifle in a trashcan. *Id.* at 106-08, 116, 186; 2/16/05 Trial Tr. 180-81.

Francois's sister corroborated much of her mother's testimony about what happened after she spotted the car she thought contained her purse. Gordon came out, then disappeared, then came back outside with a long gun, waived it from side to side, and

began shooting at them. When the shooting stopped, her brother was dead. Francois was not armed, and he never ran up on Gordon or went up to his house. *Id.* at 23-35, 45-46, 67.

Gordon's mother, who testified for the prosecution, came out of the house after the shooting. 2/14/05 Trial Tr. 109-10; 2/15/05 Trial Tr. 37. She saw Gordon standing on the sidewalk with a rifle; she also saw two women outside and Francois stumbling against a curb across the street. 2/14/05 Trial Tr. 204-07. At one point, she heard Gordon say "Who is you—who was you all? Why you running up on me?" *Id.* at 208-09.

The physical evidence, including the location of Francois's body and the vehicles, also corroborated his mother's and sister's version of events. The six cartridges found at the scene were fired from the same weapon—an assault rifle. 2/15/05 Trial Tr. 85-86; 2/16/05 Trial Tr. 19.

In addition to other defense witnesses, Gordon testified in his own defense. His story was that he was attacked by two men and, after his attackers left, he went inside, got his rifle and went back outside because he was in fear; he then "heard some shots" and "returned fire back." 2/16/05 Trial Tr. at 169-75. But Gordon admitted that he never saw anyone shooting, even though he said the shots were coming from behind the SUV parked directly in front of his house. *Id.* at 186-87. There was also no physical evidence that anyone else was shooting at him, or that anyone else had a weapon. Gordon's conduct that night was also suspect: he did not call the police after the alleged attack on his home, nor did he after the shooting say anything about being attacked and believing he

needed to protect himself and his family, or that the shooting was accidental. Gordon also did not wait for the police to arrive. Instead, he took off running and dumped his assault rifle in a trash can. *Id.* at 178-81.

The jury rejected Gordon's self-defense claim and found Gordon guilty after just two hours of deliberating. But the verdict wasn't for lack of effort by defense counsel—who, as discussed below, was an aggressive, and at times overzealous, advocate.

2. Gordon's four-day trial was contentious from the start.

On the first day of trial, defense counsel asked the judge to prevent the prosecutor from stating that she represents the People of the State of Michigan. When the judge responded that the caption of the case was the People of the State of Michigan, not the People of Wayne County, defense counsel responded, "[i]t's miscaptioned then." Defense counsel then accused the judge of engaging in certain "behavior" by denying his motion to restrict the prosecution's reach. 2/14/05 Trial Tr. 5-9. During the prosecutor's opening remarks, defense counsel objected to the prosecutor's words, interrupting the judge as he ruled that they were "just adverbs" and "adjectives" and that there was "nothing inflammatory" about them. *Id.* at 69-71.

Throughout the trial, defense counsel bickered with and interrupted the judge. When the judge ruled on an objection, defense counsel argued with the judge, causing him to inform counsel that "[i]f the Court says something is not relevant, you can't tell me it is. I made the ruling." When defense counsel responded by stating "I do have the right to argue," the

judge informed him that “your right to argue stopped when the Court makes a ruling.” 2/14/05 Trial Tr. 145-47. But defense counsel continued to argue with, interrupt, and disagree with the judge about rulings throughout the trial. 2/14/05 Trial Tr. 209-11; 2/15/05 Trial Tr. 118-19; 2/16/05 Trial Tr. 55-56, 61-62, 75, 85-86, 96, 139-40.

Defense counsel also argued with witnesses, which frustrated the judge. When the court at one point asked defense counsel if he had another question for the witness and counsel responded, “Judge, I have a right --,” the judge informed counsel that he had “a right to do one thing right now . . . to sit down, so would you please sit down.” 2/14/05 Trial Tr. 155-56. When the judge later found that defense counsel was arguing with another witness, counsel denied arguing and said he was correcting a mistake. 2/16/05 Trial Tr. 44-45. Defense counsel also interrupted the prosecutor and admonished her to not talk directly to him: “You talk to the judge.” *Id.* at 50.

Defense counsel interrupted and argued with the judge again when he permitted the victim’s mother and other witnesses to remain in the courtroom after they testified. 2/14/05 Trial Tr. 166-68. Defense counsel renewed his objection the next day for another witness but the judge explained he had already ruled. 2/15/05 Trial Tr. 80-81. A few minutes later, defense counsel objected on the same basis again, out of the jury’s presence, and the judge noted his objection. *Id.* at 99-103.

At one point when a witness asked to see his prior statement and the judge directed counsel to give it to the witness, the judge asked defense counsel why he

had to argue about everything. 2/14/05 Trial Tr. 197. Out of the presence of the jury, defense counsel also accused the court and prosecutor of engaging in an ex parte conversation when he was not in the courtroom; the prosecutor apparently asked the judge in defense counsel's absence whether the next witness could be declared hostile. When defense counsel objected to the ex parte communication, the judge asked counsel—before the jury came out—whether he had any more accusations. *Id.* at 202-03.

At another point, defense counsel asked a question that apparently evoked laughter in the courtroom; defense counsel said he did not see anything funny about his question. The judge assured defense counsel that he was not laughing but counsel complained that the judge had not stopped others from laughing. The judge told defense counsel to stop the “battering back and forth,” to continue his cross-examination, to remember that only the court makes the rulings and that counsel could do only what the court said he had a right to do. 2/14/05 Trial Tr. 220-21.

Defense counsel accused the judge of bias. The judge, frustrated that defense counsel made such an allegation in front of the jury, warned that if counsel did that again, he would be held in contempt. 2/15/05 Trial Tr. 72-73. Later, defense counsel objected to a diagram that he said the judge admitted without asking if he had an objection. The judge asked defense counsel if he was chastising the court, then asked defense counsel to be “more diplomatic” in his tone and asked if they taught legal courtesy in law school. The judge explained that he was trying to be patient and courteous with counsel and instructed counsel to not

chastise the court. 2/16/05 Trial Tr. 51-52. The judge's questions revealed frustration with defense counsel's tone, which even counsel agreed was less than diplomatic.

That same frustration and irritation was reflected in the judge's remark that defense counsel made a false statement. On the last day of trial, the prosecutor in rebuttal explained that she put the evidence technician on the witness stand last not to hide anything but because she could not locate him sooner. Defense counsel objected because "that's not part of any record." As the judge began to explain, defense counsel interrupted with a direct challenge to the court's authority: "How dare you, Judge How dare you do that." It was then that the judge told defense counsel to never say that to him again and said he would tell the jury because counsel was the one who brought it up and made a false statement. Defense counsel objected, and the judge excused the jury. 2/17/05 Trial Tr. 65-66.

Out of the jury's presence, the exasperated judge then stated that in his 27 years on the bench, defense counsel was "one of the most obnoxious" and "overbearing" attorneys that he has tried a case with. The judge noted that defense counsel complained to the jury that the prosecutor was being devious because a witness was not called until last, despite defense counsel knowing "darn well that we adjourned court one day because that witness was in another courtroom and was not available." The judge said he was going to "tell the jury the truth," and, still out of the

jury's presence, found counsel in contempt.¹ Defense counsel repeatedly interrupted the judge during this colloquy. When the jury returned to the courtroom, the judge informed them that "there were some remarks about the evidence technician in this case being placed last for whatever reason" and that "the truth of the matter is that we were here one day and the evidence technician was testifying elsewhere" and "that's why he wasn't called that day." 2/17/05 Trial Tr. 65-70.

Despite defense counsel's recurring behavior, the judge ruled in defense counsel's favor multiple times. For instance, the judge recognized defense counsel's absolute right to object for purposes of the record, 2/14/05 Trial Tr. at 6-9, and sustained a number of defense counsel's objections. See, e.g., 2/14/05 Trial Tr. 190-91 (sustaining defense counsel's objections to prosecutor's lack of foundation for a question); 2/15/05 Trial Tr. 47 (sustaining defense counsel's objection to prosecutor's leading question); 2/16/05 Trial Tr. 7 (sustaining defense counsel's objection to prosecutor's request to have a witness declared an expert); *id.* at 25 (sustaining defense counsel's objection to a witness's speculative testimony); *id.* at 85, 88-89 (sustaining defense counsel's hearsay objections).

The judge also overruled many of the prosecutor's objections to defense counsel's questions and tactics. See, e.g., 2/14/05 Trial Tr. 4-5 (telling prosecutor that

¹ This judge's first-ever finding of an attorney in contempt was short-lived; less than 45 minutes later, the judge now accused of personal bias rescinded the \$100 contempt-of-court fine, stating that he merely wanted defense counsel to behave. 2/17/05 Trial Tr. 96.

the court could not stop defense counsel from calling a particular witness and to “just make her objections”); *id.* at 9-10 (rejecting prosecutor’s request to instruct Gordon’s supporters not to talk about the case in the hallway); *id.* at 135, 152-53 (rejecting prosecutor’s objections of mischaracterization); *id.* at 178, 180 (overruling prosecutor’s hearsay objections); *id.* at 212 (overruling prosecutor’s objection to relevance of question about Gordon’s nickname); 2/15/05 Trial Tr. 56, 88 (overruling prosecutor’s objections to defense counsel’s questions to Gordon’s sister and firearms expert); *id.* at 159 (overruling prosecutor’s objection to defense counsel’s question about what a witness saw); 2/16/05 Trial Tr. 47, 50-51, 54 (overruling prosecutor’s objections and allowing defense counsel to continue his recross examination of witness); *id.* at 96-99 (overruling prosecutor’s objections, including an objection that defense counsel was arguing and screaming at a witness, and allowing defense counsel to continue his cross-examination of witness); *id.* at 118 (overruling prosecutor’s relevancy objection); *id.* at 119 (*sua sponte* objecting to question asked by prosecutor).

The judge also at times interrupted or expressed frustration with the prosecutor. See, e.g., 2/14/05 Trial Tr. 188 (telling prosecutor to “[l]et me make the ruling” after prosecutor interrupts); *id.* at 227, 231 (telling prosecutor that witness had already answered the question); 2/16/05 Trial Tr. 54 (telling prosecutor that she’s “making the matter worse”).

In addition, the judge at times allowed defense counsel to proceed even when he apparently thought counsel had violated the rules of evidence. Pet. App. 37a; see, e.g., 2/14/05 Trial Tr. 212 (allowing defense

counsel to proceed even though question had been asked and answered); *id.* at 223 (stating in response to prosecutor’s relevance objection, “I’m just tired of battering back and forth and arguing, I’m just going to give him carte blanche.”); 2/16/05 Trial Tr. 117 (overruling prosecutor’s hearsay objection even though it was hearsay); *id.* at 118-19 (permitting “totally irrelevant” testimony elicited by defense counsel to be admitted); *id.* at 134, 165, 189 (allowing defense counsel to lead a witness); *id.* at 169 (allowing defense counsel to proceed despite the way he characterized someone’s conduct). The judge also permitted defense counsel to recall any witnesses he wanted, 2/15/05 Trial Tr. 160, and to have the prosecution produce the witnesses that defense counsel requested. *Id.* at 203-06. The judge also granted most of defense counsel’s requests for specific jury instructions. 2/16/05 Trial Tr. 192-93; 2/17/05 Trial Tr. 95-97.

At the conclusion of trial, the jury deliberated for some two hours and found Gordon guilty as charged. The judge sentenced Gordon as noted above.

B. Gordon unsuccessfully seeks relief in the Michigan trial and appellate courts.

The state courts affirmed Gordon’s convictions on direct appeal. Gordon first raised the claims currently before this Court in a post-conviction motion for relief from judgment. The state-court judge—a *different* judge than the one who presided over Gordon’s trial—held an evidentiary hearing on those claims, where a number of witnesses testified, including Gordon’s appellate and defense counsel.

Gordon's appellate counsel testified that he did not raise judicial-bias claims on direct appeal because he did not believe the trial judge's actions went beyond the bounds of propriety or harmed Gordon. 5/22/09 Hearing Tr. 25, 54, 60. Some of the judge's remarks suggested he was "flustered with the way things were going" and others were out of the jury's presence, so it could not affect them. *Id.* at 35, 45. Also, it is important for an attorney to be courteous and to not chastise or lie to the court, *id.* at 58-60, and defense counsel's tenacious advocacy was part of basis for the acrimony between him and the trial judge. *Id.* at 53-54.

Defending himself against numerous allegations of ineffectiveness and a bar grievance that Gordon filed, defense counsel largely blamed the trial judge, whom he described as a "very bad judge" who he "couldn't control" and who infuriated him. 5/22/09 Hearing Tr. 63, 86; 6/19/09 Hearing Tr. 7-8. Defense counsel believed the judge was "fighting" and "attacking" him and counsel "couldn't be polite to him anymore." *Id.* at 102. Defense counsel denied interrupting the judge and accusing the court of bias, *id.* at 26-28, and insisted it was the judge who kept interrupting him. 6/19/09 Hearing Tr. 12-13. Defense counsel agreed that "[i]n theory" an attorney should stop talking when a judge is speaking. *Id.* at 11. Defense counsel admitted that other courts had found him in contempt, but not for his presentation. As to his respect for the bench, defense counsel opined that while some judges are "idiots" he does not call them that, and while as a defense attorney he may come "close to the line," he does not cross it. 5/22/09 Hearing Tr. 102, 104.

The state trial court denied Gordon’s motion for relief from judgment on the merits.² The state trial court found that while the judge was at times frustrated or annoyed with defense counsel’s tactics, the judge “did not demonstrate actual bias” against the defense; that many of the verbal conflicts were precipitated by defense counsel’s continued objections to the judge’s rulings and related to defense counsel’s overzealous conduct in handling the case; and that the judge did not direct his comments to Gordon or the defense witnesses, or comment on the weight or substance of the proffered defense. Pet. App. 73a-76a. The state trial court also concluded that Gordon “did not receive ineffective assistance from his [defense] counsel when counsel failed to file a motion for a new trial as the trial court directed.” Pet. App. 79a.

The state appellate courts denied Gordon leave to appeal based on his failure to establish entitlement to relief under Michigan Court Rule 6.508(D). *People v. Gordon*, No. 300247, Order (Mich. Ct. App. July 20, 2011); *People v. Gordon*, 808 N.W.2d 767 (Mich. 2012).

C. The district court and court of appeals deny habeas relief.

Gordon raised a myriad of claims in his habeas petition, including that the trial judge was biased and that defense counsel was ineffective for not moving for a new trial on the purported bias. The district court denied relief on all of Gordon’s claims.

² The court of appeals rejected the State’s argument that the trial court also applied a procedural default. Pet. App. 6a-7a.

As to Gordon's general allegations of bias, the district court found that many were "clearly not supported by the record." Specifically, it was "simply not true" that the trial judge belittled defense counsel at every opportunity or refused to grant any of his objections or treated his objections with contempt. Instead, the judge recognized defense counsel's absolute right to object and sustained a number of his objections, overruled a number of the prosecutor's objections, allowed defense counsel to proceed even when the judge thought that he violated the rules of evidence, permitted defense counsel to recall any witnesses he wanted and to have the prosecution produce the witnesses that defense counsel requested, and granted most of defense counsel's request for specific jury instructions. Pet. App. 31a-45a. The district court further noted that while "there were times when the trial court admonished defense counsel for asking irrelevant questions or for being repetitive or argumentative," a judge is not a mere moderator in a jury trial but must ensure proper conduct and determine questions of law (quotation marks and citation omitted). Pet. App. 37a-38a.

The district court determined that a number of Gordon's more specific allegations "did not reflect actual bias" but instead constituted appropriate judicial conduct in moderating the trial. While the district court found some of the challenged remarks more "troubling," some were tempered by other remarks by the judge or were not made in the jury's presence. The district court ultimately concluded that the judge's remarks did "not reveal a deep-seated or high degree of antagonism that made fair judgement impossible." Pet. App. 38a-45a. The district court did not address

Gordon's claim that defense counsel was ineffective for not moving for a new trial based on judicial bias.

In an unpublished decision, a unanimous panel of the court of appeals affirmed the denial of habeas relief. After finding that Gordon's judicial-bias claims were exhausted and not procedurally defaulted, Pet. App. 6a-7a, the court of appeals rejected Gordon's argument that de novo review should apply to the state court's ruling because it applied the wrong standard. The court of appeals found that *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), which Gordon relied on, actually "supports the State's view that appearance of bias is only sufficient to establish judicial bias of a constitutional dimension a limited class of cases" and that the state court, in not applying a mere-appearance-of-bias standard, "did not conflict with clearly established federal law." Pet. App. 9a-13a.

Viewing the record as a whole, the court of appeals determined that Gordon "failed to establish that the judge exhibited conduct sufficient to establish unconstitutional judicial bias," and that under AEDPA, the state-court ruling was not contrary to or an unreasonable application of clearly established federal law. Pet. App. 14a-22a. As to Gordon's claim that defense counsel was ineffective for not moving for a new trial based on judicial bias, the court of appeals applied de novo review after finding that the state trial court did not address this claim on the merits, and denied relief. Pet. App. 22a-23a ("Because the judge's conduct is more reflective of a frustration with defense counsel's overzealous advocacy rather than any bias against him or Gordon, his claim would have failed even under de novo review. Accordingly, his underlying

ineffective assistance of counsel claim fails as well because Gordon cannot establish judicial bias.”).

The court of appeals denied Gordon’s petition for panel rehearing and his petition for rehearing en banc, noting that “[n]o judge ha[d] requested a vote” on the request for rehearing en banc. Pet. App. 82a-83a.

Gordon’s petition in this Court followed. This Court has requested a response from the State to the petition.

REASONS FOR DENYING THE PETITION

I. The court of appeals’ opinion does not conflict with this Court’s precedent.

Because the state court adjudicated Gordon’s judicial-bias claims on the merits, Gordon must establish entitlement to relief under AEDPA’s “difficult to meet” standard. *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015); *Burt v. Titlow*, 571 U.S. 12, 19 (2013) (“AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court”). Gordon has not shown that the state-court decision was factually erroneous under 28 U.S.C. § 2254(d)(2), so the question whether it was “contrary to” or involved “an unreasonable application of” clearly established federal law as determined by this Court. § 2254(d)(1). Under AEDPA, or even de novo review, Gordon’s claims fail.

A. The court of appeals correctly found that no clearly established federal law holds that an appearance of bias alone violates due process.

Recognizing the difficulties of showing actual bias on the part of a judge, Pet. 24, Gordon asserts he was denied due process because the judge's remarks and conduct at trial gave *an appearance* of bias. To evade his high burden under AEDPA and obtain de novo review, Gordon claims the state court applied the wrong standard (actual prejudice) and that it should have applied an appearance-of-bias standard, and that this Court has "routinely found" due-process violations where the judge was not actually biased. Pet. 16. While this Court has identified certain situations where due process was violated based on something less than actual bias, those circumstances are limited and not present in Gordon's case.

Notably, Gordon cites no case where this Court has overturned a conviction on due-process grounds based on an appearance of bias alone. In the situations where this Court has found a constitutional violation (or that due process required recusal) based on something less than actual bias (i.e., where "the probability of actual bias on the part of the judge . . . [was] too high to be constitutionally tolerable," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)), there has been some existing objective factor that creates a serious risk of actual bias (not just the appearance of bias) on the part of the judge, or *any* judge, under that particular circumstance. For instance, this Court determined that something less than actual bias violates due process in cases where the judge had an actual pecuniary interest in the litigation. See e.g., *Tumey v. Ohio*, 273

U.S. 510, 523 (1927) (due-process violation found where a mayor-judge had “a direct, personal, substantial pecuniary interest” in convicting the defendant”); *Ward v. Monroeville*, 409 U.S. 57 (1972) (same); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (state supreme court justice’s deciding vote and opinion against insurance company “had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case” against insurance companies). The holdings in these cases, derived from a pecuniary interest in the litigation and not a mere appearance of bias based on a judge’s conduct at trial, are not on point.

Nor are this Court’s holdings requiring recusal in the criminal-contempt context, where the judge was challenged based on his participation in an earlier proceeding. See e.g., *In re Murchison*, 349 U.S. 133 (1955) (due-process violation for judge to act as one-man grand jury and to then try the persons accused as a result of his investigations); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (due process requires a defendant in criminal-contempt proceedings be tried before “a judge other than one reviled by the contemnor”). Gordon’s case does not involve alleged bias based on the judge’s participation in an earlier proceeding; he alleges an appearance of bias based only on the judge’s moderating of his trial.

Gordon asserts that this Court in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), eliminated “[w]hatever doubt there may have been about a general appearance-of-bias standard.” Pet. 17. But *Caperton*’s holding was not so broad. There, this Court considered bias “in the context of judicial elections,” 556

U.S. at 881-82, and, after noting that the “difficulties of inquiring into actual bias” underscore the need for objective rules, *id.* at 883, held “there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.” *Id.* at 884.

The court of appeals in Gordon’s case aptly found that *Caperton* “supports the State’s view” and that although this Court at times used “broad language in reaching its conclusion . . .[,] it did not intend to extend broadly the circumstances under which an individual can establish a Due Process violation by proving something less than actual bias.” Pet. App. 11a-13a. Indeed, this Court emphasized the limited nature of its ruling. See e.g., 556 U.S. at 887 (“[o]ur decision today addresses an extraordinary situation where the Constitution requires recusal”); *id.* at 890 (“[a]pplication of the constitutional standard implicated in this case will thus be confined to rare circumstances”).³

³ To the extent this Court has used language that “endorses the importance of an appearance standard in the judicial process,” the Eleventh Circuit has properly recognized such language as dicta. *Davis v. Jones*, 506 F.3d 1325, 1335-36 (2007). And this Court has also observed that most matters relating to judicial disqualification do not rise to a constitutional level, *Caperton*, 556 U.S. at 876 (quotation marks omitted), that “matters of . . . personal bias . . . would seem generally to be matters of legislative discretion,” *Tumey*, 273 U.S. at 523, and that “[p]ersonal bias or prejudice alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.” *Caperton*, 556 U.S. at 877 (internal quotation marks omitted).

Gordon’s reliance on *Rippo v. Baker*, 137 S. Ct. 905 (2017), and *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), Pet. 18, is also misplaced because, as the court of appeals noted, the question is what was “clearly established” federal law in September 2009, when the state court issued its decision. Pet. App. 10a. Moreover, those cases involved very different circumstances from Gordon’s. In *Williams*, this Court set forth another circumstance giving rise to an unacceptable risk of actual bias: when a judge had an earlier significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case. *Id.* at 1905. And *Rippo* involved an allegation that the judge could not impartially adjudicate a case in which one of the parties was also criminally investigating him for bribery. Neither of these objective preexisting circumstances are present in Gordon’s case.

Gordon’s case does not implicate any of the concerns—pecuniary interest, criminal-contempt proceedings where the judge participated in an earlier proceeding, or the amount and timing of campaign contributions—which were the factual bases for this Court’s decisions holding that due process required disqualification. At best, he alleges mere personal bias, which this Court has repeatedly said is not enough. See Argument I(B).

Given that what is “clearly established” under AEDPA includes only the holdings, as opposed to the dicta, of this Court’s decisions, that this Court’s

But “[c]learly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta,” of this Court’s decisions. *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (internal quotations and citations omitted).

holdings are “construed narrowly,” *House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008), and the lack of a decision by this Court holding that an appearance of bias alone is sufficient to violate due process,⁴ the court of appeals properly rejected Gordon’s attempt to *extend* this Court’s precedent—which he cannot do on habeas, *White*, 134 S. Ct. at 1707. Pet. App. 13a. Indeed, the petition’s introduction confirms that he seeks the extension, not the application, of existing law: the introduction starts with existing due-process precedent (*Tumey* and *Caperton*) that requires recusal of a judge with a pecuniary interest and argues that those principles should apply in—that is, be extended to—the personal-bias context; it does not cite any personal-bias cases that held that this type of circumstance creates actual bias or an unconstitutionally high risk of actual bias.

Under AEDPA, Gordon has not met his admittedly “almost impossible task,” Pet. 24, by showing that there is “no reasonable dispute” the state court’s ruling was wrong. *Woods*, 135 S. Ct. at 1376 (“[O]n collateral review, federal courts are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong.”).

⁴ Under AEDPA, the lack of clearly established law is fatal to a petitioner’s claims and should be the end of the inquiry. See e.g., *Woods*, 135 S. Ct. at 1376-77 (reversing habeas grant where federal court failed to identify any decision from Court directly on point and concluded only that the circumstances in that case were “similar” to this Court’s precedent); *Lopez v. Smith*, 135 S. Ct. 1, 3-4 (2014); *White*, 134 S. Ct. at 1705-07.

B. The court of appeals correctly found that even on de novo review Gordon’s judicial-bias claims fail.

Apart from whether any “clearly established” federal law exists holding that an appearance of bias alone can violate due process, Gordon’s claims also fail on de novo review, as the court of appeals alternatively found. Pet. 23a.

Gordon cites several decisions from this Court involving claims of bias stemming from a judge’s conduct. Pet. 17. But those decisions undercut, rather than support, his claims. Consider first *Liteky*. It did not involve the Due Process Clause but rather an interpretation of a federal recusal statute, 28 U.S.C. § 455(a), applicable to federal judges, but some of this Court’s language is instructive.

This Court stated, in relevant part, that “judicial rulings alone almost never constitute a valid basis” for a bias motion, and that “opinions formed by the judge on the basis of . . . events occurring in the course of current proceedings . . . do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Liteky*, 510 U.S. at 555. As this Court continued, repeating that the antagonism must be so strong it makes fair judgment impossible:

[J]udicial remarks during the course of trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that deprives from an extrajudicial

source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. [*Id.*]

Thus, the burden for establishing judicial bias is high. And this Court also explained that signs of impatience or annoyance do not meet the fairness-is-impossible standard:

Not establishing bias . . . are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge’s ordinary efforts at courtroom administration—even a stern and short-tempered judge’s ordinary efforts at courtroom administration—remain immune. [510 U.S. at 555-56 (emphasis in original).]

The allegations of bias found inadequate in *Liteky* “[a]ll occurred in the course of judicial proceedings,” were not based “upon knowledge acquired outside such proceedings,” and did not display “deep-seated and unequivocal antagonism” that rendered fair judgment impossible. 510 U.S. at 556. So too in Gordon’s case. And indeed, if the judge had harbored that type of antagonism against defense counsel, presumably the judge would not have rescinded the (relatively mild) \$100 contempt fine. And as the court of appeals recognized, many of the challenged statements were in response to defense counsel’s “obstinate behavior”—which included arguing with witnesses and interrupting and arguing with the judge after he made rulings, accusing the judge of being biased in front of the jury, and boldly challenging the court’s

authority—and all those statements were “outside the realm of unconstitutional conduct.” Pet. App. 21a. Gordon has not shown otherwise, or overcome the “presumption of honesty and integrity in those serving as adjudicators.” *Withrow*, 421 U.S. at 47.

Also undercutting Gordon’s claims is *Ungar v. Sarafite*, 376 U.S. 575 (1964)—a case he does not cite but that the court of appeals described as “fitting” as to allegations of disdain by a judge toward counsel or a party. Pet. App. 19a-20a. In *Ungar*, this Court rejected the petitioner’s claim that his contemptuous remarks about the presiding judge at a criminal trial were, without more, enough to bias the judge and disqualify him from the post-trial contempt hearing. *Id.* at 583-84. This Court explained that it “cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions.” *Id.* at 584. This Court concluded that the record did not reflect that the judge “permitted himself to become personally embroiled with petitioner” and that “[w]hatever disagreement there was between petitioner and the judge stemmed from the petitioner’s resistance to the authority of the judge and its exercise during the trial.” *Id.* at 585. Gordon’s record reflects the same.

The two other cases Gordon cites are totally different from his and demonstrate the “extreme” or “extraordinary” facts needed to reverse a conviction based on judicial bias. In *Quercia v. United States*, 289 U.S. 466 (1933), this Court found error when the trial judge “added to [the evidence]” in instructing the jury

that “wip[ing] [one’s] hands” when testifying, as defendant had done, was “almost always an indication of lying” and that “every single word [the defendant said], except when he agreed with the Government’s testimony, was a lie.” 289 U.S. at 470-73. In contrast, the judge at Gordon’s trial did not act as an expert witness on nonverbal cues or usurp the jury’s role.

In *Offutt v. United States*, 348 U.S. 11 (1954), this Court reversed a criminal-contempt sentence summarily imposed on counsel immediately after the criminal trial. This Court reversed the sanctions because the trial judge had “permitted himself to become *personally* embroiled” with counsel throughout trial and “failed to represent the impersonal authority of law.” *Id.* at 15-17 (emphasis added). Gordon’s case did not involve criminal-contempt proceedings or a challenge based on the judge’s participation in a prior proceeding, nor did the judge in his case become so personally embroiled with counsel that he could not represent the impersonal authority of law.

Considering Gordon’s allegations in light of the judge’s role not as a mere moderator but as the governor of the trial to assure its proper conduct, Pet. App. 18a-19a, the court of appeals properly found that the judge’s conduct and moderation of his trial reflected no actual bias or an unconstitutionally high probability of bias. Instead, the challenged conduct was driven largely by defense counsel’s own overzealous behavior, argumentative style, and discourteous demeanor. And under an objective inquiry,⁵ defense counsel’s

⁵ In *Caperton*, 556 U.S. at 881, this Court described the objective inquiry as “whether the average judge in his position is ‘likely’ to

conduct likely would have frustrated and exasperated *any* judge under those circumstances. Viewed in context and as a whole, the judge’s expressions in Gordon’s case were well “within the bounds of what imperfect men . . . even after having been confirmed as federal judges, sometimes display.” *Liteky*, 510 U.S. at 555-56; see also 5/22/09 Hearing Tr. 25, 54, 60 (Gordon’s direct-appeal counsel testifying that he did not believe judge’s actions went beyond the bounds of propriety or harmed Gordon).

Although the jury witnessed some of the judge’s expressions of frustration and annoyance with defense counsel’s tactics, the judge also instructed them to consider only the evidence properly admitted, that its decision may not be based on bias or sympathy, and that the court is “not an advocate” and does not “represent any side” or take any sides. 2/17/05 Trial Tr. 74-75. It is well established that “[a] jury is presumed to follow its instructions.” *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). The challenged conduct simply was not the type of “extraordinary” or “extreme” conduct necessary for a due-process violation, even when the due-process claim is reviewed de novo, as the court of appeals did in the alternative.

II. The court of appeals’ decision is not an outlier among the circuits.

Contrary to Gordon’s claim, the court of appeals’ decision is not an “outlier among the circuits.” Pet. 20.

be neutral, or whether there is an unconstitutional ‘potential for bias.’” *Id.* at 881.

The court of appeals rejected Gordon’s argument that clearly established federal law allows petitioners to establish a due-process claim based on judicial bias if a judge gives only the appearance of bias, Pet. App. 7a-8a, and determined that this Court’s precedent, including *Caperton*, holds that “appearance of bias is only sufficient to establish judicial bias of a constitutional dimension in a limited class of cases.” Pet. App. 11a-12a. In other words, this Court has not held that the mere appearance of bias, outside of limited contexts, establishes a due-process claim.

Other circuits have reached the same conclusion. See e.g., *Davis v. Jones*, 506 F.3d 1325, 1333 (11th Cir. 2007) (finding that “none of the Supreme Court cases relied upon by [the defendant] establishes that an appearance [of judicial bias] violates the Due Process Clause”); *Johnson v. Carroll*, 369 F.3d 253, 263 (3rd Cir. 2002) (explaining that “the Supreme Court’s case law has not held, not even in dicta, let alone ‘clearly established,’ that the mere appearance of bias on the part of a state trial judge, without more, violates the Due Process Clause”); *Del Vecchio v. Illinois Dep’t of Corrections*, 31 F.3d 1363, 1371-72 (7th Cir. 1994) (en banc) (holding that the “Supreme Court has never rested the vaunted principle of due process on something as subjective and transitory as appearance”).

That these decisions predate *Caperton*, Pet. 23, is of no consequence. *Caperton*’s holding, which was limited to the judicial-election context, does not change the court of appeals’ or other circuits’ holdings that this Court’s precedent in the appearance-of-bias area

is not clearly established.⁶ This Court in *Caperton* merely set forth another limited circumstance that gives rise to an unacceptable risk of actual bias, 556 U.S. at 887 (“Our decision today addresses an extraordinary situation where the Constitution requires recusal.”), and stated that its prior “recusal cases are illustrative,” noting that each case “dealt with extreme facts that created an unconstitutional probability of bias.” *Id.* at 887. This Court was “careful to distinguish the extreme facts of the cases before it from those interests that would not rise to a constitutional level” and this Court expressly stated that in *Caperton* it “do[es] nothing more than what [it] has done before.” *Id.* at 888.

Gordon states that other circuits have “recognized that this Court’s precedent clearly established a general unacceptable-risk-of-bias standard long ago.” Pet. 20. But there is no inconsistency between these other circuits and the court of appeals in his case. The other circuits merely, and properly, acknowledged that there may be a due-process violation based on something less than actual bias; they did not go so far as to hold that a mere appearance of bias, without more, violates due process. And the circumstances in which this Court has found a due-process violation on something less than actual bias are limited to the “extraordinary” or “extreme” situations that this Court has squarely addressed. *Caperton*, 556 U.S. at 886-90.

⁶ The Seventh Circuit has reiterated, post-*Caperton*, that this Court’s “has never held, or even intimated” that due process requires recusal based solely on how the situation might have “appeared” to an outside observer. *Suh v. Pierce*, 630 F.3d 685, 692 (7th Cir. 2011).

Gordon has also not demonstrated that the decisions of the circuits he cites actually conflict with the court of appeals' decision in his case. Judicial-bias inquiries tend to be fact specific, *United States v. Laureano-Perez*, 797 F.3d 45, 69 (1st Cir. 2015), and turn on the facts of the particular case. For example, in *Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014), the allegations of bias arose because the defendant filed an interlocutory appeal against the judge presiding over his murder trial, and the judge filed a substantive response in the state appellate court, describing the murder as "brutal" and defending her ruling denying appointment of co-counsel. *Id.* at 775-76. The same judge presided over the rest of the trial, over sentencing, and over post-conviction proceedings. The defendant later filed for federal habeas review and alleged that the trial judge had exhibited bias by authorizing pleadings to be filed against him in her name during his trial, knowing that the pleadings expressed "her personal opposition to his request for relief" and "repeatedly denigrated defense counsel." *Id.* at 790. The Ninth Circuit did not apply an *appearance-of-bias* standard; rather, it recognized there was a risk of *actual* bias because the judge affirmatively advocated against him as a party in an appellate proceeding at the same time she was supposed to be the neutral arbiter of his murder trial. And the Ninth Circuit did not hold that a due-process violation occurred; rather, it simply remanded the petitioner's case for an evidentiary hearing to determine factual issues on his judicial-bias claim. *Id.* at 792.

The courts in *Alston v. Smith*, 840 F.3d 363 (7th Cir. 2016), and in *Jones v. Luebbbers*, 359 F.3d 1005 (8th Cir. 2004), also did not reach different outcomes

than the Sixth Circuit did; to the contrary, each held that *no* constitutional violation occurred based on the specific facts in those cases. *Alston*, 840 F.3d at 370 (state court’s “conclusion that there was no unconstitutional risk of bias” was “neither incorrect nor unreasonable”); *Jones*, 359 F.3d at 1015 (“Jones’s claims of a due process violation are without merit.”). The purported bias in *Jones* was also predicated on more than the judge’s intervention at trial—it also stemmed from the way the judge treated one of the defendant’s lawyers in prior proceedings, including recommending criminal charges and sanctions against her. Yet the petitioner’s conviction was upheld.

The direct-appeal circuit cases that Gordon cites, Pet. 22-23, are not subject to AEDPA deference—and therefore cannot establish a conflict on the question presented—and are also factually distinguishable. And even on direct appeal courts have been reluctant to reverse convictions based on accusations of trial-court impartiality. See, e.g., *United States v. Betts-Gaston*, 860 F.3d 525, 534-36 (7th Cir. 2017) (no error despite “real and serious breakdown in the professional relationship between counsel and court”); *United States v. Lanza-Vazquez*, 799 F.3d 134, 143-45 (1st Cir. 2015) (judge “skirted near the line . . . but, on the whole, never crossed it” when he repeatedly interrupted and expressed exasperation with counsel, generally benefitting the prosecution); *United States v. Tipton*, 11 F.3d 602, 611-13 (6th Cir. 1993) (no error even though court’s various comments were “inappropriate” and “undermined defense counsel’s credibility”).

III. This case would be a poor vehicle to address the questions presented.

Contrary to Gordon's claim, Pet. 25, there are procedural hurdles underlying his judicial-bias claims. While the court of appeals rejected the State's procedural-default and exhaustion arguments, this Court could not reverse the lower-court judgment and grant Gordon relief unless it resolved the procedural hurdles too; procedural hurdles that represent an independent and adequate state ground bar review, unless he can show cause for the default and prejudice. *Trevino v. Thaler*, 569 U.S. 413, 421 (2013). Here, the state court's opinion contains language indicating that it applied or at least intended to apply a procedural default, and Gordon has not demonstrated or alleged cause to excuse that default. And it is undisputed Gordon raised a number of additional allegations of judicial bias in the court of appeals—claims he never presented to the district court and state courts. According to this Court, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts . . . or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Gordon was required to present both the legal *and factual* bases for his judicial-bias claims to the state courts and he failed to do so. This case is not as clean a vehicle as Gordon suggests.

And this matter is complicated by the presence of an interrelated claim that the court of appeals addressed and rejected: Gordon's claim that his trial counsel was ineffective for failing to move for a new trial on the basis of judicial bias. Gordon correctly notes that the court of appeals reviewed the claim *de novo* because the state trial court failed to address the

claim when it was presented to it on collateral review. Gordon dismisses the court of appeals' resolution of the claim by asserting that it "applied the same actual-bias standard it had used to reject Gordon's judicial-bias claim . . .," Pet. 15, and then proceeds to ignore it for the remainder of his petition, apparently believing that the resolution of the judicial-bias claim presented necessarily determines the result of the ineffective-assistance-of-counsel claim. But this is not necessarily true. For example, if this Court applied AEDPA to the "stand-alone" due-process claim and determined that the court of appeals correctly rejected it, does that necessarily mean that when the claim is addressed in the context of a claim of ineffective assistance of counsel (necessarily reviewed *de novo*), the same result must ensue? The answer is not clear, and this ambiguity makes this case a far less attractive vehicle for addressing the stand-alone due-process claim.

Finally, the outcome of Gordon's case also would not change if this Court granted certiorari and ruled in Gordon's favor on the AEDPA question because Gordon ultimately cannot meet his high burden under *de novo* review, as the court of appeals alternatively found. Pet. App. 23a. The court of appeals' unpublished opinion also has no precedential value within the circuit or State, and there is no evidence the opinion was not published in order to prevent review. Gordon's case involved run-of-the-mill claims and straightforward legal principles that the court of appeals applied in a well-reasoned manner.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record

Raina Korbakis
Assistant Attorney General
Criminal Appellate Division

Attorneys for Respondents

Dated: AUGUST 2018