

No. 17-1404

IN THE
Supreme Court of the United States

JIMMIE GORDON,

Petitioner,

v.

BLAINE LAFLER, WARDEN,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

REPLY IN SUPPORT OF CERTIORARI

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Petitioner Jimmie Gordon asked the State of Michigan a simple question. Under the Due Process Clause, the appearance of bias—and the accompanying likelihood of actual bias—often require recusal where there may be no actual bias. For instance, a mayor may not adjudicate a traffic ticket because of the small chance that the gain to city coffers could sway his vote. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972). How, then, could due process require a defendant facing life in prison to prove actual bias where the judge’s own conduct created an unconstitutionally high suggestion of it?

The State hasn’t even tried to answer that question. Instead, it attempts to limit this Court’s cases to their facts, disregards the circuits that have disagreed with the Sixth Circuit’s position, and invents imaginary obstacles to review. This Court should grant certiorari for full briefing or summarily vacate and remand so that the Sixth Circuit can apply this Court’s clear teachings.

I. THIS COURT DEMANDS MORE THAN THE ABSENCE OF ACTUAL BIAS

In case after case, this Court has overturned judgments because of the risk and appearance of bias, whether or not the adjudicator was actually biased. *See* Pet. 15–20. The State cannot avoid these well-settled precedents.

1. The State concedes that “this Court has identified certain situations where due process was violated based on something less than actual bias.” Br. 19. But it insists that the standard deployed in these cases covers only the isolated areas at issue.

Br. 19–23. For cases outside that grab bag, due process allows everything but actual bias. Br. 23.

That is not what this Court has said. “[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009). The Court has applied those objective standards across a host of circumstances—where judges have “a financial interest in the outcome of the case,” *id.* at 890, where they have a “prior [hostile] relationship with the defendant,” *id.* at 881, where they “participate[d] in a major adversary decision” earlier in the case, *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906 (2016), and so on. But it has never suggested that the due process *standard* changes with the circumstances. Quite the opposite: in each scenario, it has asked whether “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *see, e.g., Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (per curiam) (quoting same); *Williams*, 136 S. Ct. at 1903 (quoting same); *Caperton*, 556 U.S. at 877 (quoting same). The State offers no reason why a different rule should apply to Gordon’s situation, any more than a different rule would apply to defendants tried on Wednesdays. *Cf. Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004) (“Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.”).

The State similarly claims that Gordon seeks to rely on this Court’s dicta about bias, rather than its holdings, in violation of AEDPA. Br. 22–23. Again,

not true. “When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [the Court]”—and everyone else—“are bound.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). The standard used to adjudicate due process claims is a holding under that test, just as the standard used to adjudicate ineffective-assistance claims is part of the “holding” of *Strickland v. Washington*, 466 U.S. 668 (1984). *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

2. The State also suggests that Gordon’s case differs from this Court’s precedents because he points to no “existing objective factor that creates a serious risk of actual bias (not just the appearance of bias) on the part of the judge.” Br. 19; *see also* Br. 22 (“objective preexisting circumstances”). If the State means to suggest that Gordon must lose because the events giving rise to his claim transpired during trial, that cannot be right: “[R]emarks during the course of a trial ... will [support a bias claim]” if they unconstitutionally suggest “a high degree of favoritism or antagonism.” *Liteky v. United States*, 510 U.S. 540, 555 (1994).

If the State means to suggest that Gordon has not identified the requisite objective evidence, the State is again wrong. Objective evidence—campaign donations, financial incentives, personal involvement—suggest actual bias in light of a “realistic appraisal of psychological tendencies and human weakness.” *Caperton*, 556 U.S. at 883 (quoting *Withrow*, 421 U.S. at 47). Here, that objective evidence comes from the judge’s own mouth. Short-circuiting counsel’s most important questions, demanding that he sit down and shut up,

holding him in contempt, wrongly telling the jury that he lied to them during closing arguments, calling him “one of the most obnoxious, overbearing attorneys [the judge] ever had the displeasure to try a case with,” Pet. App. 42a—each of these objective facts calls Judge Townsend’s neutrality into question at *least* as much as a small financial stake or a campaign ad.

3. Finally, the State tries to exclude this Court’s on-point decision in *Rippo* by noting that it postdated Gordon’s case. Br. 22. As Gordon explained, a summary reversal “reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time.” Pet. 19–20 (quoting S. Shapiro et al., Supreme Court Practice § 5.12(b), p. 344 (10th ed. 2013)). If it would have been a waste of time to brief whether the court there erred by looking for “actual, subjective” bias, *Rippo*, 137 S. Ct. at 907, it was clearly established that Gordon did not need to prove actual bias either. Here, too, the State has no response.

II. OTHER CIRCUITS HOLD THAT THIS COURT’S DUE PROCESS PRECEDENTS DEMAND MORE THAN THE ABSENCE OF ACTUAL BIAS

In case after case, the circuits have held that, under clearly established law, apparently biased adjudicators with a serious risk of actual bias may not preside over cases. *See* Pet. 20–23. If anything, the State’s response only magnifies the conflict.

1. The State cannot distinguish Gordon’s cases. Take first *Hurles v. Ryan*, which held, even under

pre-*Caperton* precedent, that a habeas petitioner “need not prove actual bias to establish a due process violation, just an intolerable risk of bias.” 752 F.3d 769, 789 (9th Cir.), *cert. denied*, 137 S. Ct. 710 (2014). The State tries to distinguish *Hurles* because it did not “hold that a due-process violation occurred.” Br. 31. But *Hurles* *did* hold that less than actual bias suffices—that is why it “remanded ... for an evidentiary hearing.” Br. 31.

The State also claims there is no split because *Hurles* “did not apply an *appearance-of-bias* standard,” but rather “recognized there was a risk of *actual* bias because the judge affirmatively advocated against [the defendant].” Br. 31 (emphasis in original). This purported distinction ignores the relationship between the appearance of bias and an unacceptable risk of bias. The two go hand in hand: the reason that it *looks* icky for judges to decide cases in which they have a financial stake is the risk that that stake will *actually* bias their decisions. So too here. The reason that Judge Townsend’s conduct created an unconstitutionally high appearance of bias is the risk, illuminated by that conduct, that Judge Townsend *was* biased against Gordon and his counsel—and that the jury thought as much.

The State’s efforts to distinguish Gordon’s other cases are even less persuasive. It argues that *Alston* v. *Smith*, 840 F.3d 363 (7th Cir. 2016), and *Jones* v. *Luebbers*, 359 F.3d 1005 (8th Cir. 2004), do not create a circuit split because each “held that *no* constitutional violation occurred based on the specific facts of those cases.” Br. 31–32. The State does not understand what a circuit split is. *Alston*

and *Jones* stated a different *rule of decision* than the Sixth Circuit's: each explained that, under clearly established law, "due process is violated not only where an adjudicator is biased in fact, but also where a situation presents a particularly high probability of bias." *Alston*, 840 F.3d at 368 (citing *Caperton* and *Withrow*); see *Jones*, 359 F.3d at 1012 ("[C]learly established Federal law ... recognizes not only actual bias, but also the appearance of bias, as grounds for disqualification."). That disagreement does not disappear simply because the defendants in *Alston* and *Jones* could not prove *their* cases under the Seventh and Eighth Circuits' more defendant-friendly approach.

The State doesn't bother to name Gordon's other cited cases—*United States v. Saenz*, 134 F.3d 697 (5th Cir. 1998) (per curiam), and *United States v. Godwin*, 272 F.3d 659 (4th Cir. 2001)—but instead insists that these direct-review cases "cannot establish a conflict" with Gordon's AEDPA-based appeal and are "factually distinguishable." Br. 32. Gordon already explained why they are relevant: they found *plain error*—a kind of clarity similar to "clearly established" federal law—where the judge's actions made him "appear[] partial," *Saenz*, 134 F.3d at 702, or "create[d] an appearance of partiality," *Godwin*, 272 F.3d at 677. The State has no response.

As for the supposed factual distinctions, they must not be relevant, for the State never explains what they are. See Br. 32. More importantly, whatever the specific facts of *Godwin* and *Saenz*, what matters is the legal standard that they applied. And as demonstrated, they applied a more lenient one than the Sixth Circuit's search for actual bias.

Indeed, even the cases that supposedly demonstrate that courts on direct review have been “reluctant to reverse convictions based on accusations of trial-court impartiality,” Br. 32, do not require actual bias. *See United States v. Betts-Gaston*, 860 F.3d 525, 534, 536 (7th Cir. 2017) (no violation where the court’s “few and minor” lapses did not “destroy[] the required atmosphere of impartiality”); *United States v. Lanza-Vazquez*, 799 F.3d 134, 144 (1st Cir. 2015) (no violation where the comments were made out of the jury’s presence because “the analytical question for [the reviewing court] is whether the jury *perceived* bias” (emphasis added)); *see also United States v. Tipton*, 11 F.3d 602, 610–13 (6th Cir. 1993) (no plain error where the comments only undermined counsel’s credibility with the jury “to some small degree” and the court instructed the jury to “disregard” them).

2. The State also insists that “other circuits” have held that clearly established federal law requires no more than the absence of actual bias. Br. 28–29. As the State acknowledges, those cases all predate *Caperton*, which removed any doubt that “the Due Process Clause [is] implemented by objective standards that do not require proof of actual bias.” 556 U.S. at 883. That explains why, for instance, the Seventh Circuit—one of those that supposedly requires proof of actual bias, *see* Br. 28—has since explained that recusal “*is* required based on an ‘appearance of bias’ where there is a high risk of actual bias.” *Suh v. Pierce*, 630 F.3d 685, 691 (7th Cir. 2011) (emphasis added). Since that position is precisely the one that Gordon advocates here—and

since it is contrary to the Sixth Circuit’s below—the State’s cited cases are no longer good law.

But even if those cases remain valid, that only increases the need for review. The State failed to explain away the circuits that do not require proof of actual bias. *See supra* pp. 4–6. If other circuits demand such proof notwithstanding *Caperton*, this Court should resolve that disagreement.

III. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THIS IMPORTANT QUESTION

1. Gordon identified thirteen cases from the Sixth Circuit alone that turned on the clearly established law governing judicial-bias claims. *See* Pet. 23–24. The State in response has provided no reason to think that the Sixth Circuit faces an unusual number of these claims. Because this question arises frequently—and because, at best, the circuits are divided on the correct approach—this Court should grant certiorari or summarily vacate the Sixth Circuit’s decision.

2. The State insists that Gordon’s case is a bad vehicle because the State would raise before this Court the same procedural objections that it unsuccessfully pressed below. Br. 33. Those objections were meritless then, and they have not improved with age. For example, even if the state court “*intended* to apply a procedural default” as the State imagines, Br. 33 (emphasis added), it did not “actually enforce[]” any such rule, Pet. App. 6a; *see Harris v. Reed*, 489 U.S. 255, 262 (1989) (procedural default “precludes federal habeas review ... only if the last state court rendering a judgment in the case rests its judgment on the procedural default”).

Similarly, the State's demand that Gordon cite each and every transcript page supporting his claim to the state post-conviction court, Br. 33, misstates the law. "It is sufficient that ... Gordon raise[d on appeal] the same claim of judicial misconduct under the same theories as [he] did before the district court" and the state courts. Pet. App. 6a (citing *Vasquez v. Hillary*, 474 U.S. 254, 257–60 (1986)). Nothing can stop the State from wasting its breath on these arguments in its merits brief, but the Court will have no trouble brushing them aside if it does.

3. The State further insists that this case is a bad vehicle because Gordon also raised an ineffective-assistance claim premised on his counsel's failure to move for a mistrial in light of Judge Townsend's comments. Br. 33–34. It is unclear why the State thinks that this additional claim poses an obstacle to review. Say, for instance, that this Court's resolution of his standalone bias claim would not necessarily determine the fate of Gordon's ineffective-assistance claim. *See* Br. 34. So what? This Court is fully capable of resolving such issues if it feels the need, and the Sixth Circuit is capable of resolving them on remand if this Court doesn't.

4. Finally, the State asserts that this Court should not grant review because "Gordon ultimately cannot meet his high burden under de novo review." Br. 34; *see also* Br. 24–28 (same). Br. 7–14 (painting the State's version of the trial in detail). The State appears to believe that it would prevail under an approach that looks to more than just actual bias.

Gordon disagrees. Judge Townsend's conduct—his constant interventions on the prosecution's behalf, his demeaning comments toward Gordon's

counsel, his repeated threats to hold counsel in contempt, his false statements about counsel to the jury—far exceeded “a stern and short-tempered judge’s ordinary efforts at courtroom administration.” *Liteky*, 510 U.S. at 556. Nor does Gordon believe that his own right to a fair trial may be sacrificed because Judge Townsend disliked his lawyer, or that his lawyer’s actions merited anything like the response they received. *See* Pet. 3–12; *Ungar v. Sarafite*, 376 U.S. 575, 585 (1964) (no violation where the judge’s actions were “fully in accord with the judicial obligation to maintain the orderly administration of justice and to protect the rights of the defendant”).

But more importantly, the question is irrelevant here. This Court does not act “as a court of first view.” *Alabama v. Shelton*, 535 U.S. 654, 673 (2002). The Sixth Circuit “reviewed Gordon’s claims under AEDPA”—and asked whether Gordon proved “actual bias”—because it believed that due process does not clearly require anything more. Pet. App. 13a–14a. Once this Court corrects the Sixth Circuit’s misunderstanding, it will be that court’s job to properly analyze Gordon’s claims in the first instance. The State’s confidence that it will later prevail under the standard it so vigorously opposes is no reason to deny certiorari in the first instance.

The State tries to bolster this argument by repeatedly claiming that the question presented does not matter here because the Sixth Circuit “alternatively found” that Gordon had not proven an unconstitutionally high probability or appearance of bias. Br. 34; *see* Br. 24, 28. The Sixth Circuit found no such thing. The State cites the court’s statement

that Gordon’s ineffective-assistance claim failed under “de novo review” “because Gordon cannot establish judicial bias.” Pet. App. 23a. But that does not mean it secretly applied an unconstitutional-risk-of-bias-standard to that claim, let alone to Gordon’s standalone judicial-bias claim. Like the State to this day, the panel *never* accepted that due process, even unconstrained by AEDPA’s limits, prohibits more than actual bias outside of narrowly defined contexts. And even under “de novo” review, the court focused on actual bias: it rejected Gordon’s claims because “the judge’s conduct [wa]s more reflective of a frustration with defense counsel’s overzealous advocacy rather than any bias against him or Gordon.” Pet. App. 23a. Indeed, it would be particularly inappropriate to read an alternative holding into the court’s opinion here. If the Sixth Circuit believed that Gordon would not prevail under his own approach, why did it spend pages discussing its understanding of the clearly established law of bias? And why did it insist that it reviewed Gordon’s standalone judicial-bias claim “under AEDPA”? Pet. App. 9a–13a.

* * *

Perhaps reasonable judges could debate whether Judge Townsend’s conduct created a sufficiently high appearance or probability of bias to warrant a new trial. But they cannot debate what this Court’s precedents clearly establish—that due process requires more than the absence of actual bias. This Court should correct the Sixth Circuit’s contrary conclusion on this important question of constitutional law.

CONCLUSION

The petition should be granted for full briefing on the merits, or the decision below should be summarily vacated and remanded.

August 21, 2018

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