No. 20-5362

In the Supreme Court of the United States

DAVID WAYNE ALLEN,

Petitioner,

v.

TIM SHOOP, WARDEN,

Respondent.

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

BRIEF IN OPPOSITION

DAVE YOST
Attorney General of Ohio
BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
BRENDA S. LEIKALA
Senior Assistant
Attorney General
30 East Broad Street, 17th Fl.
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@
ohioattorneygeneral.gov

Counsel for Respondent

CAPITAL CASE – NO EXECUTION DATE SCHEDULED

QUESTION PRESENTED

David Wayne Allen, a murderer, claims that Ohio state courts violated his Sixth Amendment right to an impartial jury by allowing a juror to serve after she stated in *voir dire* that she could be impartial notwithstanding the fact that her brother had been murdered. Did the Sixth Circuit err in unanimously denying Allen's habeas petition after concluding that the Ohio Supreme Court's rejection of this claim neither misapplied clearly established Supreme Court precedent nor rested on unreasonable factual findings?

LIST OF PARTIES

The petitioner is David Wayne Allen, an inmate at the Chillicothe Correctional Institution.

The respondent is Tim Shoop, warden at the Chillicothe Correctional Institution, who is automatically substituted for the former warden, Betty Mitchell. *See* Rule 35.3.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *Allen v. Mitchell*, No. 02-4145 (6th Cir.) (judgment entered March 24, 2020)
2. *Allen v. Mitchell*, No. 99-1067 (N.D. Ohio) (judgment entered October 3, 2002)
3. *State v. Allen*, No. 2016-1657 (Ohio) (judgment entered September 27, 2017)
4. *State v. Allen*, No. 103492 (Ohio Ct. App., 8th Dist.) (judgment entered September 29, 2016)
5. *State v. Allen*, No. 98-1410 (Ohio) (judgment entered October 7, 1998)
6. *State v. Allen*, No. 72427 (Ohio Ct. App., 8th Dist.) (judgment entered June 4, 1998)
7. *Allen v. Ohio*, No. 95-7509 (U.S.) (*certiorari* denied March 18, 1996)
8. *State v. Allen*, No. 96-1111 (Ohio) (judgment entered December 18, 1996)
9. *State v. Allen*, No. 62275 (Ohio Ct. App., 8th Dist.) (judgment entered March 3, 1996)
10. *State v. Allen*, No. 93-2377 (Ohio) (judgment entered September 6, 1995)
11. *State v. Allen*, No. 62275 (Ohio Ct. App., 8th Dist.) (judgment entered September 9, 1993)
12. *State v. Allen*, No. CR 91-264901 (Ohio Ct. Common Pleas) (judgment entered July 15, 1991)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

INTRODUCTION

To win federal habeas relief from a state conviction, a petitioner must make one of two showings. *First*, he may win relief by showing that the state court's "decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). *Second*, he may win relief by showing that the state court's decision "was based on an unreasonable determination of the facts." §2254(d)(2).

David Wayne Allen cannot make either showing. He alleges that the trial court in his case erred by failing to strike a juror who said, in *voir dire*, that she could serve impartially as a juror in Allen's murder trial even though her brother had recently been murdered and even though she found issues pertaining to murder distressing. And, according to Allen, the Supreme Court of Ohio's decision rejecting his impartial-jury claim was so clearly erroneous that it justifies the award of federal habeas relief. But Allen has not pointed to any Supreme Court decision that the Supreme Court of Ohio contradicted or unreasonably applied in rejecting his juror-bias claim. Nor has he identified any unreasonable factual determination on which the state court's rejection of that claim rests. As such, he has not carried the burden needed to win habeas relief, as the Sixth Circuit unanimously held. Pet.App.8–10; Pet.App.21–22 (Moore, J., concurring in the judgment).

Because Allen's petition for *certiorari* seeks pure error correction, and because the Sixth Circuit did not err, the Court should deny the petition.

STATEMENT

1. David Wayne Allen met an elderly woman named Chloie English "through a prison ministry program." Pet.App.2. Upon his release, he murdered English, stabbing, beating, and strangling her to death. Pet.App.2. The jury heard ample evidence of Allen's guilt: investigators found Allen's thumbprint "on the inside of one of the lenses of" English's "glasses"; "cigarette butts consistent with Allen's brand (Dorals) and saliva (type O secretor) were found in English's trash can"; and a bus driver testified that he picked up Allen "near English's home" around the time of her death. Pet.App.2. The jury recommended a death sentence, the trial court imposed it, and Allen has been fighting that sentence ever since.

The fight relevant to this case dates back to *voir dire*. During *voir dire*, a prospective juror named Patricia Worthington revealed that her brother had recently been murdered and that the suspected killer had been acquitted. Pet.App.3–4. She further revealed that "two of her friends were police officers, and that she got to know a detective and the prosecutor from her brother's case," who had "kept in contact with her mother." Pet.App.4. Worthington admitted that she felt some "bitterness and resent[ment]" over the acquittal of the man she believed to have killed her brother. Pet.App.13 (Moore, J., concurring in the judgment) (quoting transcript). The trial court asked if she could "set aside those feelings … and evaluate this defendant and reach a verdict with regard to this defendant based solely on the evidence that comes out in open court." Worthington responded

that she could. The trial court then made clear that Worthington was to "let [the court] or the prosecutor or the defense attorney" know if she later decided she was "not up to serving on this particular case." Worthington responded: "Yes." Pet.App.13–14 (quoting transcript).

Next, the lawyers asked questions. Here is Worthington's exchange with the prosecutor:

> [Prosecutor]: And from what I understood you to say to the Judge was that in spite of what happened [in your brother's case] …
>
> In spite of what happened … that you will make every effort as humanly possible to set aside that experience and judge this case solely on whatever evidence is here. You'll forget what took place in the courtroom then and rely only on what takes place in the courtroom now; is that correct?
>
> Ms. Worthington: Yes.
>
> [Prosecutor]: And in doing so, you could follow the law that Judge Cleary will tell you the law is in this case, apply it to the evidence that you have heard in the courtroom, and come to what in your mind will be a fair and impartial verdict; you can do that?
>
> Ms. Worthington: Yes.

Pet.App.14 (quoting transcript).

Once the prosecutor finished, defense counsel began. He told Worthington that the trial would feature testimony by employees "from the coroner's of-

fice … and there are going to be people from the trace evidence department at the coroner's office and they may be some of the same people that testified in your brother's trial." Pet.App.15 (quoting transcript). Counsel asked Worthington if, "when these people take the witness stand," she would "be able to hold back any kind of an emotional rush that's going to occur when you see these ladies here testifying about the same kind of things they did in your brother's trial." Worthington responded: "I don't know." Pet.App.15 (quoting transcript). But after admitting that she could not rule out the possibility of feeling some rush of emotions, Worthington unequivocally answered "No" when asked if her feelings "might substantially impact" her "ability to develop complete concentration on this case." And she answered "No," again unequivocally, when asked if her emotions would "impact on [sic] the case." Pet.App.16 (quoting transcript).

Although defense counsel had already exhausted his peremptory strikes, he moved to have Worthington dismissed for cause. The trial court, after listening to counsel's argument, denied the motion. The court explained that Worthington, "when questioned, unequivocally stated that she could be fair and impartial," that she "understands the responsibility," and that the court did not "see a problem with her serving." Pet.App.16 (quoting transcript).

2. After his conviction, Allen appealed (among other things) the trial court's refusal to strike Worthington. He lost before the Eighth District Court of Appeals, and fared no better before the Supreme Court of Ohio. In an opinion by then-Justice

Cook (who is now a judge on the Sixth Circuit), the court explained that Worthington "answered 'no' when asked if her feelings would 'impact' … the case." Pet.App.133. And the trial court judge, who "saw and heard Worthington and could legitimately validate her statements," concluded that her answers constituted an "unequivocal[]" statement "that she could be fair and impartial." Pet.App.133.

After this Court denied Allen's petition for a writ of *certiorari*, *see Allen v. Ohio*, 516 U.S. 1178 (1996), Allen turned his attention to seeking post-conviction relief. He filed his federal habeas petition in 1999. The District Court denied his request for relief and Allen appealed to the Sixth Circuit. There, Allen raised two claims, "First," he argued "that the trial court's failure to dismiss Worthington deprived him of his constitutional right to an impartial jury, resulting in an unreasonable application of clearly established federal law," thus entitling him to habeas relief under 28 U.S.C. §2254(d)(1). Pet.App.18 (Moore, J., concurring in the judgment). "Second," he argued "that the trial court's decision not to dismiss Mrs. Worthington for cause was based on an unreasonable determination of the facts," thus entitling him to relief under 28 U.S.C. §2254(d)(2). Pet.App.18

Following a years-long stay, the Sixth Circuit unanimously denied Allen's request for habeas relief. All three judges agreed that the "Ohio Supreme Court's ruling—that the trial court did not abuse its discretion in empaneling Worthington—was neither contrary to clearly established federal law, nor based on an unreasonable determination of the facts." Pet.App.9; *accord* Pet.App.22 (Moore, J., concurring

in the judgment). The court stressed that a trial court's determinations regarding the impartiality of prospective jurors are entitled to heavy deference. Pet.App.7. And while Worthington's statements may have been "somewhat unclear and equivocal," she did say that "she could set aside her feelings, decide the case based only on the evidence presented in court, follow the law as instructed, and come to a fair and impartial verdict." Pet.App.7. The Supreme Court of Ohio did not unreasonably apply or contradict any holding of the Supreme Court of the United States when it denied Allen relief in these circumstances. Nor did its conclusion rest on an unreasonable finding of fact, since a judge could reasonably deem Worthington impartial in these circumstances. Pet.App.7–9. "Especially in light of the special deference owed to the trial court's determination of juror impartiality as well as the deferential standard for reviewing factual findings under §2254," the Sixth Circuit concluded, it could not "say that the Ohio Supreme Court's ruling … was an unreasonable application of clearly established federal law or an unreasonable determination of the facts." Pet.App.9.

Judge Moore wrote separately to explain that she would have ruled for Allen on "direct review." Pet.App.22. But in the habeas posture, she determined, a proper analysis required ruling for the Warden.

REASONS FOR DENYING THE WRIT

David Allen seeks pure error correction. That is reason enough to deny his petition. This Court sits to resolve important legal issues that will impact many cases, not to resolve one-off errors in discrete

cases. *See Barnes v. Ahlman*, No. 20A19, ___ U.S. ___ 2020 U.S. LEXIS 3629, at *7 (Aug. 5, 2020) (Sotomayor, J., dissenting from the grant of stay); *Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (statement of Alito, J., respecting denial of the petition for a writ of *certiorari*); Rule 10.

Regardless, the case for *certiorari* is doomed by the fact that the Sixth Circuit committed no error. It correctly held, unanimously, that Allen's claim for habeas relief is a loser. Because this case presents no circuit split or other important issue of law, and because the lower court did not err, the Court should deny the petition for *certiorari*.

I. ALLEN SEEKS PURE ERROR CORRECTION IN A CASE IN WHICH THE SIXTH CIRCUIT COMMITTED NO ERROR.

"Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quoting *Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998)). "It 'disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Id.* (quoting *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)). Accordingly, federal law makes it very difficult for state petitioners to win habeas relief. Two sections—subsections (d)(1) and (d)(2) of 28 U.S.C. §2254—allow for relief in only two, very limited circumstances. Although Allen seeks relief under both, he is not entitled to relief under either.

Section 2254(d)(1). Section 2254(d)(1) allows federal courts to award habeas relief only when the state court's decision was either "contrary to" or involved an "unreasonable application of" this Court's precedents. The Court has long read these phrases to cover distinct fields. *See Williams v. Taylor*, 529 U.S. 362, 405–06 (2000).

"The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Id.* at 405 (citation omitted). So a state court's decision is "contrary to" the Court's cases in only two situations: (1) if "the state court applies a rule that contradicts the governing law set forth in [the Court's] cases," or (2) if "the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [its] precedent." *Id.* at 405–406. "Avoiding these [two] pitfalls does not require citation of [the Court's] cases—indeed, it does not even require awareness of [its] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*). And when deciding whether a state court's ambiguous opinion correctly identified the governing legal rules, the Court starts with a "'presumption that state courts know and follow the law.'" *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (*per curiam*) (citation omitted). Federal courts thus should not show a "readiness to attribute error" to state courts. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*). Instead, state courts must "be given the benefit of the doubt" in federal habeas proceedings. *Id.*

The bar for proving an "unreasonable application" of Supreme Court precedent is just as high. Courts must "assess whether the [state court's] decision 'unreasonably applies [the governing legal] principle to the facts of the prisoner's case.'" *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (quoting *Williams*, 529 U.S. at 413). The Court has repeatedly "explained that 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Williams*, 529 U.S. at 410). A state court's decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

Allen cannot satisfy either standard.

First, the Supreme Court of Ohio's decision was not "contrary to" clearly established Supreme Court holdings. The Sixth Amendment guarantees all criminal defendants the right to a trial "by an impartial jury." And a juror is "impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court is a question of federal law." *Patton v. Yount*, 467 U.S. 1025, 1037 n.12 (1984). But the Supreme Court of Ohio did not apply a rule "that contradicts" that principle. *Williams*, 529 U.S. at 405. To the contrary, it recognized that jurors must be impartial—it simply determined that the trial court had not erred in deeming Worthington impartial.

Nor did the Supreme Court of Ohio reach a decision at odds with a Supreme Court decision involving "a set of facts that are materially indistinguishable"

from the facts in this case. *Williams*, 529 U.S. at 406. Indeed, there is no Supreme Court case that presents materially indistinguishable facts. Worthington acknowledged that testimony about a murder *might* make her emotional (she did not know), but she twice and unequivocally answered "No" when asked whether her brother's murder would affect her ability to parse the evidence in this case. *See* Pet.App.16 (quoting transcript). No Supreme Court case has considered whether, let alone held that, facts like those presented here give rise to a Sixth Amendment violation.

Second, the Supreme Court of Ohio's decision was not an "unreasonable application" of Supreme Court precedent, as there is ample room here for "fairminded disagreement" regarding the correctness of its ruling. The trial judge asked Worthington probing questions, listened to her answers to the attorneys' questions, observed her in person, and credited her testimony that she would not be impartial. The judge's determination was entitled to a good deal of deference. *Wainwright v. Witt*, 469 U.S. 412, 426 (1985). A fairminded jurist could therefore have concluded that the decision to let Worthington serve comported with the Sixth Amendment. It follows that the Supreme Court of Ohio did not unreasonably apply Supreme Court precedent.

Section 2254(d)(2). Allen's claim for relief fares no better when analyzed under §2254(d)(2). Again, that section permits habeas courts to award relief *only* in cases where the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court

proceeding." The petitioner bears the burden of "rebutting the presumption of correctness" of the state court's "determination[s]" of "factual issues" by "clear and convincing evidence." § 2254(e)(1). Thus, if "[r]easonable minds reviewing the record might disagree" as to the correctness of the state court's factual determination, then the finding is not "unreasonable" in the sense required for habeas relief. *See Rice v. Collins*, 546 U.S. 333, 341 (2006). Put differently, a habeas petitioner cannot win relief under §2254(d)(2) if there is "evidence in the state-court record" that "can fairly be read to support" the state court's factual determination. *Wood v. Allen*, 558 U.S. 290, 301–02 (2010); *accord Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (*per curiam*).

Here, there is ample "evidence in the state-court record" supporting the determination that Worthington would be impartial. *Wood*, 558 U.S. at 301–02. Indeed, although Worthington admitted that she might be emotional hearing testimony about a murder, she never suggested that it would affect her impartiality—to the contrary, she twice, without equivocation, answered "No" when asked if her brother's murder would affect her ability to adjudicate Allen's case impartially. Pet.App.16 (Moore, J., concurring in the judgment) (quoting transcript); *see also* Pet.App.133; Pet.App.8. The "trial judge saw and heard Worthington and could legitimately validate her statements." Pet.App.133. Because "[r]easonable minds reviewing the record" might agree that Worthington would be impartial, that finding was not "unreasonable," and the Supreme Court of Ohio's relying on that finding does not entitle Allen to habeas relief. *Rice*, 546 U.S. at 341.

* * *

Because Allen seeks pure error correction in a case not involving any error, this Court should deny his petition for a writ of *certiorari*.

II. ALLEN PROVIDES NO SOUND BASIS FOR GRANTING HIS *CERTIORARI* PETITION.

Allen's arguments for granting *certiorari* do not alter the analysis. His petition begins by simply challenging the Sixth Circuit's resolution of this case. But it does so unpersuasively. Allen spends two pages insisting that the state trial court should not have believed Worthington when she said she would be impartial. Pet.8–10. But since this is a habeas case, the question is not whether the state courts erred in their factual determinations. Instead, the relevant question is whether any factual error regarding Worthington's impartiality was so egregiously wrong that no "evidence in the state-court record" could "fairly be read to support" the finding of impartiality. *Wood*, 558 U.S. at 301. As explained above, the record evidence amply supported that factual finding.

Allen also asks this Court to grant *certiorari* to resolve a supposed circuit split over the question whether a prospective juror's bias must be "actual" or whether it may be "implied." In other words, can a prospective juror's bias be conclusively presumed based on objective circumstances—such as a familial relationship to a party—even if the prospective juror does not *admit* to being biased? There does not appear to be a split on this issue. In arguing otherwise, Allen points to cases from the Fourth, Fifth, and Eighth Circuits. The Fourth and Fifth Circuits rec-

ognize the implied-bias doctrine and apply it in habeas cases. *See Conaway v. Polk,* 453 F.3d 567, 585 (4th Cir. 2006); *Brooks v. Dretke*, 418 F.3d 430, 435 (5th Cir. 2005). And while the Eighth Circuit case that Allen cites expressed uncertainty about the doctrine's existence, it assumed the doctrine's existence and applied it to the petitioner's claims. *Sanders v. Norris*, 529 F.3d 787, 792–93 (8th Cir. 2008). The Warden has not found any circuit that has squarely rejected the doctrine's existence. *See also* Pet.App.20 n.7 (Moore, J., concurring in the judgment).

In any event, assuming there is a split, this is a terrible vehicle for resolving it for two reasons.

First, the validity of the implied-bias doctrine does not arise here. The Supreme Court of Ohio and the Sixth Circuit both applied the doctrine (without naming it) by asking whether the circumstances here established bias even though Worthington said she would *not* be biased. Pet.App.7–9; Pet.App.133. And Judge Moore, in her concurrence, stated expressly that the she was applying the implied-bias doctrine. Pet.App.20 n.7. Thus, the question whether the doctrine *should* apply does not arise: as the Sixth Circuit's decision shows, Allen loses even if the doctrine does apply. Because the doctrine's existence is irrelevant to the outcome of this case, it is unnecessary to reach the issue and thus necessary not to. *See PDK Labs., Inc. v. United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment).

Second, this is an AEDPA case. Thus, the Court cannot even reach the question whether there *is* an implied-bias doctrine unless it first determines that

the doctrine is "clearly established." §2254(d)(1). If no such doctrine is "clearly established," then Allen loses and the Court will have no reason to reach the question whether the doctrine ought to be recognized.

CONCLUSION

The Court should deny David Allen's petition for a writ of *certiorari*.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

BENJAMIN M. FLOWERS*
Solicitor General
**Counsel of Record*
BRENDA S. LEIKALA
Senior Assistant
Attorney General
30 East Broad Street, 17th Fl.
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@
ohioattorneygeneral.gov

Counsel for Respondent

AUGUST 2020