No. 21-1587

**In the Supreme Court of the United States**

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TIM SHOOP, Warden,

*Petitioner*,

v.

JERONIQUE D. CUNNINGHAM,

*Respondent.*

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

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# REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## CAPITAL CASE - NO EXECUTION DATE

## QUESTIONS PRESENTED

**1.** AEDPA generally prohibits courts from awarding habeas relief to state prisoners. It lifts that prohibition with respect to prisoners in custody because of a state-court ruling that 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). Did the Sixth Circuit err by granting habeas relief based on an alleged misapplication of its own circuit precedent?

**2.** If the requirements for a federal evidentiary hearing are otherwise satisfied, but Federal Rule of Evidence 606(b)(1) forbids considering the only evidence supporting an evidentiary hearing, must a court hold the hearing regardless?

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## REPLY

Allowing jury verdicts to be "attacked and set aside on the testimony of" participating jurors would destroy all "frankness and freedom of discussion" in jury deliberations. *McDonald v. Pless*, 238 U.S. 264, 267–68 (1915). In this case, the Sixth Circuit failed to heed that warning. As emphasized by the seventeen *amici* States, *see* Br. of Kentucky, et al., the Circuit's decision will result in jurors being "harassed and beset" by defendants seeking "evidence of facts which might establish misconduct sufficient to set aside a verdict," Pet.App.87a (Kethledge, J., dissenting) (quoting *Tanner v. United States*, 483 U.S. 107, 120 (1987)). The Court should either summarily reverse or set this case for argument.

### I. The Sixth Circuit egregiously erred.

Recall the facts. A jury convicted Jeronique Cunningham of murder and an Ohio court sentenced him to death. After the trial ended, an investigator approached a juror named Nichole Mikesell while she played outside with her children. Pet.App.80a (Kethledge, J., dissenting). Mikesell told the investigator that social workers at the children-services agency where she worked were afraid of Cunningham. Pet. App.81a (Kethledge, J., dissenting).

In state-postconviction proceedings, Cunningham argued that Mikesell's comments indicated bias. But the state courts disagreed. The last one to address the issue explained that it was impossible to tell whether Mikesell learned of the social workers' fears "prior to, during, or subsequent to" Cunningham's trial. Pet.App.177a. Because no evidence suggested that Mikesell learned of this information before or

during the trial, her comments did not support Cunningham's juror-bias theory.

Then came the federal habeas proceedings. The habeas court allowed Cunningham to interview and depose Mikesell and some other jurors. The testimony confirmed that Mikesell learned of the social workers' comments *after* Cunningham's trial. But two jurors testified that, during deliberations, Mikesell said either that she had worked or might one day work with the victims' families. Pet.App.7a–10a (majority op.). After hearing this evidence, the District Court found that Cunningham failed to establish his entitlement to relief under AEDPA.

The Sixth Circuit reversed, over Judge Kethledge's dissent. It gave two reasons for doing so. First, it concluded that the state courts, by rejecting Cunningham's first juror-bias claim without holding a hearing, unreasonably applied *Remmer v. United States*, 347 U.S. 227 (1954). Pet.App.16a–26a. Second, and relying on evidence of the just-discussed statements Mikesell allegedly made during jury deliberations, the Circuit concluded that Cunningham was entitled to an evidentiary hearing under 28 U.S.C. §2254(e). Pet.App.26a–42a. It acknowledged that the only evidence justifying that evidentiary hearing—testimony from fellow jurors—was inadmissible under Rule 606(b) of the Federal Rules of Evidence. *See* Pet.App.41a–42a. It ordered a hearing nonetheless.

The Sixth Circuit erred egregiously. And its errors resulted in a ruling that intrudes egregiously upon Ohio's system of justice, "needlessly prolong[ing]" this case and undermining "the 'essential' need to promote the finality of state convictions."

*Shinn v. Ramirez*, 142 S. Ct. 1718, 1739 (2022); *see also Shoop v. Twyford*, 142 S. Ct. 2037, 2044–45 (2022). The Sixth Circuit created a serious error worthy of this Court's attention, not a "modest" error unworthy of review. BIO.1.

### A. Cunningham is not entitled to habeas relief in connection with his first juror-bias claim.

**1.** Cunningham's first juror-bias claim rests on the statement Mikesell made to the investigator. Specifically, it relates to Mikesell's claim that her co-workers feared Cunningham. A state court rejected this theory because there was no evidence Mikesell learned of her co-workers' feelings before or during her jury service. *See* Pet.App.177a. Cunningham claims that this Court's decision in *Remmer* required the state court, before reaching that conclusion, to hold a hearing regarding Mikesell's bias.

To prevail on his habeas claim, Cunningham needs to show that the state court "unreasonabl[y] appli[ed] … clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. §2254(d)(1). In other words, he needs to show the state court's application of *Remmer* was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). He cannot make that showing. *See* Pet.15–23.

*Remmer* held that, when a juror has been exposed to an outside influence, a court should hold a hearing to review "the circumstances, the impact thereof upon the juror, and whether or not [the outside influence] was prejudicial." 347 U.S. at 230. But in

*Remmer*, it was undisputed that one juror had been exposed to outside influence. As a result, *Remmer* did not "attempt to describe, qualitatively or quantitatively, the showing necessary to mandate" a hearing. Pet.App.83a–84a (Kethledge, J., dissenting). To this day, the Court has yet to issue a decision addressing the type or amount of evidence that requires a *Remmer* hearing. Pet.App.85a–86a (Kethledge, J., dissenting). It is therefore impossible to say that the state court's failure to hold a *Remmer* hearing reflects an "unreasonable application of" this Court's precedent; *Remmer*'s lack of guidance left ample room for fairminded disagreement about whether Mikesell's temporally ambiguous statement about her co-workers' thoughts justified a hearing. Pet.21–22; *accord* Pet.App.83a (Kethledge, J., dissenting).

The Sixth Circuit did not seriously argue otherwise. Instead, the majority concluded that the state court misapplied *Sixth Circuit* precedents interpreting *Remmer*. Pet.App.17a–20a, 22a–24a. It erred. AEDPA permits courts to award relief based on unreasonable applications of *Supreme Court* precedents. The Sixth Circuit is not the Supreme Court, and this Court has repeatedly reversed the Sixth Circuit for awarding habeas relief based on supposed misapplications of circuit precedent. *Parker v. Matthews*, 567 U.S. 37, 48–49 (2012) (*per curiam*); *White v. Woodall*, 572 U.S. 415, 420 n.2 (2014). The majority's "plain and repetitive error" justifies summary reversal. Pet.App.83a (Kethledge, J., dissenting).

**2.** Cunningham has no good response.

He first claims that a defendant need not prove actual bias to be entitled to a *Remmer* hearing. BIO.10. True, but irrelevant. While *Remmer* allows

for hearings to determine *whether* there was actual bias, it never describes, "qualitatively or quantitatively," what a defendant must show to win such a hearing. Pet.App.83a–84a (Kethledge, J., dissenting). Its failure to do so leaves room for fairminded disagreement regarding whether Mikesell's ambiguous statements entitled Cunningham to a hearing.

Perhaps sensing this problem, Cunningham argues that mere allegations of juror partiality are sufficient to warrant a hearing. He supports this argument by suggesting that *Remmer* itself involved mere allegations. *Remmer*, Cunningham insists, held that the trial court should have held a hearing to examine the alleged bias and to determine "what actually transpired." BIO.10 (quotation omitted). The Sixth Circuit read *Remmer* the same way. *See* Pet.App. 19a–20a (majority op.). But while the quoted words appear in *Remmer*, Cunningham and the Circuit take them out of context. No party in *Remmer* disputed that someone tried to bribe a juror. 347 U.S. at 228. Indeed, at least two newspaper articles had discussed the events. *Id.* at 229. So, while a hearing might have been helpful in developing the *details* about "what actually transpired," *id.*—and in particular, whether the events proved actual bias—undisputed facts established the need for a hearing. As a result, the case cannot be read to stand for the proposition that mere allegations of outside influence justify a *Remmer* hearing.

Cunningham additionally cites *Smith v. Phillips*, 455 U.S. 209 (1982), for the proposition that "prima facie 'allegations of juror partiality' are sufficient to warrant a hearing." BIO.11. *Smith* held no such thing. The state court in *Smith* had conducted a *Remmer* hearing. And *Smith* presented a single

question: whether the state court's *Remmer* hearing passed constitutional muster. 455 U.S. at 216, 218. The Court did not address how much evidence of outside influence was needed to trigger a *Remmer* hearing. It had no need to, for two reasons. First, the state court had already conducted a *Remmer* hearing. Second, as in *Remmer*, no party disputed that a juror in *Smith* was subject to outside influence. *Id.* at 212–13. When *Smith* referred to "allegations of juror partiality," the Court was discussing this specific, undisputed evidence of outside influence. *See id.* at 218. It was not, as Cunningham suggests, holding that *Remmer* requires a hearing every time there is *any* allegation of juror partiality.

Rather than relying on Supreme Court precedent alone, the Sixth Circuit determined that the state courts had misapplied *circuit* precedent. *See* Pet. App.17a–18a (citing *United States v. Herndon*, 156 F.3d 629, 635 (6th Cir. 1998)). Specifically, the court relied on *Herndon* for the proposition that courts must hold a *Remmer* hearing whenever there is a "colorable" claim of juror bias. *See id.* The term "colorable" does not appear in *Remmer*'s five short paragraphs. *See generally,* 347 U.S. 227. Neither do the words "credibly allege." BIO.7.

One final point. Cunningham insists that Ohio law would not have allowed him to take discovery in state-postconviction proceedings, which is where he raised his juror-bias claim. BIO.12. This paints an incorrect picture of Ohio law. Ohio courts may authorize capital prisoners to conduct discovery for good cause. Ohio Rev. Code §2953.21(A)(1)(e). Plus, when *Remmer* requires a hearing, state courts must hold a hearing *regardless* of what state law allows. In any event, this argument is irrelevant, since the

state court did not unreasonably apply *Remmer* by failing to hold a hearing.

### B. The Sixth Circuit improperly granted an evidentiary hearing on Cunningham's second juror-bias claim.

Cunningham's second jury-bias claim rests on allegations that Mikesell was biased by her actual or potential relationship with the victims' families. The Sixth Circuit, relying exclusively on testimony regarding what Mikesell said during jury deliberations, ruled that the District Court should have held an evidentiary hearing to determine whether Mikesell was biased by her actual or possible relationship with the victims' families. It erred. *See* Pet.27–30.

**1.** Once a verdict "has been entered, it will not later be called into question based on the comments or conclusions [the jurors] expressed during deliberations." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017). This principle is now embodied in Federal Rule of Evidence 606(b), which generally prohibits federal courts from even receiving a juror's testimony about statements made during deliberations.

Rule 606(b) bars federal courts from even considering the only evidence that the Sixth Circuit identified as justifying an evidentiary hearing regarding Mikesell's relationship with the victims' families. Cunningham asserted that Mikesell was biased against him because she had, or was likely to have, a relationship with the families of his victims. *See* Pet. App.26a. He relied exclusively on affidavits and testimony from two jurors regarding statements that Mikesell allegedly made during deliberations. *See* Pet.App.7a–10a. The Sixth Circuit should never

have even *received* that evidence—the court certainly should not have relied upon this evidence when granting relief. This Court should summarily reverse.

**2.** Cunningham argues that he does not need to rely on evidence barred by Rule 606(b) because he might be able to find admissible evidence that would show Mikesell's bias. *See* BIO.16, 18. If such evidence exists, Cunningham has never presented it. The *only* evidence Cunningham has ever provided in support of his second juror-bias claim consists of affidavits and testimony discussing statements made during jury deliberations. *See* Pet.App.7a–10a. And the Sixth Circuit relied exclusively on that evidence when it ordered the District Court to conduct an evidentiary hearing on the second juror-bias claim. *See* Pet.App.37a–42a. When Cunningham says that he has been "attempting to present" admissible evidence, BIO.18, he means that he has long sought an evidentiary hearing at which he might go fishing for evidence. That is what *Twyford* said habeas petitioners may not do. 142 S. Ct. at 2044–45.

Cunningham's failure to produce admissible evidence of juror misconduct defeats his attempt at distinguishing *Tanner v. United States*, 483 U.S. 107. *See* BIO.20. The district court in that case, Cunningham notes, held a hearing on the defendant's first request for a new trial. But that request, unlike Cunningham's request for an evidentiary hearing, relied on admissible, non-juror evidence. *See Tanner*, 483 U.S. at 113. Perhaps Cunningham *could have* supported his request for an evidentiary hearing with admissible evidence. But he did not. The more appropriate comparison is therefore to the *Tanner* defendant's *second* request for a hearing, which, like

Cunningham's request, rested on evidence barred by Rule 606(b). *See id.* at 126–27. The Court in *Tanner* held that the district court did not err by denying that second request. *Id.* The Sixth Circuit should have done the same thing here.

Cunningham argues that Rule 606(b) does not apply to requests for evidentiary hearings. According to him, the rule applies only during the hearings themselves. *See* BIO.18. But that is not what the rule says. It says that courts cannot "receive" juror testimony during any inquiry into the validity of a verdict. A habeas petition challenges the validity of a state-court verdict. *See* §2254(d). Rule 606(b) therefore applies in habeas cases. Cunningham does not argue otherwise, he simply insists that the bar on receiving such evidence ceases to apply when the habeas court is asked to consider whether to hold a hearing. That *ad hoc* distinction "happens to fit this case precisely, but it needs more than that to recommend it." *DHS v. MacLean*, 574 U.S. 383, 394 (2015). Nothing more does. Indeed, adopting this *ad hoc* distinction would contradict an important principle that the Court twice affirmed this past year: habeas courts should not permit evidentiary development unless the habeas petitioner can establish that doing so will likely prove fruitful. *See Shinn,* 142 S. Ct. at 1739; *Twyford*, 142 S. Ct. at 2045. A hearing supported exclusively by inadmissible evidence does not pass muster.

Perhaps aware of these problems with his argument, Cunningham raises two others.

*First*, he appears to argue that any error regarding Rule 606(b) is immaterial. Specifically, he claims that the Sixth Circuit properly held that courts must

order an evidentiary hearing under §2254(e)(2) whenever the petitioner makes "vague allegations" of juror bias. Thus, Cunningham reasons, the mere allegations of bias would have required a hearing without regard to the inadmissible evidence. *See* BIO.15.

Cunningham's argument relies on a misreading of *Michael Williams v. Taylor*, 529 U.S. 420 (2000)—a misreading the Sixth Circuit embraced as well. *See* Pet.App.38a–39a. In *Michael Williams*, the Court considered an issue distinct from the one presented here. In limited circumstances, §2254(e)(2) allows habeas petitioners to obtain evidentiary hearings on matters that could not have been "discovered" in state proceedings "through the exercise of due diligence." *Michael Williams* held that a petitioner who makes only "vague allegations" about an issue in state court can nonetheless be deemed to have exercised the requisite diligence. *See* 529 U.S. at 430, 442; *see also Cullen v. Pinholster*, 563 U.S. 170, 184 (2011). As this description shows, *Michael Williams* did not address the question whether mere allegations of bias require a hearing under §2254(e)(2).

*Second*, Cunningham denies that Rule 606(b) bars the federal courts from receiving the evidence the Circuit relied upon in ordering an evidentiary hearing—namely, the other jurors' testimony about what Mikesell said during jury deliberations. Cunningham points to Rule 606(b)(2)(A), which makes an exception to Rule 606(b)'s general prohibition on receiving evidence regarding jury deliberations. This exception permits jurors to testify about "extraneous prejudicial information [that] was improperly brought to the jury's attention." But even the panel majority found that exception inapplicable here,

since the second juror-bias claim "does not involve allegations of extraneous influence." Pet.App.39a; *see also* Pet.App.89a–94a (Kethledge, J., dissenting). Rightly so. "[I]nformation is deemed 'extraneous' if it derives from a source 'external' to the jury." *Warger v. Shauers*, 574 U.S. 40, 51 (2014) (quotation omitted). The testimonial evidence the Circuit relied upon when ordering the hearing does not address "external" influence. Rather, it suggests that Mikesell's actual or anticipated experiences predisposed her to ruling against Cunningham. That constitutes "internal" influence under this Court's precedents. *Id.* at 51–52.

## II. This case implicates two circuit splits.

**A.** If the only evidence of juror misconduct is barred by Rule 606(b), does a "district court … abuse its discretion" by declining to hold a hearing on the matter? Pet.31 (quotation omitted) (collecting cases). Most circuits say no. At least two have said so in habeas cases. *See Crowe v. Hall*, 490 F.3d 840, 848 (11th Cir. 2007); *Austin v. Davis*, 876 F.3d 757, 787–91, 798–99 (5th Cir. 2017). The Sixth Circuit's contrary ruling thus implicates a circuit split.

Cunningham says his case is distinguishable from the other circuits' cases for two reasons. BIO.26–27. First, he says the evidence regarding his second juror-bias claim is admissible under Rule 606(b)(2)(A). That is not true, as just discussed. Second, Cunningham claims that a hearing in his case would perhaps have produced admissible evidence. Even assuming (improbably) that the same could not be said of the other cases, the distinction Cunningham suggests is irrelevant to the question that divides the circuits: whether parties can obtain evidentiary

hearings using evidence Rule 606(b) makes inadmissible.

**B.** The second split asks whether a district court is *ever* required to hold an evidentiary hearing. *See* Pet.33–34. This Court has held that, even when §2254(e)(2)'s requirements apply, a federal habeas court "is not re*quired* to hold a hearing or take any evidence." *Shinn*, 142 S. Ct. at 1734; *see also Schriro v. Landrigan*, 550 U.S. 465, 468 (2007). Cunningham claims those holdings resolve the split. BIO.29–30. If that is right, it provides yet another basis for summary reversal. Rather than applying an abuse-of-discretion standard, the Circuit held that the District Court was *required* to hold a hearing. Pet.App. 43a (majority op.).

Respectfully submitted,

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AUGUST 2022