No. 12-813

In the Supreme Court of the United States

KEITH BUTTS, SUPERINTENDENT, PETITIONER,

v.

VIRGIL HALL, III

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

BRIEF OF *AMICI CURIAE* STATES OF MICHIGAN, ARIZONA, FLORIDA, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA, NEW MEXICO, UTAH, AND WYOMING IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether this Court has clearly established under 28 U.S.C. § 2254(d)(1) the standard by which the state courts are to review claims that extraneous jury influences may have prejudiced a criminal defendant's right to a fair trial?

2. Should this Court repudiate the presumed prejudice standard, and clarify that a criminal defendant should only be entitled to relief where he shows that the extraneous influence would prejudice a hypothetical average juror?

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INTEREST OF *AMICI CURIAE*

One of the chief police powers of the States is to protect the safety of the community. The *amici* States are responsible for securing criminal convictions and defending the constitutional validity of criminal convictions that have been obtained in state court when challenged in federal habeas corpus review. In safeguarding this duty, the *amici* States have two distinct interests in having this Court review Indiana's petition.

First, the *amici* States seek to ensure that the standards of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)are properly applied. AEDPA bars the federal courts from vacating state criminal convictions unless contrary to this Court's "clearly established" law. And this Court has issued decisions with conflicting standards about the issue presented here—how to determine whether a criminal defendant is entitled to relief where there are extraneous influences on the jury.

Second, this Court should grant certiorari to clarify the proper standard on the issue of extraneous influences, thereby giving the necessary guidance to the lower courts. This issue is a recurring problem, one that this Court has not addressed in 20 years. Given the conflicting standards in the courts below, this habeas case would provide an excellent vehicle to articulate the rule of law in this area.[1]

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[1] Consistent with Rule 37.1, more than 10 days in advance of filing, counsel for the *amici* States contacted attorneys for Indiana and for respondent to inform them of the intent to file.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue whether a legal principle is "clearly established" by this Court under 28 U.S.C. § 2254(d) is a critical threshold question for examining a state court decision. The circumstances of this case provide a paradigm area of the law that requires clarification.

The Court has issued three decisions addressing the standard for evaluating extraneous influences on juries, and these decisions have yielded no fewer than four competing lower court standards: (1) presumption of prejudice for egregious violations; (2) presumption of prejudice for factual claims not presented to the jury; (3) presumption of prejudice unless the influence was innocuous; and (4) a "substantial prejudice" test in which the criminal defendant has the burden of proving that the extraneous influence would have prejudiced a hypothetically average juror.

This area is ripe for review.

In granting habeas review in other cases, this Court has taken the opportunity to clarify the area of law and establish a rule that is workable and consistent with constitutional standards. The Court should grant review here and adopt the "substantial prejudice" test. The presumption-of-prejudice test should be reserved for claims that are not amenable to review. As demonstrated by the Third Circuit's experience, the "substantial prejudice" test reflects the proper balancing of the parties' interests. It also reflects what is really occurring in the other circuits. Egregious violations are prejudicial, and innocuous ones are not. There should be a single, governing test.

ARGUMENT

I. The Court's conflicting precedents regarding the standard for evaluating extraneous juror influences have created a prominent and longstanding circuit split.

Only this Court can dictate what constitutes "clearly established federal law" for purposes of federal habeas review. But what may have been clearly established law with respect to extraneous juror influences in 1954 has since been eroded by subsequent decisions of this Court. Consequently, the Court should take this opportunity to clarify the standard by which lower courts evaluate extraneous influences on jurors.

The circuit courts' widely varying approaches on this issue indicate a lack of clarity and difficulty in application. The circuits have fashioned four discrete approaches from this Court's holdings in *Remmer* v. *United States*, 347 U.S. 227 (1954), *Smith* v. *Phillips*, 455 U.S. 209 (1982), and *United States* v. *Olano*, 507 U.S. 725 (1993). This variety underscores the point that the U.S. Court of Appeals for the Seventh Circuit did not rely on clearly established law in holding that the state court decision here was objectively unreasonable.

A. The requirement that this Court's decisions be "clearly established" is a critical threshold that significantly limits the nature of habeas review.

AEDPA contemplates an extremely limited scope of review. Under 28 U.S.C. § 2254(d)(1), a federal court can only grant relief with respect to a claim that a

state court has rejected if the state court's adjudication was contrary to or an unreasonable application of this Court's clearly established precedent. And the decision regarding what constitutes this Court's "clearly established" precedent is derived from the Court's holdings at the time of the relevant State adjudication, rather than from *obiter dictum*. In the last few years, this Court has reiterated the point that the rule must be one that this Court specifically established.

Indeed, the circumstance in which there is an open and established circuit split on the proper standard in light of this Court's decisions is one in which the law is not clearly established. *Price* v. *Vincent*, 538 U.S. 634, 643 n.2 (2003) ("This was not an objectively unreasonable application of clearly established law as defined by this Court. Indeed, numerous other courts have refused to find double jeopardy violations under similar circumstances."). See generally Brian Means, *Federal Habeas Manual*, (2011), § 3.32 ("Breadth of the 'clearly establish' limitation"), pp. 222–229. Thus, the lower courts' divergent application of this Court's decisions is relevant for determining whether the standard from Supreme Court precedent is clearly established.

B. The Court has issued conflicting decisions that have resulted in disparate lower court standards for evaluating extraneous jury influences.

The issue here stems from three decisions of this Court involving extraneous jury influence. As the split among the circuits attests, these cases do not clearly establish the test for analyzing extraneous influence on juries.

First, in *Remmer* v. *United States*, 347 U.S. 227 (1954), the Court held that "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, *deemed presumptively prejudicial*." *Id.* at 229 (emphasis added). Nevertheless, the Court emphasized that the "presumption is not conclusive," and the "burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Id.* at 229.

Nearly three decades later, this Court seemingly disposed of the prejudice presumption in *Smith* v. *Phillips*, 455 U.S. 209 (1982). There, the Court noted that it had "long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity *to prove actual bias*." *Id.* at 215 (emphasis added). The Court went on to hold that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.* at 217.

Another decade after *Phillips*, the Court addressed the extraneous-jury-influence standard again in *United States* v. *Olano*, 507 U.S. 725 (1993). The Court began by endorsing the *Remmer* presumption: "[t]here may be cases where an intrusion should be presumed prejudicial . . . ." *Id.* at 739. But the Court ultimately determined that "a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" *Id.* In fact, the

Court clarified that "[w]e generally have analyzed outside intrusions upon the jury for prejudicial impact," and called *Remmer* "a prime example" of that principle. *Id*. at 738.

Understandably, the circuits have struggled with the state of the *Remmer* presumption in the wake of *Phillips* and *Olano*. See *Teniente* v. *Wyoming Atty. Gen*., 412 Fed. App'x 96, 103 n.4 (10th Cir. 2011) (holding that *Remmer* is not clearly established for purposes of habeas review given the "lively debate among [and within] federal courts . . . ."). The conflicting language from these three decisions has resulted in competing standards that fall into four distinct categories.

First, the Second, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits still presume prejudice unless the influence on the jury was innocuous or de minimis. *United States* v. *Farhane*, 634 F.3d 127, 168–69 (2d Cir. 2011); *United States* v. *Lawson*, 677 F.3d 629, 646 (4th Cir. 2012); *United States* v. *Martin*, 692 F.3d 760, 765 (7th Cir. 2012); *Tong Xiong* v. *Felker*, 681 F.3d 1067, 1076 (9th Cir. 2012); *McNair* v. *Campbell*, 416 F.3d 1291, 1307–308 (11th Cir. 2005); *United States* v. *Scull*, 321 F.3d 1270, 1280 n.5 (10th Cir. 2011). As with the decision by the Seventh Circuit, circuits adopting this approach insist that *Phillips* did not significantly alter the standards from *Remmer*.

Second, the Eighth Circuit presumes prejudice only for factual claims not presented to the jury. *United States* v. *Honken*, 541 F.3d 1146, 1167 (8th Cir. 2008) ("We have consistently held the *Remmer* presumption of prejudice does not apply unless the alleged outside

contact relates to factual evidence not developed at trial.").

Third, the First Circuit presumes prejudice, but only for egregious violations. The court recently held that "[t]his court continues to assume that a presumption of prejudice exists but only 'where there is an egregious tampering or third party communication which directly injects itself into the jury process.'" *United States* v. *Dehertogh*, 696 F.3d 162, 167 (1st Cir. 2012) (quoting *United States* v. *Boylan*, 898 F.2d 230, 261 (1st Cir. 1990)). The court also noted that "the circuits are divided on whether *Remmer* represents the current thinking of the Supreme Court." *Dehertogh*, 696 F.3d at 167.

Fourth and finally, the Third Circuit employs the "substantial prejudice" test, which requires proof that the extraneous influence would have prejudiced a hypothetical average juror, though, the trial court need not "conduct an investigation where an insufficient factual basis for [the allegation of extraneous juror influence] exists." *United States* v. *Fumo*, 655 F.3d 288, 304 (3d Cir. 2011). In a similar vein, the Sixth Circuit has held that *Phillips* "worked a substantive change" in *Remmer*, requiring that the criminal defendant prove "actual juror partiality." *United States* v. *Pennell*, 737 F.2d 521, 532 n.10 (6th Cir. 1984).

In light of these varying approaches, the law on extraneous juror influences cannot be fairly said to be clearly established even among the circuits much less from this Court. *Price*, 538 U.S. at 643 n.2. Accord *Miller* v. *Colson*, 694 F.3d 691, 698 (6th Cir. 2012) ("[A] disagreement among the circuit courts is evidence that a certain matter of federal law is not clearly

established."). Consequently, the Indiana Court of Appeals' decision that Hall failed to carry his burden of proving prejudice was not an unreasonable application of clearly established federal law as determined by this Court.

II. This Court should grant leave and adopt the "substantial prejudice" test.

Given the regularity with which issues about extraneous influences arise, it is important that the lower courts have a clear standard to apply to resolve these claims. Even though this case is postured as a review in habeas, it does not foreclose this Court from clarifying the proper standard. There is a need for development in this area of the law.

This Court's decisions in *Remmer* and *Phillips*, as well as the lower courts' efforts to faithfully apply these standards, really reflect an ultimate endeavor to ensure that the jurors were not prejudiced by the extraneous influences. The standards articulated in this Court's decisions, and the underlying considerations of the competing standards, are best reflected in the Third Circuit's jurisprudence. This Court should adopt the "substantial prejudice" test.

A. This Supreme Court may clarify constitutional standards on habeas review.

The body of law that is relevant for reviewing a state court merits decision is this Court's clearly established precedent at the time of the decision. See *Greene* v. *Fisher*, 132 S. Ct. 38, 44 (2011). Thus, in

reviewing a state conviction in habeas, this Court can (1) disagree with the state and conclude that the Court *had* clearly established law in the area, or (2) agree with the state and either (a) clarify the law as a means to showing that the state court got it right (and the federal habeas court got it wrong) or (b) simply hold that habeas relief should have been denied due to the absence of clearly established law.

Given the ambiguity in this Court's precedents and the significant, four-way circuit split, the first possibility is not an option. But the Court can and should vacate the Seventh Circuit's decision, clarify the law, and hold that habeas relief was inappropriate given the absence of clearly established Supreme Court law.

B. The "substantial prejudice" test ensures that the Sixth Amendment right to an impartial jury is properly vindicated.

The overarching principle supporting this Court's decisions in *Remmer* and *Phillips* is the question whether the jury's ability to be fair was compromised. As recognized by these decisions, there is a fundamental difference between a juror who has been the subject of a bribery offer and one who sought a job and had some communications with the prosecuting agency's office. There are some extraneous influences that will likely impair the ability of an ordinary juror to be impartial, while other influences will have no bearing on the juror's objectivity.

The standard from the Third Circuit effectively captures this dynamic by measuring this influence against the "hypothetical average juror." *Fumo*, 655

F.3d at 304. The test provides for a consideration of relevant factors:

> (1) "the extraneous information relates to one of the elements of the case that was decided against the party moving for a new trial";
>
> (2) "the extent of the jury's exposure to the extraneous information";
>
> (3) "the time at which the jury receives the extraneous information";
>
> (4) "the length of the jury's deliberations and the structure of the verdict;"
>
> (5) "the existence of instructions from the court that the jury should consider only evidence developed in the case"; and
>
> (6) "whether there is a heavy volume of incriminating evidence."

Id. (internal quotes and citations omitted). Significantly, the point of reference is the "hypothetical" juror, and this emphasis on the ordinary juror places the focus in exactly the right place for three reasons.

First, it ensures that there will be no inquiry into the actual internal deliberations of the jurors. *Fumo*, 655 F.3d at 304 ("the court may inquire only into the existence of extraneous information and not into the subjective effect of such information on the particular jurors.") (internal quotes and citation omitted.) As provided in the federal rules of evidence, the jurors'

subjective decisions on a criminal matter should be beyond the scope of judicial inquiry. Fed. R. Evid. 606(b)(2)(A). These are sacrosanct matters that may be invaded only for the gravest of reasons.

Second, this test would eliminate the confusion caused by the different kinds of presumption-of-prejudice standards that the circuits are employing by looking to the fairness of an ordinary juror. There is no reason to create a separate category of influences that were either "egregious" or not "innocuous" or related to facts not presented at trial. Instead, the proper question is whether the criminal defendant has proven that the influences would have compromised the fairness of an ordinary juror. If so, the criminal defendant would be entitled to a new trial. This is a workable standard.

Third, it effectively navigates the considerations between the usual obligation to prove prejudice and presuming prejudice. It does not examine the actual deliberations, but considers the "hypothetical" juror. The proper prejudice framework examines prejudice *to the process*, not to the trial outcome for this actual jury. This is a critical feature and would clarify the confusion on the meaning of prejudice in this area.

Jury tampering may be harmless. Yet there are some circumstances that even where the evidence at trial is overwhelming, the nature of the extraneous influence would compromise the juror's fairness. The bribery example from *Remmer* is the case in point. Although *Fumo* does provide for an analysis on the "outcome of the trial," its focus is helpful in evaluating prejudice based on the "probable effect" on the *hypothetical* juror. *Fumo*, 655 F.3d at 304. The Ninth

Circuit has described the point by evaluating whether the jury tampering affected the "freedom of action" of the juror. *United States* v. *Henley*, 238 F.3d 1111, 1118 (9th Cir. 2001).

Ordinarily, the Court presumes prejudice only for structural errors precisely because they are not amenable to harmless-error analysis. That is because the nature of the error does not allow a determination about whether the verdict would have been different based on the error. *Fulminante* v. *Arizona*, 499 U.S. 279, 309 (1991). An example of this point is the deprivation of a right to a public trial. See *Presley* v. *Georgia*, 130 S. Ct. 721, 724 (2010). Once violated, there is no way to determine whether this error affected the outcome of the trial because it does not relate to any of the evidence from the trial. Hence, the error is categorized as "structural." See, e.g., *United States* v. *Agosto-Vega*, 617 F.3d 541, 543 (1st Cir. 2010) ("we find that the District Court committed a structural error by excluding the public from the courtroom during the selection of the jury.")

Consistent with *Remmer* and *Phillips*, the claim of jury tampering under *Fumo* requires a showing of prejudice, and the standard properly dispenses with the presumption of prejudice. *Fumo*, 655 F.3d at 304. *Fumo* requires the court to examine the "hypothetical average juror;" and the proper focus is not whether the trial verdict would have been different for this actual jury, but rather that an ordinary juror would no longer have been able to be fair. That is the right inquiry.

The most significant feature of the proper standard in this area of law is the nature of the prejudice inquiry. The question is whether harmless error

requires proof that the specific jury would have reached a different verdict in the absence of an extraneous influence. The Indiana Court of Appeals expressly struggled with this very point. Pet. App. 135a. Even relying on *Remmer* alone, the Indiana Court engaged in a reasonable construction of that decision by requiring proof of actual prejudice for this specific jury insofar as that decision allows for a "harmless error" analysis. *Remmer*, 347 U.S. at 229.

If this Court adopted the Third Circuit's formulation, this would be a significant clarification, effectively creating a new rule. *Teague* v. *Lane*, 489 U.S. 288, 310 (1989). The Indiana court's resolution was not unreasonable based on the conflicting understandings of the law at the time. *Price*, 538 U.S. at 643 n.2. For this reason, this Court should grant the petition and clarify this area of the law.

CONCLUSION

The *amici* States ask this Court to grant the State of Indiana's petition for certiorari.

Respectfully submitted,

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