No. _____

In the

Supreme Court of the United States

CARLTON JOYNER, WARDEN,
Petitioner,

v.

WILLIAM LEROY BARNES &
JASON WAYNE HURST,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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Capital Cases

QUESTION PRESENTED

Pursuant to 28 U.S.C. § 2254(d)(1), a federal court may not grant habeas corpus relief to a state prisoner unless the state court adjudication on the merits "resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by [this Court]." In *Remmer v. United States*, 347 U.S. 227 (1954), this Court held that when a juror has communicated with a third party "about the matter pending before the jury," an evidentiary hearing must be held to determine the prejudicial impact, if any, of the communication. The state court in these two unrelated capital cases held that the alleged third-party communications – with a juror's clergyman about the religious ramifications to the juror in serving on a jury in a capital case (*Barnes*) and with a juror's father about a Bible verse related to the death penalty (*Hurst*) – did not concern "the matter pending before the jury." Neither of the alleged communications addressed the facts of these cases or the specific sentencing choice the juries had to make with respect to respondents. The question presented is:

Did the Fourth Circuit contravene § 2254(d)(1) when it granted habeas relief on the ground that the North Carolina state courts unreasonably applied "clearly established" law when they held that third-party religious discussions with jurors did not concern "the matter[s] pending before the jury"?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Carlton Joyner, Warden of Central Prison in Raleigh, North Carolina, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit in these unrelated capital cases. Pursuant to Rule 12.4, petitioner files a single petition covering all of the judgments in these cases, as they arise from the same court and involve closely related questions.

OPINIONS BELOW

Barnes v. Joyner

The opinion of the Fourth Circuit (App. A) is reported at 751 F.3d 229. The judgment of the district court (App. B) is unreported. The magistrate judge's report and recommendation is unreported. The relevant order of the North Carolina Superior Court (App. D) is unreported.

Hurst v. Joyner

The opinion of the Fourth Circuit (App. G) is reported at 757 F.3d 389. The opinion of the district court denying habeas relief (App. H) is unreported. The report and recommendation of the magistrate judge, recommending the denial of habeas relief (App. I) is unreported. The district court order (App. J) reviewing the magistrate judge order denying discovery (App. K) is unreported. The relevant order

of the North Carolina Superior Court (App. M) is unreported.

JURISDICTION

The judgment of court of appeals in *Barnes v. Joyner* was issued on May 5, 2014. A petition for rehearing was denied on June 2, 2014. (App. C). The judgment of the court of appeals in *Hurst v. Joyner* was issued on July 2, 2014. A petition for rehearing was denied on July 29, 2014. (App. L).

On August 8, 2014, Chief Justice Roberts extended the time within which to file the petition in *Barnes* until October 2, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Sixth Amendment, states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

STATEMENT

A. *Joyner v. Barnes*

1. On October 29, 1992, Barnes and two co-defendants robbed and killed B.P. and Ruby Tutterow. Later testing confirming gunshot residue on Barnes' hands and the waistband of his pants linked Barnes to the crimes. *State v. Barnes*, 481 S.E.2d 44, 53 (N.C. 1997). Additionally inculpatory, Barnes wore the fruits of the robbery – a gold necklace and a watch belonging to the Tutterows – at

an early court appearance in November. *Id.* After a capital trial, the jury convicted Barnes of both counts of first-degree murder on the theory of premeditation and deliberation, as well as felony murder. *Id.*

Thereafter, the trial court conducted a sentencing hearing during which the State presented evidence supporting aggravating circumstances and the defense presented evidence in support of mitigating circumstances. During closing arguments in the penalty phase, counsel for one of Barnes' co-defendants argued to the jury that jurors would suffer personal spiritual ramifications should they recommend the death penalty for the defendants. App. E. Specifically, counsel argued that jurors would violate God's law if they recommended the death penalty, irrespective of whether state law allowed such a sentence. *Id.*

The jury was then instructed as to the applicable state law to be considered in recommending punishment. Notably, none of the aggravating and mitigating circumstances which the jury was tasked with considering included a juror's consideration of the spiritual ramifications to the juror upon recommending a sentence of death. Nor did any of the instructions suggest that the spiritual ramifications to the jurors were in any way relevant to the jury's decision. The jury recommended that Barnes be sentenced to death, and consistent with this recommendation, the trial court imposed a sentence of death for each murder.

2. After the jury returned its sentencing recommendation, defense counsel asserted to the trial court that a juror had taken a Bible into the jury room and read to the jury members from it and that another juror called a minister to ask a question about the death penalty. App. F at 173a-174a.

Defense counsel moved for a mistrial, new trial, new sentencing, to set aside the verdict, and for appropriate relief. The trial court inquired as to whether there was any evidence that "anybody discussed the particular facts of this case with anybody outside the jury" and, when defense counsel answered that there was not, the trial court denied all motions. App. F at 174a-176a.

3. Barnes appealed his convictions and sentences to the Supreme Court of North Carolina, raising the issue of alleged improper third-party communication with a juror. The court rejected this argument, holding that the trial court did not abuse its discretion by failing to inquire further into this issue as there was no evidence that the alleged communication was directed to the facts or law at issue in the case. *Barnes*, 481 S.E.2d at 66-68. Specifically, the court found the allegations failed to establish that the juror had been exposed to "extraneous evidence" about the defendant or the facts of the case or that the jury had "gained access to improper or prejudicial matters" in the case. *Barnes*, 481 S.E.2d at 68. His convictions and sentence were subsequently affirmed, and thereafter

this Court denied certiorari review. *Barnes*, 481 S.E.2d 44, *cert. denied*, 523 U.S. 1024 (1998).

Barnes raised this same issue on state post-conviction review in a motion for appropriate relief (MAR). In support, Barnes submitted several affidavits and post-conviction investigation notes, which collectively alleged the following: that juror Hollie Jordan contacted her pastor after the sentencing-phase argument by defense counsel wherein counsel had argued that jurors would one day face God's judgment if they recommended the death penalty; that the pastor provided the juror with a Bible passage which instructs that Christians have a duty to follow the laws of the state; that counsel's argument had infuriated some jurors; and that an unidentified juror brought a Bible into the jury deliberation room and read from it in response to counsel's argument. Ultimately, the state superior court procedurally barred this claim (as it had already been addressed by the Supreme Court of North Carolina on direct appeal). App. D at 162a. Alternatively, the court found the claim without merit for the reasons provided by the state Supreme Court on appeal. App. D at 163a. The North Carolina Supreme Court denied Barnes' request for discretionary review.

4. Barnes raised this claim in a petition for writ of habeas corpus filed in the United States District Court for the Middle District of North Carolina. The district court denied the petition

concluding that it was not unreasonable for the state court to have held that the matter allegedly discussed between the third party and the juror did not concern the matter before the jury. Therefore, concluded the district court, the state superior court's conclusion was not an unreasonable application of this Court's clearly established law. App. B at 100a, 102a. In so finding, the district court noted that the evidence as alleged did not suggest that the pastor advised the juror whether the defendant's crimes warranted death nor did it indicate whether the juror should recommend a death sentence. Instead, the district court found that the pastor merely "directed her to a portion of the Bible in response to a defense argument that was most assuredly **not** before the jury – i.e., whether God would condemn a juror who voted to impose a death sentence." App. B at 98a (emphasis in original). The district court granted a certificate of appealability as to this issue. App. B at 134a.

On appeal, a divided panel of the Fourth Circuit vacated and remanded. App. A. The court concluded that the state court's failure to apply *Remmer*'s presumption of prejudice and further investigate what it termed "an external influence on the jury" was an unreasonable application of this Court's clearly established law. App. A at 3a. In so finding, the court faulted the state court for failing to further investigate the juror's "conversation with a third party about the spiritual or moral implications of making this decision [recommending life or death

as punishment]" because the court of appeals found this discussion to be "the matter pending before the jury." App. A at 41a. The court of appeals remanded the case to the district court for an evidentiary hearing to determine if the state court's failure to apply this Court's law resulted in a substantial and injurious effect or influence on the jury's verdict.

Judge Agee dissented, specifically concluding that the "spiritual or moral implication" to the juror herself was decidedly not an issue before the jury. App. A at 67a (Agee, J., dissenting). Further, Judge Agee faulted the majority for failing to offer any "substantive basis" for its conclusion that the state court unreasonably applied this Court's law and failed to "grapple with the arguments or theories that could have supported the state court's decision to the contrary." *Id.* Instead, Judge Agee found, "the majority opinion treats the issue before [the Circuit Court] as if it were here on direct appeal from the trial court and not a § 2254 petition constrained by AEDPA." App. A at 67a.

B. *Joyner v. Hurst*

1. Evidence presented at Hurst's trial established that he lured his victim, Daniel Branch, to a field where, unprovoked, he shot Branch while Branch begged for his life. Hurst then fled to West Virginia in Branch's car, where he was eventually arrested. Hurst later gave a full confession. *State v. Hurst*, 624 S.E.2d 309, 314-15 (N.C. 2006). After a

capital trial Hurst was convicted of first-degree murder, and pursuant to recommendation by the jury after a sentencing hearing, was sentenced to death. *Id.* The Supreme Court of North Carolina unanimously affirmed the conviction and sentence, and thereafter this Court denied certiorari review. *Hurst*, 624 S.E.2d 309, *cert. denied*, 549 U.S. 875 (2006).

2. On state post-conviction review, Hurst filed a motion for appropriate relief (MAR) (App. Q) in state Superior Court, alleging, among other claims, that a juror had improper communication with her father about the case. In support of his MAR, Hurst attached a handwritten affidavit from juror Christina Foster, who affirmed that during the trial she communicated with her father by asking him where she could look in the Bible for help and guidance "in making [her] decision for between life and death." App. R at 462a. In response her father directed her to one of the Bible verses which contained the phrase "an eye for an eye." *Id.* Later juror Foster read this Bible verse at home. *Id.* She claimed she slept better that night but it did not make her decision any easier. *Id.*

Hurst also filed a motion for discovery by depositions regarding this claim and in support provided an affidavit of a post-conviction investigator who interviewed not only juror Foster but also her father who "confirmed" that he had a conversation with Foster "about an 'eye for an eye' section of the

Bible during his daughter's deliberations in the Hurst trial." App. P at 449a. According to the investigator, the father stated that pursuant to his daughter's request for a Bible verse he called his mother, Foster's grandmother, who gave him the Biblical reference. App. P at 449a. The state superior court summarily denied the juror-communication claim as without merit. App. M at 410a-411a. Specifically, the state court found that the Bible does not constitute an "external influence," and that no evidence established that the juror's father, in providing the requested reference, attempted to influence her vote. App. M at 411a.

3. Hurst raised his improper-juror-communication claim in a habeas corpus petition he filed in the United States District Court for the Middle District of North Carolina. The district court denied the petition, (App. H) concluding that it was not unreasonable for the state court to have determined that the matter allegedly discussed between the juror and the third party did not concern the matter before the jury, and therefore the state court's conclusion was not an unreasonable application of this Court's clearly established law. App. H at 220a. In rejecting this constitutional claim, the district court noted that this Court "has not held that the reading of a Bible verse constitutes 'a matter before the jury' or raises a presumption of prejudice as an improper extrinsic influence." *Id*. Therefore, it was not unreasonable for the state court to have determined that the juror's father by simply

directing her to a Bible verse was also not an extrinsic influence triggering a presumption of prejudice. *Id*. In fact, the district court noted that there was no evidence of any discussion as to how the juror should vote or that any opinion was expressed by her father. App. H at 219a.

Consistent with that holding, the district court also affirmed the magistrate judge's opinion and order denying Hurst's motion for leave to conduct discovery in the federal court (App. K). The magistrate judge had found that juror Foster's father was not "a biased editor of the Bible, i.e., one who combed through its conflicting statements about the death penalty and selected a verse that suited his personal agenda." App. I at 271a n.17. Rather, the record "actually reflects that the juror used her father like a neutral index, i.e., one who would simply point her to where in the Bible material related to capital punishment appeared." App. I at 271a n.17. The district court issued a certificate of appealability regarding this claim. App. H at 236a.

On appeal, a three-judge panel of the Fourth Circuit reversed and remanded the case to the district court for an evidentiary hearing "on the issue of whether the communication between Juror Foster and her father about the Bible verse had a substantial and injurious effect or influence in determining the jury's verdict." App. G at 199a-200a. The court stated that the prior "holding in *Barnes* dictates" that the district court's denial of Hurst's

petition be reversed and remanded for an evidentiary hearing. App. G at 195a. While no judge in *Hurst* dissented, Judge Shedd wrote a separate concurrence, which Judge Niemeyer joined, concluding that he would have affirmed the district court's grant of summary judgment (denying habeas relief) if not for the "recent *sweeping* opinion in *Barnes*." App. G at 201a (emphasis added).

REASONS FOR GRANTING THE PETITION

Disregarding AEDPA's strict limits, the court of appeals granted relief in two capital murder cases even though the state court determinations were not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011). This is a fundamental error of a sort that this Court has repeatedly and forcefully condemned. *See e.g.*, *Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (*per curiam*); *Carey v. Musladin*, 549 U.S. 70 (2009); *Parker v. Matthews*, 132 S. Ct. 2148 (2012) (*per curiam*).

This Court in *Remmer* did not hold that prejudice to the defendant is presumed, and an evidentiary hearing must be held, *any* time a juror communicates with a third party about the case on which the juror is sitting. Rather, *Remmer* held that an evidentiary hearing is required only when the third-party communication concerns "the matter

pending before the jury." Does a discussion between a juror and his pastor on whether "the jurors would one day face God's judgment for their actions" (App. A at 37a) concern "the matter pending before the jury" – when the pastor did not suggest how the jurors should vote or address the specific facts of the case and when no jury instruction even implied that "God's judgment" was a relevant consideration? Reasonable minds could disagree. And AEDPA mandates deference to the state court's judgment when that is the case. By nonetheless granting habeas relief in these cases, the Fourth Circuit exceeded its authority and "disregard[ed] . . . the sound and established principles that inform [the] proper issuance" of the writ. *Richter*, 131 S. Ct. at 780.

As stated in Judge Agee's dissent in *Barnes* and again by Judge Shedd's concurrence in *Hurst*, the majority opinion in *Barnes* "acknowledges AEDPA's constraints only in the abstract, while simultaneously analyzing the case at bar as if it were on direct appeal." App. A at 51a-52a. In so doing, it "'disregard[ed] perfectly reasonable interpretations [of Supreme Court precedent] and hence contravene[ed] § 2254(d)'s deferential standard of review,' *White* [*v. Woodall*], 134 S. Ct. at 1704." App. G at 201a. Because the court's failure to observe the well-established limits of AEDPA is apparent in these cases on the record, the decisions below should be reversed, either summarily or after briefing and oral argument. *See*, *e.g.*, *Wright v. Van Patten*, 552

U.S. 120, 126 (2008) (*per curiam*) (reversing summarily after finding circuit court failed to apply AEDPA deference on review).

I. The Fourth Circuit Contravened AEDPA Because Fairminded Jurists Could Disagree About Whether the Third-Party Communications with Jurors in These Cases Concerned "The Matter Pending Before the Jury."

A state court's application of this Court's clearly established law may be overturned "if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *White v. Woodall*, 134 S. Ct. 1697, 1706-07 (2014). Under the demands of AEDPA review, "state-court decisions [must] be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*)). The only question the federal court should be asking in federal review is "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holdings in a prior decision of this Court." *Richter*, 131 S. Ct. at 786. As five of the eight federal judges to review these cases concluded, petitioners did not meet this high standard.

This Court has recognized that it is "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Indeed, if due process "require[d] a new trial every time a juror has been placed in a potentially compromising situation, . . . few trials would be constitutionally acceptable[,]" for "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Id.* *Remmer* thus requires courts to conduct an evidentiary hearing to determine whether a third-party communication with a juror had a prejudicial impact only when the communication concerned "the matter pending before the jury." *Remmer*, 347 U.S. at 229-30.

That requires state courts, in each case involving an alleged third-party communication to apply the general "matter pending before the jury" principle to the specific facts. And as this Court has explained "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Richter*, 131 S. Ct. at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)); *see also Woodall*, 134 S. Ct. at 1706 ("where the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims")(internal quotation marks omitted). The state courts here reasonably exercised the leeway they are granted by AEDPA.

In *Barnes* the state court reasonably determined that the subject matter of the alleged third-party contact with a juror did not involve the matter pending before the jury because it did not concern the defendant or the evidence presented in this case, nor did it involve any attempt to influence a verdict. Defense counsel raised an irrelevant issue, asserting that a member of the jury would violate the "law of God" if he or she voted for death. The juror's communication with her pastor pertained to that irrelevant issue. The pastor provided a Biblical reference which contradicted defense counsel's theological assertion. The juror then brought a Bible from home and read to other jurors a Bible verse which instructed that Christians have a duty to follow the law of the government. The state court concluded that this communication did not justify an evidentiary hearing.

That holding was a reasonable application of this Court's clearly established law. Defense counsel's inflammatory argument that jurors would face God's judgment should they recommend the death penalty even if state law allowed it did not make that contention a matter properly pending before the jury. The jurors heard evidence and were instructed as to the law to be applied in the case; that was the only matter properly pending before the jury. Barnes did not allege that the pastor advised the juror whether the defendant's crimes warranted death, or that he urged her to impose a death sentence. Further, nothing about the particular Bible

passage cited would have been inconsistent with the law presented to the jury at trial. The Bible passage expressed no opinion on the merits of the death penalty but rather indicated that a Christian has a duty to follow the laws of the state. All told, therefore, the state court was not unreasonable in concluding that this communication did not concern the matter pending before the jury.

The state court adjudication in *Hurst* was likewise not an unreasonable application of clearly established federal law. A juror contacting her father to obtain Bible verses about the death penalty did not constitute communication about the matter pending before the jury, for it did not relate to the evidence presented nor did it advocate an appropriate punishment to be imposed. Even the Fourth Circuit acknowledged that the affidavits submitted during Hurst's state MAR proceeding "did not allege that Juror Foster discussed with her father the facts or evidence that had been presented in the trial, or the status of the jury's deliberations. Nor was there any evidence that Juror Foster's father expressed any opinion about the case or attempted to influence her vote." App. G at 196a. Instead, as the magistrate judge had found, all of the evidence indicated that the juror used her father as a "neutral index" in locating relevant Biblical passages. *See* App. I at 271a n.17. Because the father did not attempt to influence the juror's vote and did not discuss matters related to the facts of this case, it was reasonable for the state court to conclude that

the subject of the communication in *Hurst* did not concern the matter pending before the jury.

Certainly the recommendation of appropriate sentence – which could include the death penalty – was before the jury in both cases. But "the eternal consequences to [the juror's] soul" in *Barnes*, and the juror's own spirituality in *Hurst*, were not. Fairminded jurists could conclude that third-party communications with a juror about a juror's own spirituality did not involve prejudicial information about the case being tried. At the very least, there are reasonable arguments on both sides, which was all that was necessary for the State to prevail on habeas review. *Woodall*, 134 S. Ct. at 1707.

To be sure, in *Barnes* the court of appeals at the outset of its analysis acknowledged the limits of federal habeas review under AEDPA. App. A at 16a-19a. Having done so, however, the Court proceeded to analyze whether the juror communications in that case concerned "the matter pending before the jury" without acknowledging that the state court's analysis was subject to fairminded disagreement. Stated otherwise, the court of appeals never considered that fairminded jurists could conclude that the subject of the communication did not concern "the matter pending before the jury." It instead applied its own precedent and determined that it would have reached a different result than the state court.

In so doing, and as Judge Agee noted in his dissent in *Barnes*, the court of appeals treated the matter "as if it were on direct appeal from the trial" and in its "first-impression analysis" substituted its "'independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" App. A at 52a (quoting *Williams v. Taylor*, 529 U.S. 362, 411 (2000)). The same could be said for the majority opinion in *Hurst*, which found that it was bound by the "sweeping opinion in *Barnes*" (App. G at 201a) and approached its review in similar fashion. This AEDPA will not allow. *Lett*, 559 U.S. at 779 ("AEDPA prevents defendants – and federal courts – from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.")

Ultimately the court of appeals concluded that the subject of the communication between the juror and her pastor concerned "the matter before the jury" because the "jury was charged with deciding whether to impose a sentence of life imprisonment or a sentence of death" and it was the "appropriateness of the death penalty" which the jury was considering. App. A at 41a. From this conclusion the court then launched a sweeping new rule that a juror's conversation with a third party "about the spiritual or moral implications of making this decision" concerned the matter pending before the jury. App. A at 41a.

In support the court pointed only to one of this Court's opinions for the unremarkable proposition that the duty of "capital sentencers" is to determine "whether a specific human being should die at the hands of the State." App. A at 41a (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985)). This quote, which is not even the holding of the case,[1] hardly speaks to the issue here which is whether a juror's consultation with a spiritual advisor regarding the spiritual ramifications *to the juror* for serving on a capital trial (*Barnes*) or a juror's consultation about Biblical references related to the death penalty in general (*Hurst*) concern "the matter pending before the jury" within the meaning of *Remmer*. As Judge Agee explained, the "spiritual or moral implications" to the juror was decidedly not an issue before the jury. App. A at 67a (Agee, J, dissenting).

In short, the court of appeals disregarded other "perfectly reasonable interpretations" of this Court's established law and thereby contravened the deferential standard of review required by AEDPA. Instead, the court of appeals collapsed the distinction between "an unreasonable application of federal law" and what it believed was "an incorrect or erroneous application of federal law." This defeats "the substantial deference that AEDPA requires." *Jackson*, 133 S. Ct. at 1994 (citations omitted). The court of appeals' decisions in *Barnes* and *Hurst*

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[1] It is this Court's holdings, as opposed to *dicta* which are controlling for purposes of AEDPA application. *See Howes v. Fields*, 132 S. Ct. 1181 (2012); *Williams*, 529 U.S. at 412.

blatantly conflict with this Court's habeas jurisprudence and justify reversal.

II. The Fourth Circuit Contravened AEDPA Because this Court Has Not Clearly Established Whether An Evidentiary Hearing Is Required In this Context.

The court of appeals violated AEDPA in still another way. Section 2254(d)(1) authorizes federal habeas relief only when a state court has unreasonably applied law that has been "clearly established" by *this Court*. When this Court has not specifically addressed the particular issue in dispute, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" *Carey v. Musladin*, 549 U.S. at 77 (quoting § 2254(d)(1)) (alterations in original). Since *Musladin*, this Court has continually reaffirmed the principle that, on habeas review, it is not "an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (citations and internal quotation marks omitted). Moreover, this Court must have applied the rule in the same "context" as that in which the habeas petitioner's claim arises. *Premo v. Moore*, 131 S. Ct. 733, 743 (2011); *Musladin*, 549 U.S. at 75-76.

For example, in *Wright v. Van Patten*, 552 U.S. 120, this Court rejected the habeas petitioner's argument that participation of an attorney via speakerphone at a hearing required review under the per se prejudicial standard of *United States v. Cronic*, 466 U.S. 648 (1984). This was because no cases from this Court "squarely addresses" that issue "or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context." *Van Patten*, 552 U.S. at 125 (citation omitted). Similarly, in *Thaler v. Haynes*, 559 U.S. 43, 47 (2010), this Court again emphasized that "[a] legal principle is 'clearly established' within the meaning of [§ 2254] only when it is embodied in a holding of [that] Court." (Emphasis added.) *Thaler* overturned a federal court of appeals' opinion because "no decision of [this Court] clearly establishes the categorical rule on which the Court of Appeals appears to have relied." *Id*. at 48; *see also Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (holding that although the Court's precedents clearly establish a defendant's right to cross-examine witnesses, they do not clearly establish a defendant's right to present extrinsic evidence for impeachment purposes).

So too here. *Remmer* announced a general rule which applies in criminal cases where there is an allegation of private communication between a juror and a third party during trial about the matter pending before the jury. *Remmer*, 347 U.S. at 229-30. Under that general circumstance, prejudice will be presumed and an evidentiary hearing is necessary to

determine the prejudicial impact, if any, on the jury's verdict. *Id*. But neither *Remmer* nor any later decision by this Court has defined the contours of what constitutes "the matter pending before the jury." Just as *Cronic* did not clearly establish that a lawyer's participation by speakerphone was a per se denial of the right to counsel, neither does *Remmer* clearly establish that a third-party communication regarding religious matters is presumptively prejudicial and requires an evidentiary hearing.

Having found no law from this Court defining this essential component of *Remmer*, the court of appeals launched forth applying its own definition, and ultimately faulted the state court for having failed to adopt the same one. App. A at 39a (citing *Stockton v. Virginia*, 852 F.2d 740, 743 (4th Cir. 1988) and *Fullwood v. Lee*, 290 F.3d 663, 678 (4th Cir. 2002)). But clearly established law is that issued by this Court, not law established through circuit jurisprudence. *See e.g.*, *Lett*, 559 U.S. at 779 (circuit court decision is not "clearly established" law as determined by the Supreme Court, so "failure to apply that decision cannot independently authorize habeas relief under AEDPA").

Whatever, exactly, this Court in *Remmer* meant by "the matter pending before the jury" (outside the facts in *Remmer* which involved an attempt to bribe a juror), it is evident that it has never extended the general rule of a presumption of prejudice necessitating an evidentiary hearing to a

novel factual situation, like in *Barnes* or *Hurst*, in which jurors had communication with a third party who did not discuss the facts of the case and did not advocate for a specific result. While this Court need not have decided a case on precisely the same facts for the law to be "clearly established," the Court (as noted) does need to have decided a case involving the same "context." Communication between a juror and a third party about the spiritual implications to the juror in jury service or about a juror's consideration of Biblical passages related to the death penalty in general are an entirely different context than attempted bribery, the context at issue in *Remmer*.

Since this Court has not yet addressed the particular issue of whether a juror's religious communication with a third party concerns "the matter pending before the jury" in a capital case, the state court's application of *Remmer* in this novel factual context was not unreasonable. Yet applying its own circuit law, the court of appeals announced a categorical rule that an evidentiary hearing is necessarily required whenever a juror communicates with a third party about the "spiritual or moral implications" of making a sentencing recommendation in a capital case. App. A at 41a. This sweeping circuit jurisprudence cannot supplant the requirement under AEDPA that this Court must have clearly addressed the issue in a similar context before a state court will be found to have unreasonably applied clearly established federal law. In this way the court of appeals has contravened the

limits of AEDPA review, and the decision in these cases should be reversed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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