No. 14-395

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

As explained in the Petition, the Fourth Circuit Court of Appeals failed to afford the required deference to the state court by substituting its own judgment for that of the state courts in determining that the state courts had failed to reasonably apply this Court's clearly established law in *Remmer v. United States*, 347 U.S. 227 (1954). While initially articulating the correct standard of deference owed under AEDPA, the court of appeals proceeded to reevaluate these cases as if they were on direct appeal before it, and, relying upon circuit precedent, concluded that the subject of the juror communications in these cases constituted "a matter pending before the jury." App. A at 41a, App. G 195a (reversing based on the precedent articulated in *Barnes*). Most importantly, the court of appeals failed to acknowledge that fairminded jurists could disagree as to whether the subject of these juror communications constituted "a matter pending before the jury[,]" a material component in the *Remmer* analysis. Where fairminded jurists could disagree on this point, the state courts cannot have been found to have unreasonably applied this Court's law. *See Harrington v. Richter*, 562 U.S. 86 (2011); *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013) (*per curiam*). For this reason, this Court should grant certiorari review and reverse.

Respondents generally argue two points in opposition. First, Respondents argue that this case involves a straightforward application of this Court's clearly established law in *Remmer* and that no further

review by this Court is warranted. Respondents contend that because reasonable jurists would not disagree that the subject of the juror communications in these cases involved "a matter pending before the jury" the state court determinations were necessarily an unreasonable application of this Court's well established law. *Barnes* BIO, p 13; *Hurst* BIO, p 11. Second, Respondents allege that this Court should deny review because Respondents have not been afforded relief by a final order granting their respective petitions for writ of habeas corpus, and therefore, the matter is not ripe for review. *Barnes* BIO, p 12-13; *Hurst* BIO, p 13-14. Respondents are wrong on both counts.

1. First, Respondents make the same mistake as the court of appeals in urging this Court to deny review because the court of appeals applied a "straightforward" application of *Remmer* to the facts of these cases. *Hurst* BIO, p 11; *Barnes* BIO, p 13. Instead, it should have conducted a straightforward application of 28 U.S.C. § 2254 on habeas review. The court of appeals should have considered whether fairminded jurists could disagree as to the state courts' application of *Remmer*. Where fairminded jurists could disagree, the state court is entitled to deference under AEDPA. *Richter*, 131 S. Ct. 770, 786-87. Although the court of appeals majority in *Barnes* acknowledged this applicable deferential standard, it announced instead that it had found, from its review of the record and by applying its own circuit precedent definitions, that the subject of the juror

communications in this case necessarily constituted "a matter pending before the jury" requiring an evidentiary hearing. App. A at 41a. In so doing, the court of appeals has substituted its own judgment for the state court's in contravention of AEDPA. *Renico v. Lett*, 559 U.S. 766, 779 (2010).

Respondent Barnes makes the same error as the court of appeals in arguing that the state courts were simply "wrong" in their analysis of the *Remmer* issue. *See e.g.*, *Barnes* BIO, pp 14-15.[1] From there, Respondent Barnes argues no deference was thus required in the federal courts' review. *Id*. Clearly the court of appeals disagreed with the state courts' application of *Remmer* to the facts in these cases, but the court of appeals was not tasked with correcting what it conceived to be errors of the state courts' analysis. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). Even wrong application of this Court's precedent survives habeas review if such application is not beyond fairminded disagreement. *Id*.

Respondent Barnes further argues that no deference was owed the state court because the state court failed to detail an explanation of its reasoning to include a finding that the juror communication did not

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[1] In support of his claim that the state court was wrong, Respondent Barnes relies upon inadmissible evidence of the discussions between jurors during deliberations and the potential effect of information received upon the jurors in their deliberations. *Barnes* BIO, pp 6, 9, 19; see N.C. Gen. Stat. § 8C-1, Rule 606(b), *compare* Fed. R. Evid. 606(b).

involve a matter before the jury. *Barnes* BIO, p 16. However, as is well established, the state court need not have done so to be afforded deference under AEDPA. *Richter*, 562 U.S. at 98. Even summary denials are entitled to deference. *Id*.

Additionally, to claim as Respondent Barnes does, that this is not a new "sweeping" jurisprudence shift is to ignore two of the three judge panel in *Hurst* identifying the "recent *sweeping* opinion in *Barnes*" dictating the reversal of the district court's denial of relief in *Hurst*. App. G at 201a (emphasis added); *Barnes* BIO, p 2. The rule announced in *Barnes*, as identified in *Hurst*, was new and involved a context not yet contemplated by this Court. Communication between a juror and a third party about the spiritual implications to the juror (*Barnes*) or about a juror's consideration of Biblical passages related to the death penalty in general (*Hurst*) are an entirely different context than the attempted bribery context at issue in *Remmer*. This sweeping circuit jurisprudence, based in part on a definition crafted in the circuit, 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. *Lopez v. Smith*, 135 S. Ct. 1, 2 (2014) (AEDPA prohibits the federal courts of appeal from relying on their own precedent to conclude that a particular constitutional principle is "clearly established" by this Court); *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (*per curiam*) (circuit precedent

cannot "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced."); *Woods v. Donald*, 2015 U.S. LEXIS 2123 (Mar. 30, 2015) (reversing court of appeals grant of relief because no decision from this Court clearly established relief under this Court's precedent). Yet here the state courts have been improperly faulted for failing to apply the general rule in *Remmer* in such a specifically different context in these cases.

To find that the state courts' determination was an unreasonable application of this Court's well established law, the court of appeals had to find that the state court's determination of this issue was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." *Richter*, 131 S. Ct. 770, 786-87. As evidenced by the number of state and federal judges reviewing these claims and finding contrary to the majority in *Barnes*, this issue is simply not beyond fairminded disagreement. The court of appeals failure to afford deference to the state courts in clear contravention of AEDPA is in direct conflict with the provisions of 28 U.S.C. § 2254 and previous decisions of this Court. *Id*. Because it is apparent from the record alone that the court of appeals failed to afford the deference owed the state court, this Court should summarily reverse. *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).

Alternatively, this Court should reverse after full briefing and oral argument.

2. Next, Respondents argue that this Court should not grant review because the decisions of the court of appeals were not final, in that the court remanded these cases for an evidentiary hearing rather than granting the writ. *Barnes* BIO, p 2, *Hurst* BIO, pp 13-14. Respondents contend that because the court of appeals' decisions were not final, the matter is not ripe for resolution in this Court. *Id*.

Yet, Respondents have been afforded relief. They have been granted evidentiary hearings at which no deference will be afforded the state courts' determinations of this issue. This is in direct contravention of AEDPA and in direct conflict with prior applicable decisions of this Court which require the federal courts reviewing habeas petitions to afford deference to the state courts' determinations, not to second guess them. *Lett*, 559 U.S. at 779. The court of appeals has reviewed this case *de novo*, instead of deferentially, and now has ordered a full evidentiary hearing to supplant the state court proceedings.

This Court has discretionary authority to grant review where a court of appeals has decided an important federal question "in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10. Here the court of appeals has eschewed proper deference to the state courts as required by AEDPA

and as repeatedly articulated by this Court's decisions. *Richter*, 562 U.S. 86; *Jackson*, 133 S. Ct. at 1992.

This Court's grant of review on writ of certiorari is one of judicial discretion; it does not require a final order. *Toledo Scale Co. v. Comp*, 261 U.S. 399, 418 (1923) (this Court's "power to grant writs of certiorari extends to interlocutory as well as final decrees...."); *see also* 28 U.S.C. § 1254(1) (cases in the courts of appeal may be reviewed by certiorari "before or after rendition of judgment or decree."). It is true that this Court's certiorari jurisdiction has been conferred to allow review of "cases involving questions of importance which it is in the public interest to have decided by this Court of last resort...[not] merely to give the defeated party in the Circuit Court of Appeals another hearing...." *Magnum Co. v. Coty*, 262 U.S. 159, 163-64 (1923); *see also* Sup. Ct. R. 11. While it may be that this Court often chooses to await final judgment in the federal courts, here to do so is to allow the abandonment of deferential review, a costly endeavor in many respects, most importantly for its precedential effect.

Respondents attempt to minimize the impact of such a wholesale abandonment of required AEDPA deference in these cases. But it is of little moment to the integrity of federal habeas review in this and other cases to declare that Respondents have not been granted relief simply because the writ has not been granted. Whether or not Respondents succeed on their claims after an evidentiary hearing misses the entire

point of the constraints on federal review as implemented in the AEDPA. The ramifications of a departure from the deference owed under AEDPA by the application of a rule which this Court has not adopted cannot be overstated. The court of appeals has contravened the limits of AEDPA review, and this Court's intervention is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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