NO. 14-395

In The Supreme Court of the United States

CARLTON JOYNER, Warden, Central Prison, Raleigh, North Carolina,

Petitioner,

v.

WILLIAM LEROY BARNES,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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*****Capital Case*****

QUESTION PRESENTED

WHERE NO COURT HAS YET GRANTED HABEAS RELIEF, WAS THE FOURTH CIRCUIT'S MERE REMAND TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING ABOUT THE PREJUDICIAL EFFECT OF JUROR MISCONDUCT, WHERE A DELIBERATING JUROR IN A CAPITAL SENTENCING HEARING SPOKE TO HER PASTOR ABOUT CONFLICTING ARGUMENTS BY THE PROSECUTOR AND CO-DEFENDANT'S COUNSEL CONCERNING THE PROPRIETY OF A DEATH SENTENCE FOR WILLIAM BARNES AND THEN RELATED THIS CONVERSATION TO THE REMAINING JURORS, AT ODDS WITH 28 U.S.C. § 2254(d)(1)?

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INTRODUCTION

This case is unremarkable and unworthy of this Court's exercise of its certiorari authority. Petitioner strains to overstate the significance of this case both by using Rule 12.4 to join it with *Hurst v. Joyner*, a wholly separate and independent matter,[1] and by disingenuously stating "five of the eight federal judges to review these cases concluded" William Barnes had not complied with 28 U.S.C. § 2254(d)(1).[2] On the contrary, only two of sixteen federal judges disagreed with the Fourth Circuit opinion in this case, as opposed to the *Hurst* matter,[3] in that only one judge dissented and none of the fifteen circuit judges (including the dissenting judge and the two concurring judges in *Hurst*) asked for a poll on petitioner's request for rehearing en banc.[4] Indeed, there are compelling reasons to deny certiorari.

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[1]William Barnes understands the respondent in *Hurst* is filing his own brief in opposition. To avoid confusion as to parties, Mr. Barnes is referred to by his name.

[2]Petition for a Writ of Certiorari at 14. In this brief in opposition, references to the Petition for a Writ of Certiorari are denominated Petition at __; references to the Appendix to the Petition for a Writ of Certiorari are denominated Appendix to Petition at __; and references to the Appendix to this Brief in Opposition are denominated App. __. This appendix, which includes several documents necessary to the disposition of the petition that were omitted from the Appendix to the Petition for a Writ of Certiorari, is attached.

[3]There are several salient distinctions between this case and *Hurst*. First, Mr. Barnes showed explicit third-party contact with a sitting juror about the sentence to be imposed. App. 1-6. The contact in *Hurst* is not so explicitly about the sentence the juror was to impose. Appendix to Petition at 410a-411a (passage given to juror by her father "did not make her sentencing decision any easier," no evidence father "knew what case" his daughter was hearing). Second, Mr. Barnes had no opportunity to present his claim to the state post-conviction in a hearing. Appendix to Petition at 161a-163a. The state-court proceedings in *Hurst* had some semblance of a hearing at which an evidentiary showing might have been attempted. Appendix to Petition at 409a-411a, 425a-441a.

[4]Appendix to Petition at 135a.

First, contrary to petitioner's repeated statements and implications, Petition at i, 12, 13, 18-19, 24-25, neither the Fourth Circuit nor the district court "granted habeas relief" in this case. Rather, the Fourth Circuit merely remanded the matter to the district court to determine whether the state court's objectively unreasonable application of *Remmer v. United States* and *Smith v. Phillips*, done without holding an evidentiary hearing, "had a substantial and injurious effect on the jury's verdict,"[5] which was a death sentence. Appendix to Petition at 50a. Until this determination is made, habeas relief cannot be granted. Thus, this case is not ripe for certiorari review.

Second, the Fourth Circuit's decision was hardly a "*sweeping* opinion." Petition at 12, 19, 24 (quoting *Hurst v. Joyner*, 757 F.3d 389, 400 (4th Cir. 2014) (Shedd, J., concurring)) (emphasis added by petitioner). Again, the Fourth Circuit applied *Remmer*, *Mattox v. United States*, and *Smith v. Phillips* in a straightforward and uncontroversial manner. As even a cursory review of these proceedings show, Mr. Barnes had presented, in his state post-conviction litigation, uncontradicted evidence showing (1) the prosecutor first interjected the Bible into the sentencing determination when, at the end of his penalty summation, which preceded the defense summations, he argued defense counsel may argue "Thou shalt not kill" means "you" should not vote for the death penalty or may try to make "you" feel

[5]*See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (habeas relief not appropriate unless federal constitutional error had a substantial and injurious effect on the petitioner's state court proceedings).

guilty for "doing your job,"[6] (2) counsel for a co-defendant then responded in his summation by suggesting jurors could "never justify violating a law of God by saying the laws of man allowed it,"[7] (3) the argument by co-defendant's counsel "made the jury furious," according to two jurors (Leah Weddington and Ardith Peacock), (4) at least one deliberating juror was inclined to return a sentence less than death, (5) another deliberating juror (Hollie Jordan), in response to her fellow juror's hesitancy to sentence Mr. Barnes to death, contacted her pastor (Tom Lomax) to obtain his advice about the closing arguments and the propriety of returning a death sentence, (6) Pastor Lomax directed Jordan to another passage from the Bible to assuage any reservations she or any other juror harbored about the jury returning a death sentence, and (7) Jordan relayed this information from Pastor Lomax, including specific references from the Bible, to her fellow jurors, specifically the juror who was struggling with the appropriate punishment, after which the jury sentenced Mr. Barnes to death. Nevertheless, no state court afforded Mr. Barnes an evidentiary hearing on his factually-based claim of an improper communication between a juror and a third person about the matter before the jury. Thus, this case presents no issue worthy of certiorari review.

Third, the Fourth Circuit did not step out of bounds under section 2254(d)(1). Unlike all of this Courts's recent cases that have summarily reversed habeas relief

[6]Trial transcript, Volume VII at 359-62.

[7]Appendix to Petition at 5a.

granted by other circuits,[8] this case does not involve a situation in which the state court's ruling was a reasonable interpretation of *Remmer* and *Smith v. Phillips* that would be entitled to deference in federal habeas under section 2254(d)(1). This case does not involve a circuit court extending a holding of this Court, *see Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (per curiam) (circuit court extended holding of *United States v. Cronic*) or expressing its disagreement with the resolution of the issue by the state courts. *See Renico v. Lett*, 559 U.S. 766, 773-74 (2010) (circuit court disagreed with state court assessment of double jeopardy claim). It is "past question" that *Remmer*, *Smith v. Phillips*, and *Mattox* are clearly established federal law from this Court.[9] *See Williams v. Taylor*, 529 U.S. 362, 390 (2000) (finding *Strickland v. Washington* clearly established law). Recognizing the right to a trial free of third-party communications with a sitting juror and the need for an inquiry when the specter of such a communication arises, as the Fourth Circuit did, hardly breaks new ground or imposes a new obligation on the states. Indeed, as noted, not one of the fifteen circuit judges, even the dissenting, asked for a poll when petitioner sought rehearing en banc in this case. Petitioner's effort to mask this case as one of a federal court overreaching its authority in federal habeas is misguided. Thus, this case presents no issue worthy of certiorari review.

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[8]*See*, *e.g.*, *Woods v. Donald*, 2015 WL 1400852 (No. 14-618, decided 30 March 2014) (per curiam); *Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (per curiam); *Parker v. Matthews*, 132 S. Ct. 2148 (2012) (per curiam); *Renico v. Lett*, 559 U.S. 766 (2010); *Thayler v. Haynes*, 559 U.S. 43 (2010) (per curiam).

[9]Federal law is "clearly established" for the purposes of 28 U.S.C. § 2254(d)(1) "when it is embodied in a holding of this Court." *Thayler*, 559 U.S. at 47; *accord Carey v. Musladin*, 549 U.S. 70, 74 (2006).

STATEMENT OF THE CASE

A. Summary of Proceedings Below

William Leroy Barnes, along with Frank Junior Chambers and Robert Lewis Blakney, was convicted of two counts of first degree murder, two counts of robbery with a dangerous weapon, and one count of first degree burglary. The same jury recommended a death sentence for Mr. Barnes and Chambers, but a life sentence for Blakney. The Supreme Court of North Carolina affirmed. *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), *cert. denied*, 523 U.S. 1024 (1998).

Mr. Barnes timely sought state post-conviction relief on numerous grounds, including a claim based on an impermissible communication between a sitting juror and her pastor about the appropriate sentence the jury should impose that the juror then relayed to the other jurors during their deliberations. Mr. Barnes supported this motion with numerous affidavits and statements from various jurors and the pastor. App. 1-6. The state post-conviction court conducted a hearing on some of the issues raised in the pleadings, but not on the claim concerning the improper communication between the juror and her pastor. The state post-conviction court denied relief on all claims. The Supreme Court of North Carolina then denied Mr. Barnes' request to review this ruling. *State v. Barnes*, 362 N.C. 239, 660 S.E.2d 53 (2008).

Mr. Barnes timely sought a writ of habeas corpus in the district court. *See* 28 U.S.C. § 2254. The district court denied the petition, but granted a certificate of appealability on the claim regarding the impermissible contact between a sitting

juror and third party. A divided panel of the Fourth Circuit reversed and remanded to the district court for a hearing on whether this impermissible communication between a sitting juror and her pastor had a substantial and injurious effect on the sentence imposed. *Barnes v. Joyner*, 751 F.3d 229 (4th Cir. 2014). The warden's petition for rehearing and rehearing en banc was denied. Appendix to Petition at 235a.

B. State Court Resolutions of Juror Misconduct Claim

Mr. Barnes developed and presented to the state courts undisputed evidence showing one of the deliberating jurors contacted her pastor during the sentencing proceeding and expressed her concerns about the closing arguments of the prosecutor and the response to it by a lawyer for one of the co-defendants.[10] She received from her pastor passages from the scriptures that assuaged her reservations about these arguments. She then relayed this information to her fellow jurors, including a juror who had continually expressed reservations about imposing a death sentence. The state courts had three opportunities to address this issue: immediately after the trial, on direct appeal, and during the post-conviction litigation. But the state courts failed at each juncture. App. 1-6.

[10]The prosecutor first interjected the Bible into the sentencing determination at the end of his penalty summation. He argued defense counsel may tell the jury "Thou shalt not kill" means "you" should not vote for the death penalty or may try to make "you" feel guilty for "doing your job." This argument preceded the summations by all defense counsel. After the prosecutor's arguments, counsel for a co-defendant responded by saying jurors could "never justify violating a law of God by saying the laws of man allowed it."

1. Mr. Barnes Brings Misconduct To Trial Court's Attention.

Immediately after the jury returned its sentencing recommendations, and before the jury dispersed, Mr. Barnes presented the information he knew at that time about this improper external influence. The colloquy with the trial court was as follows:

(The jurors exit the courtroom.)

THE COURT: I take it everyone wants to enter some notice of Appeal. Is that correct?

MR. HARP: The first thing we would like to get in is that late yesterday afternoon we were informed, after talking to alternate jurors, that on Tuesday, before deliberations and before instructions were given by the Court, one of the jurors carried a Bible back into the jury room and read to the other jurors from that. *That it was also discovered by us that one of the jurors*, *one of the other jurors*, *called a member of the clergy*, perhaps a relative of hers, *to ask her about a particular question as to the death penalty*. We also informed you of it this morning at ten o'clock and that we need to enter that on the record for purposes of preserving that.

MR. FRITTS: Judge, for Mr. Barnes we join in on that. We would for those reasons make a Motion for Mistrial and we would request the Court to inquire of the jurors, and I understand the Court's feelings on that, but that would be our request.

THE COURT: No evidence that anybody discussed the particular facts of this case with anybody outside the jury. Is that correct?

MR. HARP: *No evidence that they did or did not* as far as the conversation with the minister is concerned.

THE COURT: No evidence that they did though. Is that correct?

MR. HARP: No, sir.

> THE COURT: All right. Well, I'm going to deny the request to start questioning this jury about what may or may not have taken place during their deliberations of this trial.

Appendix to Petition at 173a-175a. The trial court's misapprehension is readily apparent. The trial court suggested no information had been developed that a juror had discussed the case with a non-juror. In fact, the information presented to the trial court showed the juror had discussed the case with her pastor. Counsel specifically reported "one of the jurors . . . called a member of the clergy, perhaps a relative of hers, to ask her about a particular question as to the death penalty." The death penalty was a fact about the case.

But the trial court did nothing. It did not inquire of the jurors about this extraneous influence. It afforded Mr. Barnes no hearing.

2. Mr. Barnes Raises This Misconduct In His Direct Appeal.

Mr. Barnes also brought the extraneous influence to the attention of the state supreme court in his direct appeal. He was, of course, limited to the materials in the appellate record, primarily the transcript of the trial and sentencing proceedings. His effort was without success. Despite the failure of the trial court to inquire of the jury about this extraneous influence, to conduct a hearing of any sort, or to apply the presumption of prejudice, the state supreme court perfunctorily rejected the argument, saying:

> With respect to a juror's alleged actions in calling a clergy member, a similar analysis applies. The trial court was faced with the mere *unsubstantiated allegation* that a juror called a minister to ask a question about the death penalty. Nothing in this assertion involved "extraneous information" as contemplated in our Rule 606(b) or dealt with the fairness or impartiality of the juror. There is no evidence that

> the content of any such possible discussion prejudiced defendants or that the juror gained access to improper or prejudicial matters and considered them with regard to this case. We cannot say under the particular circumstances of this case that the trial court's actions in failing to probe further into the sanctity of the jury room was an abuse of discretion.

State v. Barnes, 345 N.C. 184, 228, 481 S.E.2d 44, 68, *cert. denied*, 523 U.S. 1024 (1998) (emphasis added).

> If the allegation was unsubstantiated, the fault lay with the trial court. It refused to make an inquiry of the jurors, which would have substantiated the claim. The proffer by Mr. Barnes indicated a sitting juror discussed the case, particularly the propriety of the death penalty and any impact recommending it might have on the jurors, with a third party during the sentencing deliberations. Indeed, to the extent Mr. Barnes did not show "any such possible discussion prejudiced [him] or that the juror gained access to improper or prejudicial matters and considered them with regard to this case," he was afforded no opportunity to do so.

3. Mr. Barnes Presents This Misconduct In State Post-Conviction.

In the state post-conviction process, post-trial interviews of jurors showed members of the sentencing jury were improperly exposed to this third-party communication. App. 1-6. This evidence confirmed a sitting juror violated the law and her duty as a juror not to communicate with outside parties by calling her pastor during the sentencing deliberations and asking his advice about the biblical correctness of the closing arguments. App. 1, 3, 5. The pastor referred her to a passage he claimed refuted the argument. App. 3-4, 5. The juror further violated the law and her duty when she took her Bible into the jury room during sentencing deliberations and read the recommended passage to the other jurors in a successful effort to garner support for a death sentence. App. 5-6. This new evidence could

not have been discovered or obtained during the trial and sentencing hearing for two reasons. First, the jurors were deliberating and could not have been approached by counsel. Second, the trial court refused to conduct its own inquiry of the jurors.

The new evidence demonstrated Hollie Jordan, a sitting juror, relayed her pastor's interpretation of the Bible to the jury *during* sentencing deliberations, not before them. App. 5-6. The jurors who recalled the incident remembered it took place during deliberations. App. 2, 3, 3-45-6. Jordan herself indicated she read the passage suggested by her pastor the day after the closing arguments. App. 1.

Jordan also acknowledged her improper communication with her pastor, as well as her reading to the jury the biblical passage he suggested, were directly related to resolving the ultimate issue of whether the jury should impose a sentence of death. App. 1, 5. Specifically, Jordan, in direct defiance of her duty as a juror not to discuss the case with outsiders, communicated with her minister during the trial to determine how she should interpret a particular defense argument that had been made in response to the prosecutor's summation. App. 1, 5. Thus, Jordan obtained extraneous information from her pastor regarding his views on the biblical support for the death penalty and relayed this extraneous information to the jury during its sentencing deliberations for the purpose of convincing at least one other juror to return a sentence of death. App. 1-6.

Despite this compelling evidence, and without conducting an evidentiary hearing, the state post-conviction court almost cavalierly rejected the argument. The entire ruling stated:

> JUROR MISCONDUCT AND EXTRANEOUS INFLUENCES ON THE JURY, MAR-II; AMAR-I; AAMAR-XIII; This issue is procedurally barred. This issue was presented in Defendant's direct appeal (Record on Appeal, p. 663, exceptions 82 and 83). It was directly addressed by the Supreme Court of North Carolina, and rejected by that court. The same inferences raised in this motion were argued to the Supreme Court of North Carolina in defendant's appeal and rejected in the published opinion at State v. Barnes, 345 N.C. 184 (1997) at page 225. Defendant's argument that there is now additional evidence which was not available at that time is without foundation or support, and defendant seeks to present anew the same contentions and inferences raised in his initial appeal. The issue was also before the Supreme Court in his oral motion for appropriate relief made at trial raising this issue and also rejected by the Supreme Court. The allegedly new evidence adds nothing to the issue as it was presented during defendant's original appeal, and the allegations are subject to the same analysis inherent in that decision. The motion based upon this allegation is summarily denied as procedurally barred and without merit.

Appendix to Petition at 162a-163a. Mr. Barnes did not have the affidavits and statements from Hollie Jordan and others that made the showing the trial court ruled was not made, as this information was developed after the direct appeal was completed.

REASONS WHY CERTIORARI SHOULD BE DENIED

I. THE MATTER IS NOT RIPE FOR REVIEW AS NO FINAL JUDGMENT HAS BEEN ENTERED REGARDING THE ISSUANCE OF A WRIT OF HABEAS CORPUS.

This case does not present a question worthy of review by this Court as there has been no final judgment granting or denying habeas relief. Review via certiorari is an exercise "of judicial discretion," and a writ is "granted only for compelling reasons." Rule 10. The petition is barren of any compelling justification, such as the Fourth Circuit's decision being in conflict with another circuit court of appeals or a state court of last resort on the same important matter or having "so far departed from the accepted and usual course of judicial proceedings" as to require this Court to exercise its supervisory powers. *Id.*

Indeed, despite petitioner's suggestions and even express statements to the contrary, the decision below did not "grant habeas relief" to Mr. Barnes. Petition at i, 12, 13, 18-19, 24-25. It merely remanded the matter to the district court for an evidentiary hearing to determine whether the communication between a third-party (a sitting juror's minister) and the sitting juror, which the sitting juror then relayed to her fellow jurors the following morning when the jury resumed deliberations, "had a substantial and injurious effect on the jury's verdict." Appendix to Petition at 50a. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (habeas relief not appropriate unless federal constitutional error had a substantial and injurious effect on the petitioner's state court proceedings). Thus, neither the Fourth Circuit

nor the district court "granted habeas relief" in this case. There is no final judgment. The case is simply not ripe for further review.[11]

As a general rule, this Court has expressed great reluctance to exercise its certiorari authority prior to the entry of a final judgment in the lower courts. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 394 (1893). Indeed, Justice Scalia has cogently observed, "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction. I think it prudent to take that course here." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) (citations omitted).

Likewise, the prudent course here is to deny the petition as it relates to William Barnes. There is no grant of habeas corpus relief. There is no compelling reason for review at this juncture. Thus, the petition for a writ of certiorari should be denied.

II. REVIEW BY CERTIORARI IS UNWARRANTED AS THE FOURTH CIRCUIT INTERPRETED AND APPLIED SETTLED FEDERAL LAW FROM THIS COURT IN A STRAIGHTFORWARD MANNER.

Uncontradicted evidence before the state courts revealed a deliberating juror consulted her pastor during an overnight recess of the sentencing proceeding and discussed a closing argument made by counsel for a co-defendant, which itself was prompted by the prosecutor's own argument. This juror's communication with a non-juror, outside of the courtroom constituted an impermissible external influence

[11]Rule 15.2 expressly directs Mr. Barnes "to point out in the brief in opposition" any perceived misstatement of fact or law that bears on the question presented.

on the deliberating jury under settled federal law, as the Fourth Circuit properly concluded. Appendix to Petition at 22a-31a; *Parker v. Gladden*, 385 U.S. 363, 363-64 (1966); *Remmer v. United States*, 347 U.S. 227, 229 (1954); *Mattox v. United States*, 146 U.S. 140, 150 (1892). Additional information about this external influence was developed and presented to the state post-conviction court. But the state post-conviction court also refused to consider the claim. Despite a presumption of prejudice that attends an external influence on the jury, *see Remmer*, 347 U.S. at 229, the state courts did not address the merits of the underlying claim. The Fourth Circuit properly found the state court's determination to be an unreasonable application of settled federal law.[12] Appendix to Petition at 36a-46a.

Indeed, the state court was simply wrong. Mr. Barnes established the existence of an improper external influence on his sentencing jury. He was at least entitled to an evidentiary hearing in some court, at which the state would have borne the burden of showing the absence of prejudice. *See Williams v. Taylor*, 529 U.S. 420, 444 (2000).

The Fourth Circuit correctly and unremarkably concluded the state court unreasonably applied two settled principles of federal law. First, the state courts did not apply a presumption of prejudice to a factual showing of an extraneous influence on the deliberating jury. *See Remmer*, 347 U.S. at 229 (in criminal cases,

[12]"[I]t is a matter of clearly established Supreme Court precedent that a criminal defendant claiming implied juror bias is entitled to an opportunity to prove actual bias." *Nevers v. Killinger*, 169 F.3d 352, 373 (6th Cir. 1999).

extraneous evidence in jury deliberations "deemed presumptively prejudicial"). Second, the state courts did not afford Mr. Barnes an evidentiary hearing at which he might prove the prejudicial impact of this extraneous influence. *See Williams*, 529 U.S. at 444 (claim of juror misconduct never resolved without evidentiary hearing). Contrary to petitioner's claim, deference to the state court under 28 U.S.C. § 2254(d)(1) was not required.

In criminal cases, any extraneous evidence or information in the jury's deliberations about trial matters is "deemed presumptively prejudicial." *Remmer*, 347 U.S. at 229; *Mattox*, 146 U.S. at 150. Information infecting the jury from any source other than properly presented evidence or instructions from the trial court during the trial, especially during jury deliberations at the sentencing phase of a capital case, is prohibited and presumptively prejudicial. *Remmer*, 347 U.S. at 229. "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced by the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (citation omitted). "[A]ny 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." *Remmer*, 347 U.S. at 229.

This case presents a paragon of an external communication with a sitting juror that is prohibited and unacceptable. A juror contacted her pastor, during an overnight recess, and discussed with him her concerns about a closing argument

dealing with the sentencing decision the jury had to make. App. 1-6. Far from an extrajudicial communication that reasonably could be described as merely "innocuous" or not "the matter pending before the jury." Petition at 12-13.

Petitioner goes to great lengths to suggest the state courts resolved this issue by concluding the third-party communication, in which Juror Jordan called Pastor Lomax to ask him about the closing arguments, did not concern "the matter before the jury." Petition at 12-13, 14, 15, 16-17. But any fair reading of the state courts' consideration of this claim reveals that no state court ever held this third-party contact did not concern the matter before the jury.

The entire ruling of each state court on this claim is set forth above. The trial court's denial of Mr. Barnes' request for an inquiry into the juror's communication with her pastor did not hinge on it not being a matter before the jury. The trial court simply stated, incorrectly, that Mr. Barnes had made no showing of any improper contact. *Supra* at 9-10; Appendix to Petition at 173a-175a. The state supreme court likewise merely stated Mr. Barnes had made no showing of improper contact, *supra* at 11; *Barnes*, 345 N.C. at 228, 481 S.E.2d at 68, ignoring that the trial court had not given Mr. Barnes an opportunity to make this showing. Finally, the state post-conviction court relied on the resolution of this issue by the state supreme court, *supra* at 13; Appendix to Petition at 162a-163a, turning a blind eye to affidavits or statements from five jurors (including Hollie Jordan) and Pastor Lomax, each of which documented the third-party contact and the substance of the communication that dealt with what sentence should be imposed. App. 1-6.

Unquestionably, this extraneous intrusion dealt with the heart of the matter pending before the jury: what sentence would be imposed on William Barnes.

Despite a substantial factual showing of this improper external influence, neither the state post-conviction court nor the district court applied the presumption of prejudice mandated by clearly established federal law. *See Remmer*, 347 U.S. at 229 (1954). Likewise, neither the state post-conviction court nor the district court conducted the evidentiary hearing that was necessary to evaluate the impact of this improper contact. *See Smith v. Phillips*, 455 U.S. at 215; *accord Williams v. Taylor*, 529 U.S. 420, 444 (2000).

Although these two settled principles of federal law were not followed, respondent criticizes the Fourth Circuit for allegedly denying the state courts the deference set forth in the Anti-Terrorism and Effective Death Penalty Act (AEDPA), noting this standard may be "difficult to meet." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). But deference need not be given where the state court has failed to properly apply the established law to the uncontested facts. And, while the deferential standard may be "difficult to meet," it is not an impossible standard to satisfy.

Petitioner has claimed this Court "has given state courts little or no guidance in adjudicating a claim" regarding evidence of external influences on a jury. *See Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (per curiam). But *Jackson* is hardly pertinent. In *Jackson*, the district court had denied habeas relief regarding the petitioner's claim that the exclusion of extrinsic evidence of the prosecutrix having

made prior, unsubstantiated allegations against him violated his constitutional right to present a defense. *Id.* at 1991-92. The divided Ninth Circuit reversed and ordered habeas relief. In doing so, the Ninth Circuit framed prior precedent in an unduly "high level of generality" that allowed a "most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.'" *Id.* at 1994 (citing 28 U.S.C. § 2254(d)(1)). *Jackson* is hardly apposite here, where Mr. Barnes relied exclusively on established federal law from *Remmer* and its progeny. Indeed, the Fourth Circuit's explication of *Remmer*, *Mattox*, and *Smith v. Phillips*, is hardly "a most imaginative extension of existing case[s]." It is no extension whatsoever.

Petitioner essentially contends the state post-conviction court's adjudication cannot be an unreasonable adjudication of clearly established law because reasonable jurists can disagree about whether the third-party communication here concerned the matter before the jury. But this reasoning sorely undervalues existing cases such as *Remmer*. Information given to a juror from any source other than properly presented evidence, argument, or instructions during the trial itself is prohibited and presumptively prejudicial. "[A]ny 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." *Remmer*, 347 U.S. at 229. A federal court does not impermissibly substitute its judgment for that of the state court, in contravention of the AEDPA, when it examines the facts presented to the state court and determines the state court's

adjudication of the issue is contrary to or an unreasonable application of established federal law. Otherwise, a habeas petitioner could never succeed. *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (AEDPA "deference does not imply abandonment or abdication of judicial review").

Mr. Barnes' proffered evidence, which the lower courts accepted as true, showed the prosecutor's closing argument prompted a co-defendant's attorney to offer a response. This exchange greatly bothered some jurors and apparently made some jurors ambivalent about whether to vote for a death sentence. One of the jurors violated the trial court's instructions and called her pastor to discuss the matter with him. This juror's conduct raised grave doubts whether she, or one of the more ambivalent jurors, would have voted for the death penalty had she not received the counsel of her pastor through this private, improper communication.[13] When this juror communicated with an outside source for the purpose of obtaining an expert opinion from a biblical scholar to rebut the defense argument on the death penalty, she abandoned her role as an impartial juror and assumed the role of an advocate for the state. To suggest that this conduct did not concern the precise matter before the jury, i.e. whether Mr. Barnes should live or die, is at best strained and at worst indefensible.

[13]Petitioner ignores the proffered evidence that Jordan admitted she called her pastor, in part to "arm" herself with expertly provided, biblical information she could use to convince other jurors to impose the death penalty, which was prejudicial. App. 1.

The Fourth Circuit ably applied both established federal law and the strictures under the AEDPA. There is no compelling reason to issue a writ of certiorari.

III. REVIEW BY CERTIORARI IS UNNECESSARY AS THE FOURTH CIRCUIT NEITHER SUBSTITUTED ITS JUDGMENT FOR THAT OF THE STATE COURTS NOR EXTENDED ANY EXISTING PRECEDENT FROM THIS COURT.

The authority of a federal court to issue a writ of habeas corpus is limited under the AEDPA. A lower court cannot disregard reasonable interpretations of this Court's precedents by a state court, *Harrison v. Richter*, 131 S. Ct. 770, 786-87 (2011), or substitute its judgment for a state court's fair reading of clearly established federal law. *White v. Woodall*, 134 S. Ct. 1697, 1704 (2014). In other words, where reasonable minds might differ about the proper interpretation and application of clearly established federal law, a state court's adjudication of an issue is entitled to deference. *Renico v. Lett*, 559 U.S. 766, 779 (2010). But this deference is wholly inappropriate where, as here, the state court never applied the established federal law at all or, if it did, applied it wrongly. Where a state court is plainly wrong, deference is not required.

Petitioner relies heavily on several decisions in which this Court was compelled to reverse circuit courts that did not heed these principles. Petition at 14, 15, 18-19, 21-23; *see Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (per curiam); *Parker v. Matthews*, 132 S. Ct. 2148 (2012) (per curiam); *Renico v. Lett*, 559 U.S. 766 (2010); *Thayler v. Haynes*, 559 U.S. 43 (2010) (per curiam); *Wright v. Van Patten*, 552 U.S. 120 (2008) (per curiam); *Carey v. Musladin*, 549 U.S. 70 (2006). But those

cases are starkly different from the Fourth Circuit's application of *Remmer*, *Mattox*, and *Smith v. Phillips*.[14]

In *Jackson*, as noted above, the habeas petitioner claimed the exclusion of extrinsic evidence that the prosecutrix had previously made unsubstantiated allegations against him violated his constitutional right to present a defense. *Id*. at 1991-92. The district court denied habeas relief, finding the state court's ruling was not objectively unreasonable A divided panel of the Ninth Circuit reversed and ordered habeas relief. But the Ninth Circuit framed prior precedent in an unduly "high level of generality" that allowed a "most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.'" *Id*. at 1994 (citing 28 U.S.C. § 2254(d)(1)). No precedent from this Court had explicated the constitutional right to present a defense to include the right to offer extrinsic evidence to impeach a witness. Here, however, the Fourth Circuit did not engage in any sort of "imaginative extension" of *Remmer*, *Mattox*, or *Smith v. Phillips*.

In *Parker*, a defendant was convicted of murder despite some evidence of being under the influence of an emotional disturbance. The state court rejected claims that the evidence was insufficient to prove murder and that the prosecutor had engaged in an improper closing argument. After the district court denied

[14]This Court recently reversed the Sixth Circuit for improperly extending clearly established federal law. *Woods v. Donald*, 2015 WL 1400852 (No. 14-618, 30 March 2015) (reversing determination that *United States v. Cronic* required a finding of the unconstitutional absence of counsel where the petitioner's lawyer was absent from courtroom for ten minutes during testimony of co-defendant that did not concern or mention petitioner). As with *Wright*, the Sixth Circuit improperly extended the *Cronic* holding to an inapplicable situation.

habeas relief, the Sixth Circuit reversed. 132 S. Ct. at 2151-56. It held the state court improperly shifted the burden of proof by its treatment of the evidence of petitioner's emotional disturbance, the evidence was insufficient to prove murder, and the prosecutor's argument was prejudicial. In reversing, this Court made three observations. First, the Sixth Circuit relied only on its own precedent regarding the burden being shifted. *Id.* at 2152 n.1. The Fourth Circuit did not so here. Second, a ruling on the sufficiency of the evidence is reviewed under a "twice-deferential" standard. *Id.* at 2152. This standard is not at play here. Third, the analysis of the prosecutor's closing argument by the Sixth Circuit did not properly apply *Darden v. Wainwright*, which requires a challenged summation to so infect the trial with fairness as to violate due process. *Id.* at 2155-56. Unlike the Sixth Circuit's reliance on *Darden*, the Fourth Circuit application of *Remmer*, *Mattox*, or *Smith v. Phillips* was not improper.

In *Renico*, a state court applied established federal law that held the protection against double jeopardy did not bar a second trial when the first trial ended in a mistrial due to a deadlocked jury. Nevertheless, the Sixth Circuit interpreted established federal law in a different way and ordered habeas relief. This Court reversed because the Sixth Circuit did not accord the state courts the required deference. 559 U.S. at 773-75. Here, however, the state court did not apply established federal law correctly, as it did not apply the presumption of prejudice required by *Remmer* or afford Mr. Barnes the evidentiary hearing required by *Smith v. Phillips*.

In *Thayler*, the petitioner claimed the trial court's rejection of a challenge to a prosecutor's peremptory strike of a minority juror was erroneous under *Batson v. Kentucky*. The state court and the district court rejected this claim based on finding made by the trial court and evidence from the voir dire proceedings, even though the trial court had not observed or noted the demeanor. 559 U.S. at 45. The Fifth Circuit reversed because the trial court accepted the prosecutor's explanation that he struck the prospective juror because of his demeanor when the trial court did not personally observe or note the stated demeanor. *Id*. at 45-46. This Court reversed because none of its holdings require that an explanation for a peremptory strike must be rejected unless the trial court personally observes and recalls the relevant aspect of the prospective juror's demeanor. *Id*. at 48 (noting federal law is clearly established "when it is embodies in a holding of this Court"). Unlike the Fifth Circuit's extension of the holding in *Batson*, the Fourth Circuit applied the precise holding in *Remmer* with respect to the presumption of prejudice and need for an evidentiary hearing when the proffered evidence shows communication between a sitting juror and a third person about the case.

In *Wright*, both the state courts and the district court rejected a claim of ineffective assistance of counsel where an attorney participated via a speaker phone in the proceedings during which the petitioner's guilty plea was entered an accepted. 552 U.S. at 122-23. These court concluded there had been no showing of ineffective assistance of counsel under *Strickland v. Washington*. *Id*. The Seventh Circuit reversed. It held the state courts unreasonably applied *United States v.*

Cronic in failing to find the complete absence of counsel in this situation. *Id*. at 124-25. This Court reversed because it had never clearly established the rule espoused by the Seventh Circuit. Indeed, *Cronic* had never been applied in a similar scenario. *Id*. at 125. Unlike the Seventh Circuit's treatment of *Cronic*, the Fourth Circuit applied the rule embodied in the holdings of *Remmer* and *Mattox*.

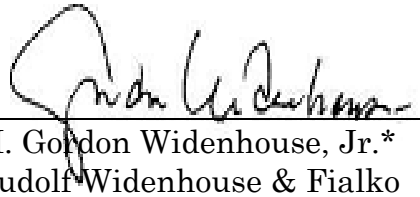
In *Carey*, there were multiple observers during the petitioner's trial who wore buttons in the courtroom displaying the victim's picture. The courts, including this Court, had afforded trial courts wide latitude in the conduct of the proceedings. 549 U.S. at 76-77. The challenged conduct did not involve state action, unlike *Estelle v. Williams*, where the trial of a defendant required to appear in prison garb was deemed improper, or *Holbrook v. Flynn*, where uniformed troopers were stationed behind the defendant during the jury trial. *Id*. at 76-77. Thus, there was no clearly established federal law, contrary to the determinations of the Seventh Circuit. *Id*. Again, the Fourth Circuit exhibited fidelity to the holdings of *Remmer* and *Mattox* and did not announce a novel interpretation or rule.

Contrary to petitioner's claim, the Fourth Circuit did not apply its own interpretation of this Court's precedent, fail to acknowledge the clearly established federal law embodied in the holdings of this Court, nor rely on its own cases in deciding this case. Indeed, the Fourth Circuit used the clearly established federal law embodied in the holdings of *Remmer*, *Mattox*, and *Smith v. Phillips*. The Fourth Circuit's ruling presents no reason for certiorari review.

CONCLUSION

For the reasons stated herein, Respondent, William Leroy Barnes, respectfully requests that this Court deny the petition for a writ of certiorari.

RESPECTFULLY submitted this the 6th day of April, 2015.



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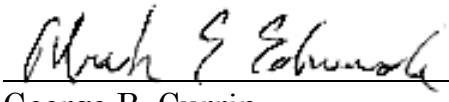

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***COUNSEL OF RECORD**

APPENDIX

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INTERVIEW SUMMARY

On May 31, 1995, Ms. Hollie Jordan was interviewed by Janine Crawley and Alexander McCoy, at her home, at 5530 Rockwell Rd, Cabarrus County, regarding her participation as a juror in the trial of William Barnes, Frank Chambers and Robert Blakney in Rowan County in January and February 1994.

Ms. Jordan told the interviewers that she was offended by one of the closing arguments made by one of defendant Chambers' attorneys. This attorney argued that if jurors voted for the death penalty, they would one day face God's judgment for killing these defendants.

Ms. Jordan, herself, did not accept the attorney's argument but she noticed that another juror, a female, seemed visibly upset by the argument.

To remedy the eff ect of the argument, Ms. Jordan brought a Bible from home into the jury deliberation room. She read an unspecified passage from the Bible stating that it is the duty of Christians to abide by the laws of the state. Ms. Jordan knew the passage from church. Ms. Jordan read the passage to all the jurors, in the jury room, during regular deliberations.

The summary is an accurate description of what I said to Janine Crawley and Alexander McCoy on May 31, 1995.

Hollie Jordan 6/1/00

Date:

STATE OF NORTH CAROLINA

COUNTY OF ROWAN

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 92 CRS 11151; 11152

STATE OF NORTH CAROLINA)
)
v.)
)
WILLIAM LEROY BARNES)

AFFIDAVIT OF
ARDITH FUNDERBURK PEACOCK

ARDITH FUNDERBURK PEACOCK deposes and says the following:

1. I, ARDITH FUNDERBURK PEACOCK, served as a juror for William Barnes' trial in the above-captioned matter on March 10, 1994.

2. During trial, Chamber's attorney said that his client would have his judgment day and that they, as jurors, would also have to face judgment day if they imposed the death penalty.

3. Chambers' attorney's remark made the jury furious.

4. To rebut what Chambers' attorney had said, one of the jurors brought a Bible into the jury room during deliberations and read from it to the jurors; however, I do not recall which juror brought the Bible and I do not recall the exact verse.

This the 7th day of ~~March~~ April, 2004.

Ardith Funderburk Peacock
ARDITH FUNDERBURK PEACOCK

Sworn to and subscribed
before me, a Notary Public
for the State of North Carolina.

Deborah C. Brinkley
Notary Public for North Carolina
My Commission expires: 1-23-2007

STATE OF NORTH CAROLINA COUNTY OF ROWAN	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 92 CRS 11151, 11152
STATE OF NORTH CAROLINA))) v.))) WILLIAM LEROY BARNES)	AFFIDAVIT

AFFIDAVIT OF CYNTHIA F. ADCOCK

I, CYNTHIA F. ADCOCK, first being duly sworn, do attest as follows:

1. I am an attorney, licensed to practice in North Carolina, and in good standing with the North Carolina State Bar. In 1995, I was employed by the North Carolina Resource Center, an organization which assisted lawyers in death penalty cases. As an employee of the Resource Center, in February 1995, I interviewed several jurors in the above captioned case.

2. On February 24, 1995, accompanied by law student Tron Faulk, I interviewed juror James Wilkie at his home in Rowan County. Mr. Wilkie stated that one juror, a woman, had a Bible during jury deliberations. She read from the Bible to try to prove a point. Mr. Wilkie did not believe that the female juror had a good understanding of the Bible, since she was relying on the Old Testament only and not the New Testament. Mr. Wilkie observed that three or four other jurors were listening to the interpretation offered by the juror who read from the Bible.

3. On February 25, 1995, accompanied by law student Tron Faulk, I interviewed juror Teresa Weddington at her home in Salisbury. Ms. Weddington was the foreperson of the jury. Ms. Weddington stated that a juror named "Hollie" brought a Bible into the jury room and read from it. Hollie also talked to her pastor during the case.

4. Also on February 25, 1995, I interviewed juror Wanda Allen, cousin of juror Teresa Weddington. Ms. Allen, too, recalled discussions about the fact that one of the jurors had brought in a bible and had talked with her pastor. In addition, either that woman juror or another juror quoted a passage of scripture during the deliberations that her mother-in-law had given her. Ms. Allen believed that some jurors were confused by the Bible issue;

some did not like the assertion by one of the co-defendant's attorneys that the death sentence would be murder.

5. Either myself, or Tron Faulk, the student who accompanied me on these juror interviews, took notes during the interviews. I have reviewed the interview memoranda based on these notes in completing this affidavit. I also have an independent memory of talking to jurors in the Barnes case and of hearing from several of them that a juror read from a Bible during deliberations and that she also called her pastor in deciding the fate of the defendants in the above-captioned case.

This the 10th day of October, 2000.

C. Adcock

Cynthia F. Adcock
Affiant

Sworn and subscribed before me, this the 10th day of October, 2000.

Michelle Bogovich
Notary Public

MICHELLE BOGOVICH
Notary in Washington, D.C.
Commission Expires July 31, 2005

STATE OF NORTH CAROLINA
COUNTY OF ROWAN

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 92 CRS 11151, 11152

STATE OF NORTH CAROLINA)
)
)
v.) AFFIDAVIT
)
)
WILLIAM LEROY BARNES)
)

AFFIDAVIT OF DANIEL C. WILLIAMS

I, DANIEL C. WILLIAMS, first being duly sworn, attest to the following:

1. I am a licensed private investigator in the State of North Carolina. I am a retired police officer, and prior to my retirement, I was employed as a detective with the Raleigh Police Department.

2. I was retained by counsel for Mr. William Barnes to provide investigative services in connection with Mr. Barnes' case. As part of my investigation, I interviewed several persons who served as jurors in Mr. Barnes' trial, in February and March, 1994. In particular, I interviewed Hollie Leach Jordan, at her mother's home on June 1, 2000. I interviewed Leah Weddington at her home on May 31, 2000, and I interviewed Ardith Funderburk Peacock outside of her home on June 1, 2000.

3. Ms. Hollie Jordan informed me that she was bothered by a closing argument made by one of the defense lawyers. The lawyer had quoted a scriptural passage which suggested that if jurors returned a death sentence, they, the jurors would one day face judgment for their actions. Ms. Jordan felt that the lawyer's argument was quoting scripture out of context. In response she called her pastor Tom Lomax. Ms. Jordan discussed the lawyer's argument with Reverend Lomax. Reverend Lomax told Ms. Jordan about another biblical passage which contradicted the passage relied upon by the defense attorney.

4. The following day, Ms. Jordan brought her own Bible, a King James version, into the jury deliberation room. She read the passage suggested to her by Reverend Lomax to all of the jurors. Ms. Jordan can no longer remember the passage she read.

5. Juror Leah Weddington confirmed that a member of the jury brought a Bible into the jury room during deliberations at the sentencing phase. The person who brought in the Bible

read a passage to a juror who was having a hard time with the death penalty. Juror Ardith Funderburk Peacock also recalled that a juror brought a Bible into the deliberation room during sentencing phase deliberations. Ms. Peacock recalled that the Bible was brought in as a response to an argument made by Chamber's attorney stating that jurors would face judgment from God, just as his client would face God's judgment, if they imposed the death penalty. The juror who brought in a Bible in response to this argument read a verse that dealt with life and death. Ms. Peacock could not recall the details of the verse.

6. On June 1, 2000, I interviewed Reverend Tom Lomax at his home. Mr. Lomax confirmed that he is the pastor at Old Country Baptist Church in Salisbury, and that juror Hollie Leach Jordan attends his church. Reverend Lomax could not recall the conversation recounted by Ms. Jordan. Reverend Lomax stated that it is possible that he did talk to her about the death penalty while she was a juror, but he simply does not remember it.

7. On May 23, 2000, I interviewed Ms. Kimberly Carr at her home in Salisbury, North Carolina. Ms. Carr stated that she was a friend of William Barnes; they went out dancing a few times, and had dinner together occasionally. In October, 1992, Ms. Carr lived four houses away from the Tutterows' residence; the Tutterows were the victims in this case. On the night that the murders occurred, William Barnes called Ms. Carr three times. The last time was in the evening, between 8:00 p.m. and 11:00 p.m.; Ms. Carr could not recall the precise time. Mr. Barnes told Ms. Carr in these calls that he was on his way to visit her, but he never arrived.

Further affiant sayeth not.

This the 20 day of Sept., 2000.

Daniel C. Williams
Affiant

Sworn and subscribed before me, this the 20 day of September, 2000.

Notary Public

My Commission Expires June 20, 2005