NO. 14-395

In The
Supreme Court of the United States

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

Petitioner,

v.

JASON WAYNE HURST,

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

Robert H. Hale, Jr.
Counsel of Record
ROBERT H. HALE, JR. & ASSOCIATES
ATTORNEYS AT LAW, PC
Post Office Box 1349
Raleigh, North Carolina 27602
(919) 838-0058
robert@halecriminallaw.com

Counsel for Respondent

Dated: April 6, 2015

THE LEX GROUP[DC] ♦ 1825 K Street, NW ♦ Suite 103 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

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

QUESTION PRESENTED

Where a juror asked her father for guidance in voting for life or death during capital sentencing deliberations, and her father provided her with an "Eye for an Eye" passage mandating death as the only appropriate punishment, did the Court of Appeals correctly determine that the state court's failure to presume prejudice and grant an evidentiary hearing was unreasonable?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULE

OTHER AUTHORITIES

BRIEF FOR JASON HURST IN OPPOSITION

Respondent, Jason Hurst, respectfully opposes and responds individually to the single petition for a writ of certiorari filed by petitioner pursuant to Rule 12.4.

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. G 177-201a) is reported at *Hurst v. Joyner*, 757 F.3d 389 (4th Cir. 2014). The opinion of the District Court denying habeas relief (Pet. App. H) is unreported. The report and recommendation of the magistrate judge recommending denial of habeas relief (Pet. App. I) is unreported. The District Court order (Pet. App. J) reviewing the magistrate judge order denying discovery (Pet. App. K) is unreported. The relevant order of the North Carolina Superior Court (Pet. App. M) is unreported.

JURISDICTION

The judgment of the Court of Appeals in *Hurst v. Joyner* was issued on 2 July 2014. The Court denied the State's petition for rehearing on 29 July 2014. (Pet. App. L) On 8 August 2014 Chief Justice Roberts extended the time within which to petition for certiorari until 2 October 2014 and a petition was filed on 2 October 2014. This Court's jurisdiction 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...and to be confronted with the witnesses against him; to have compulsory process for

> obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment states in pertinent part:

> No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1) states 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

State Superior Court Proceedings

Jason Hurst was tried capitally to a jury at the 1 March 2004 Criminal Session of Randolph County North Carolina Superior Court. On 12 March 2004 he was found guilty of first-degree murder. On 17 March 2004, after a penalty phase sentencing proceeding, the jury recommended a sentence of death. The trial court imposed the sentence of death the jury recommended. (Pet. App. M at 408a) The North Carolina Supreme Court affirmed Hurst's conviction and sentence on direct appeal. *See North Carolina v. Hurst*, 624 S.E.2d 309 (N.C. 2006).

On 27 June 2007, Hurst filed a post-conviction motion for appropriate relief in North Carolina Superior Court, and sought a new capital sentencing hearing. He argued that Christina Foster, one of the jurors at his trial, had a private and

prejudicial communication about her sentencing decision with her father during her penalty-phase deliberations. As a result, Hurst argued he was denied his rights to both an impartial jury and to confront his accusers, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States, as explained by this Court in *Remmer v. United States*, 347 U.S. 227, 229 (1954) (holding that private communications during deliberations between a juror and a third party about the matter pending before the jury, are to be deemed presumptively prejudicial and require an evidentiary hearing). Hurst requested an evidentiary hearing on the claim. (Pet. App. G at 179-80)

In support of his motion, Hurst presented an affidavit from Juror Foster, who was interviewed by defense investigator Adam Pfeiffer after the trial. (Pet. App. P at 448a) According to Juror Foster:

> 9. During the trial, I often had lunch with my father who worked near the courthouse. Prior to deliberations, I asked my father where I could look in the Bible for help and guidance in making my decision, [sic] for between life and death. After the jury had found Mr. Hurst guilty but before we decided his sentence, I opened the Bible at home because I wanted to read something to help me with my decision. My father had given me the section of the Bible where I could find "an eye for an eye." That night after reading that section in the Bible, it helped me to sleep better. It didn't make the decision any easier. The next day, during deliberations, I voted for the death penalty.

(Pet. App. R at 462) The "eye for an eye" section of the Bible Juror Foster's father gave her mandated death as the only appropriate punishment for the crime of murder.[1] Juror Foster read the passage and voted for death the next day.

---

[1] There are three "eye for an eye" passages in the Bible. *See Exodus* 21:12-25 (King James) ("He that smiteth a man, so that he die, shall be surely put to death. . . . give life for life, [e]ye for

Thereafter, Investigator Pfeiffer interviewed Juror Foster's father, Michael Freeman. Investigator Pfeiffer prepared an affidavit that tracked their discussion and Hurst submitted it to the Court as additional factual support for his claim. According to Investigator Pfeiffer:

> 13. [Mr. Freeman] confirmed that he had a conversation with his daughter about "an eye for an eye" section of the Bible during his daughter's deliberations in the Hurst trial.
>
> 14. Mr. Freeman also stated that he called his mother, Margaret Dew, who lives in South Carolina and got a biblical reference from her before providing it to his daughter.

(Pet. App. P at 449a) Investigator Pfeiffer attempted to locate and interview Ms. Dew, but was never able to reach her. He also attempted to re-interview Juror Foster, but he was never able to do so. Investigator Pfeiffer stated:

> 17. At this point, I do not believe that either Ms. Dew intends to speak to me or Ms. Foster intends to speak to me any further about her jury service or the conversation she had with her father about the "eye for an eye" section of the Bible.

(Pet. App. P at 450a)

Hurst moved for discovery by depositions of Juror Foster, Mr. Freeman and Ms. Dew. (Pet. App. O) He argued to the state court that ordering their depositions would "significantly assist in the search for truth about Juror Foster's extrajudicial conversations with her father." (Pet. App. O at 444a)

---

eye, tooth for tooth, hand for hand, foot for foot, burning for burning, stripe for stripe"); *Leviticus* 24:17-20 ("[H]e that killeth any man shall surely be put to death. . . . Breach for breach, eye for eye, tooth for tooth"); *Deuteronomy* 19:21 ("[T]hine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot").

Other Bible passages explicitly reject the "eye for an eye" concept of punishment. *See*, *e.g.*, *Matthew* 5:38-39 ("Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth: But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also"). Juror Foster's father did not provide her with any of these passages.

Petitioner moved to dismiss Hurst's claim. Petitioner argued that *Remmer* was not applicable to the claim, and that it should be denied as a matter of law.

The state court held a non-evidentiary hearing on petitioner's motion to dismiss Hurst's claim, and later granted the motion to dismiss by written order, "as a matter of federal constitutional law." (Pet. App. M at 411a) No evidentiary hearing was allowed on the claim, and Hurst's motion for discovery was denied. (Pet. App. M at 410a-11a) The state court's order did not cite *Remmer*, nor did it indicate that the claim was analyzed pursuant to *Remmer*. (Pet. App. M at 410a-11a) Nor did the order hold that the communication between Juror Foster and her father during the trial "did not concern- 'the matter pending before the jury,'" as petitioner claims. (Pet. Question Presented)

Federal District Court Proceedings

After exhausting his remedies in state court, Hurst petitioned for habeas corpus relief in federal district court under 28 U.S.C. § 2254. Again, he raised the juror-influence claim, and argued he was denied the rights guaranteed to him by the Sixth and Fourteenth Amendments to the Constitution of the United States, as explained in *Remmer*. He also requested an evidentiary hearing and moved for discovery, seeking to depose the same three witnesses. Petitioner moved for summary judgment. (Pet. App. H at 184a)

The District Court specifically identified *Remmer* as the controlling legal precedent applicable to Hurst's juror-influence claim. (Pet. App. H at 220a) It found that Hurst sufficiently alleged that a private contact or communication

occurred between Juror Foster and her father during her deliberations at Hurst's trial, and that "the father/daughter discussion about the Bible verse concerned the sentencing phase of the trial, which was a matter before the jury." (Pet. App. H at 219a) However, the District Court ultimately concluded that the state court could reasonably have denied Hurst a hearing under *Remmer*. (Pet. App. H at 219a) Accordingly, it denied Hurst's requests for discovery and an evidentiary hearing, and dismissed Hurst's petition. (Pet. App. H at 220a)

The District Court, however, granted a certificate of appealability on the issue of whether Juror Foster's extraneous contact with her father violated Hurst's Sixth Amendment rights. (Pet. App. H at 236a) Hurst appealed the denial of his habeas corpus petition to the United States Court of Appeals for the Fourth Circuit.

Fourth Circuit Proceedings

Hurst alleged on appeal that he was denied his Sixth and Fourteenth Amendment rights to an impartial jury, and to be confronted with the witnesses against him, when Juror Foster discussed her sentencing decision with her father during her deliberations. *Hurst v. Joyner*, 757 F.3d at 391.

The Court of Appeals reversed the District Court order and remanded the case for an evidentiary hearing. *Id*. Petitioner then moved for rehearing and rehearing *en banc*. The motion was denied, with no votes cast in favor of granting either rehearing or rehearing *en banc*. (Pet. App. L at 406a)

In its analysis, the Court of Appeals first recognized the very strict standard under which its review was restricted pursuant to 28 U.S.C. § 2254(d), as revised by

AEDPA. The Court noted that decisions of this Court have increasingly cautioned that AEDPA significantly constrains federal review of state court decisions on federal constitutional claims:

> We are not at liberty to substitute our judgment for that of the state court on matters of federal constitutional law, even if we believe the state court decision was incorrect. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was *unreasonable* – a substantially higher threshold."

Hurst v. Joyner, 757 F.3d at 394 (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *see also Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 785 (2011)). The Court further recognized that, "[t]he state court decision may be deemed unreasonable only if it is so erroneous that there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e] [Supreme] Court's precedents." *Id.* (quoting *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013) (per curiam)).

The Court of Appeals then turned to the merits of Hurst's claim. It explained that the Sixth and Fourteenth Amendments "guarantee[] to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors," and ensure that "the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right[s]." *Id.* (quoting *Irvin v. Dowd*, 336 U.S. 717, 722 (1961); *Turner v. Louisiana*, 379 U.S. 466, 472 (1965)).

The Court of Appeals then identified this Court's decisions in *Remmer and Mattox v. United States*, 146 U.S. 140 (1892), as controlling precedent of this Court.

In *Mattox*, a case that involved jury tampering, evidence indicated that a bailiff made prejudicial extrajudicial statements to the jury, and that a damaging newspaper article was also provided to the jury. This Court held that "private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear." *Id.* at 395 (quoting *Mattox*, 146 U.S. at 150).

> Thereafter, in *Remmer v. United States*, the Supreme Court considered an alleged bribery attempt of a juror during trial, and the FBI's investigation of the attempt, all of which was handled by the district court in an ex parte proceeding prior to the verdict being delivered. After learning of the incident through post-trial press accounts, the defendant moved for a new trial and requested "a hearing to determine the circumstances surrounding the incident and its effect on the jury."
>
> Building upon its earlier precedent in *Mattox*, the Supreme Court held that:
>
> > In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial *about the matter pending before the jury* is, for obvious reasons, deemed presumptively prejudicial . . . . the presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice and hearing of the defendant, that such contact with the juror was harmless to defendant.

Id. at 394 (emphasis original) (quoting *Remmer v. United States*, 347 U.S. at 229)).

The Court of Appeals reasoned, as it did in its earlier decision in *Barnes v. Joyner*, 751 F.3d 229, [WL] *10 (4th Cir. 2014),[2] that *Remmer* clearly established not only a presumption of prejudice, but also a defendant's entitlement to an

[2] Barnes, the co-respondent in the instant petition, also raised a juror-influence claim. Like Hurst, Barnes was denied an evidentiary hearing in both state and federal court, despite having made allegations of extrajudicial communications between a juror and third party (her pastor) during deliberations. (Pet. App. A at 3a)

evidentiary hearing, when the defendant presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury. *Hurst v. Joyner*, 757 U.S. at 396. Additionally, *Barnes* explained:

> [i]t is clearly established federal law for purposes of our review under AEDPA that a defendant is entitled to a hearing when he or she presents a credible allegation of communications between a third party and a juror concerning the matter pending before the jury. Once the defendant presents such a "genuine allegation," the presumption of prejudice must be applied, and . . . a hearing must be held.

Hurst v. Joyner, 757 F.3d at 394 (quoting *Barnes*, 751 F.3d 229, [WL]at *12).

After considering the facts alleged by Hurst in support of his claim, the Court of Appeals reversed the District Court and remanded the case for an evidentiary hearing. It held:

> Hurst presented a credible allegation of a private communication about the matter pending before the jury, entitling Hurst to the presumption of prejudice and an evidentiary hearing. Accordingly, we hold, as we did in *Barnes*, that the state court's failure to apply the *Remmer* presumption and to conduct an evidentiary hearing in light of this showing was contrary to or an unreasonable application of the Supreme Court's precedents applicable to juror-influence claims.

Hurst v. Joyner, 757 F.3d at 398. Contrary to petitioner's assertion that the Court of Appeals "granted [Hurst] habeas relief," (Pet. Question Presented, 13) the District Court not issue a writ of habeas corpus and vacate Hurst's death sentence. Rather, it explained that Hurst was not yet entitled to federal habeas relief, because he had not yet demonstrated prejudice. Specifically, the Court of Appeals noted:

> Hurst is not entitled to federal habeas relief unless we are also convinced that the communication between Juror Foster and her father "had a 'substantial and injurious effect or influence in determining the jury's verdict.'"

Hurst v. Joyner, 757 F.3d at 399 (quoting *Fullwood v. Lee*, 290 F.3d 663, 679 (4th Cir. 2002); accord *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

The Court of Appeals further ordered that Hurst will bear the burden of proving actual prejudice on remand, and Hurst will not enjoy the presumption of prejudice that he was unreasonably denied in state court:

> Hurst will be given the opportunity to develop the record as it pertains to Juror Foster's extraneous conversation with her father, but he will not be entitled to the *Remmer* presumption in attempting to demonstrate that the communication had a substantial and injurious effect or influence on the jury's verdict.

Hurst v. Joyner, 757 F.3d at 400.

REASONS TO DENY THE PETITION

Petitioner did not identify with specificity the basis upon which it seeks this Court's review pursuant to S. Ct. R. 10. It has not alleged that there is a split between the circuit courts of appeal with regard to any issue raised in the petition, or that the Court of Appeal's decision conflicts with the decision of the highest court of any state, or that the petition involves an important federal question. To the extent it alleges the Court of Appeals' decision conflicts with any decision of this Court or the AEDPA, respondent contends it does not, and that this Court's review is not warranted. Additionally, because the Court of Appeals did not grant Hurst habeas relief, and no final judgment has been entered in the case, review is not warranted at this time.

I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE STATE COURT UNREASONABLY APPLIED *REMMER*, AND ITS DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR CONTRAVENE AEDPA.

First, the Court of Appeals correctly identified *Remmer* as the controlling precedent from this Court applicable to Hurst's juror-influence claim. After identifying the correct governing law, the Court of Appeals conducted a straightforward application of *Remmer* to the allegations made by Hurst. It correctly determined that the state court's determination that the alleged communications between Juror Foster and her father did not warrant a presumption of prejudice and evidentiary hearing under *Remmer* was unreasonable. Hurst's evidence alleged that there was a (1) private, (2) contact, communication, or tampering, (3) with a juror, (4) during deliberations, (5) about the matter pending before the jury. Therefore, Hurst's allegations established all of the elements of the *Remmer* analysis.

The Court of Appeals also properly rejected petitioner's argument that it would have been reasonable for the state court to conclude that the alleged conversations between Juror Foster and her father were not "about the matter pending before the jury." As the Court had reasoned in *Barnes*:

> During the sentencing phase of the trial, the jury was charged with deciding whether to impose a sentence of life imprisonment or a sentence of death for Barnes and his co-defendants. Clearly, then, "the matter before the jury" was the appropriateness of the death penalty for these defendants. To the extent that a juror had a conversation with a third party about the spiritual or moral implications of making this decision, the communication 'was of such a character as to reasonably draw into question the integrity of the verdict.'"

Barnes, 751 F.3d at 248-49 (internal citations omitted). The Court of Appeals properly reached the same result in *Hurst*. In this case, a juror asked her father for "help and guidance" in making her decision "between life and death" during the penalty phase of a capital trial. Her father consulted with another family member and then directed her to the "eye for an eye" passage in Bible that mandated death as the only appropriate punishment. No fairminded jurist could reasonably conclude that the contact or communication about imposition of the death penalty *was not* about "the matter pending before the jury." Thus, the Court of Appeals decision does not, as petitioner argues, conflict with this Court's decision in *Harrington* that "a state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree." *Harrington*, 562 U.S. at 101. (internal quotations omitted) Neither does the decision of the Court of Appeals contravene AEDPA, for the same reason.

Additionally, this case is unlike those relied on by petitioner, where a court of appeals either extended a prior holding of this Court to a new context, or rested its ruling on dicta, thereby ignoring the strict limits of AEDPA when reviewing of a state court decision. For example, in *White v. Woodall*, 134 S. Ct. 1697 (2014), the Sixth Circuit granted habeas relief after it extended this Court's existing precedent to a new and different context. The Sixth Circuit erroneously concluded that, since this Court previously held that a no-adverse-inference instruction regarding a defendant's failure to testify was required at the guilt phase of a trial, one must also be required at the penalty phase of a capital trial, even though this Court had never

previously held that it did. This Court reversed, and held that the Sixth Circuit's decision ran afoul of AEDPA when it extended existing precedent to a new, different context. *Id*. at 1701. Likewise, in *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) this Court reversed a Ninth Circuit grant of habeas relief where that court "fram[ed] [this Court's] precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into 'clearly established Federal law as determined by the Supreme Court.'"

Here, the holding in *Remmer* squarely controls the result reached by the Court of Appeals. The Court of Appeals did not transform or extend the *Remmer* holding in any way in order to reach the result it did. It simply applied *Remmer's* analysis to the facts before it. Petitioner has cited no case from any court that holds *Remmer's* phrase "about the matter pending before the jury" is ambiguous or requires additional explanation, such that applying it in the context of this case would require an extension of existing law. Hence, the Court of Appeals decision is not in conflict with any decision of this Court, and does not conflict with AEDPA, as petitioner suggests. (Pet. 12-21)

Review by this Court is not warranted.

II. REVIEW BY THIS COURT IS ALSO NOT WARRANTED AT THIS TIME, BECAUSE HURST WAS NOT "GRANTED HABEAS RELIEF," AND NO FINAL JUDGMENT HAS BEEN ENTERED.

As explained above, rather than granting habeas relief, the Court of Appeals remanded the case for evidentiary hearing in federal court, at which Hurst will have the burden of demonstrating actual prejudice. (Pet. App. G at 196-97a) Since

Hurst will not enjoy *Remmer*'s presumption of prejudice at the hearing, his burden will be a high one.

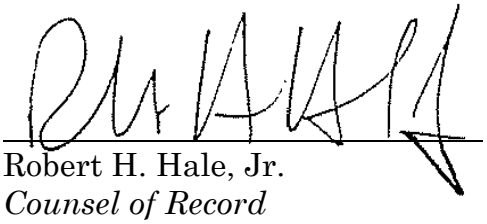
Additionally, petitioner has not cited any case where this Court has granted certiorari to review a circuit court's decision where, as in this case, federal habeas relief was not yet granted. Instead, all of the cases upon which petitioner relies were reviewed by this Court after federal habeas relief was granted, and a court of appeals ordered the writ be issued. *See White v. Woodall*, 134 S. Ct. at 1701; *Nevada v. Jackson*, 133 S. Ct. at 1992; *Parker v. Matthews*, 132 S. Ct. 2148, 2151 (2012); *Harrington v. Richter*, 562 U.S. at 92; *Wright v. Van Patten*, 552 U.S. 120 (2008); *Carey v. Musladin*, 549 U.S. 70, 73 (2006).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. HALE, JR. & ASSOCIATES
ATTORNEYS AT LAW, PC



Robert H. Hale, Jr.
Counsel of Record
N.C. State Bar No. 21352
P.O. Box 1349
Raleigh, NC 27602
Tel. (919) 838-0058
Fax. (919) 833-9427
robert@halecriminallaw.com