No. ___

IN THE
Supreme Court of the United States

KEITH BUTTS, SUPERINTENDENT,

Petitioner,

v.

VIRGIL HALL, III,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
STEPHEN R. CREASON
Chief Counsel
ASHLEY TATMAN HARWEL
HEATHER HAGAN MCVEIGH
Deputy Attorneys General

Counsel for Petitioner

QUESTIONS PRESENTED

1. Is federal law with respect to the presumption of prejudice applicable in jury spoliation cases "clearly established" under 28 U.S.C. § 2254(d)(1), as determined by this Court's precedents and in light of a well-established circuit conflict concerning that presumption?

2. Was state court rejection of the jury bias claim in this case "contrary to" or an "unreasonable application of" any such "clearly established" federal law?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CASES (CONT'D)

CASES (CONT'D)

CASES (CONT'D)

CASES (CONT'D)

CASES (CONT'D)

CASES (CONT'D)

FEDERAL STATUTES

RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Keith Butts,[1] Superintendent of the New Castle Correctional Facility where respondent, habeas petitioner Virgil Hall, is presently incarcerated, respectfully petitions the Court to grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this matter.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at *Hall v. Zenk*, 692 F.3d 793 (7th Cir. 2012), and is reprinted in the appendix at 1a. The opinion of the United States District Court, Northern District of Indiana, is reported at *Hall v. Superintendent*, 834 F. Supp. 2d 848 (N.D. Ind. 2011), and is reprinted in the appendix at 31a. The denial of transfer from the Indiana Supreme Court on Hall's petition for State post-conviction relief is reported at *Hall v. State*, 919 N.E.2d 555 (Ind. 2009), and is reprinted in the appendix at 62a. The opinion of the Indiana Court of Appeals denying post-conviction relief is unreported and is reprinted in the appendix at 63a. The denial of transfer from the Indiana Supreme Court on Hall's direct appeal is reported at *Hall v. State*, 812 N.E.2d 792 (Ind. 2004), and is reprinted in the appendix at 115a. The opinion of the Indiana Court

---

[1] On October 15, 2012, Petitioner Keith Butts succeeded Michael Zenk as Superintendent of the New Castle Correctional Facility.

of Appeals on Hall's direct appeal is reported at *Hall v. State*, 796 N.E.2d 388 (Ind. Ct. App. 2003), and is reprinted in the appendix at 116a. The denial of transfer from the Indiana Supreme Court on Hall's interlocutory appeal is reported at *Hall v. State*, 774 N.E.2d 512 (Ind. 2002), and is reprinted in the appendix at 151a. The opinion of the Indiana Court of Appeals on Hall's interlocutory appeal is reported at *Hall v. State*, 760 N.E.2d 688 (Ind. Ct. App. 2002), and is reprinted in the appendix at 152a.

JURISDICTION

The Court of Appeals entered final judgment on August 29, 2012. The Court has jurisdiction to review this case under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amend. VI

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; 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.

United States Constitution, amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

28 U.S.C. § 2254(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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

This case represents yet another instance where lower federal courts have failed to apply a common-sense understanding of the term "clearly established Federal law" when overturning a state criminal conviction under 28 U.S.C. § 2254(d)(1). Certiorari is warranted to clear up when to presume prejudice when jurors receive extrinsic communications about a case, and whether federal law on that subject is already "clearly established," especially in view of a well-recognized circuit conflict over the issue.

Background

On May 25, 2000, Virgil Hall was at home with his two stepsons, Peyton, age 3, and Hunter, age 5. Pet. App. 2a. At around 11:00 a.m., Hall called the fire department's deputy chief and told him that he needed help because his stepson Peyton had fallen off a swing. Pet. App. 2a. The deputy chief arrived at the house, realized that the child was badly injured, and told Hall to call an ambulance. Pet. App. 2a. At the hospital, doctors determined that Peyton had a fractured skull and damage to his torso. Because of the severity of his injuries, they had him airlifted to Riley Hospital for Children in Indianapolis. Pet. App. 3a, 65a. Peyton died the next day from swelling in his brain. Pet. App. 3a.

Prosecutors charged Hall with savagely beating the boy, resulting in Peyton's death. Hall admitted

that he had lied about Peyton's fall from a swing, but claimed that, instead, he had accidentally knocked Peyton off a workbench and that Peyton hit a dog cage as he fell. Pet. App. 3a. Several doctors at trial, however, testified that it was likely that Peyton's injuries and death resulted from punches or kicks. Pet. App. 3a. The autopsy showed that Peyton "suffered at least three separate injuries to his head, a severe injury to his chest, another to his abdomen, a sixth to his scrotum, and a laceration to the ligament that holds his head to his cervical spine." Pet. App. 3a.

In February 2001, a jury found Hall guilty of both murder and neglect of a dependent resulting in serious bodily injury. Pet. App. 90a. The trial court sentenced Hall to sixty-five years imprisonment for murder, a Class A felony, and three years for neglect of a dependent, as a Class D felony, with the sentences to run concurrently. Pet. App. 90a-91a.

After the jury delivered its verdict, Hall discovered that one of the jurors in his case had a son that was a fellow inmate in the county lockup. Pet. App. 4a. Hall also learned the following: (1) after the jury was picked, but before any evidence was presented, the juror's inmate-son informed the juror that Hall was likely innocent; and (2) during the trial, the juror learned that his son and several co-inmates changed their minds about Hall and thought him guilty. Pet. App. 4a. The juror relayed this extraneous information to several other jurors.

Hall moved to depose the jurors. Pet. App. 162a. The trial court denied this motion based on Indiana Rule of Evidence 606(b), and was affirmed on interlocutory appeal by the Indiana Court of Appeals. Pet. App. 163a, 161a. On remand, the trial court denied Hall's request for a new trial, ruling that Hall was not prejudiced by the extrinsic communications that reached the jury. Pet. App. 150a.

Then, on direct appeal from his convictions, Hall argued "that he was not afforded an impartial jury that decided his case strictly upon the evidence presented." Pet. App. 2a. The Indiana Court of Appeals affirmed. Pet. App. 146a. Hall petitioned for discretionary review, but the Indiana Supreme Court denied the request. Pet. App. 115a.

Three years later, Hall sought post-conviction relief through Indiana's court system based on alleged jury bias owing to the extrinsic communications. Pet. App. 90a. The trial court denied relief on November 12, 2008, and the Indiana Court of Appeals affirmed in August 2009. Pet. App. 114a; 88a. The court of appeals, citing *Griffin v. State*, 754 N.E. 2d 899, 901 (Ind. 2001), held that the burden was on the defendant to show that he was actually prejudiced by the extrinsic communications, and that Hall had failed to meet that burden. Pet. App. 125a. The Indiana Supreme Court denied transfer. Pet. App. 62a.

Meanwhile, in April 2009, Hall filed a federal habeas corpus petition in the Northern District of Indiana. Pet. App. 31a. Hall argued that the Indiana courts contravened clearly established federal law as determined by this Court when they required Hall to demonstrate actual prejudice owing to improper communications with a juror. He argued that *Remmer v. United States*, 347 U.S. 227 (1954), made it constitutionally necessary to presume such prejudice upon a prima facie showing that the jury was tainted. Pet. App. 36a.

The district court held that, under the standard set forth by 28 U.S.C. § 2254(d)(1), the Indiana courts had indeed ruled contrary to "clearly established" federal constitutional law, and that the error in Hall's case was not harmless. Pet. App. 44a. The district court acknowledged that *Remmer* was contradicted by later Supreme Court cases and that "the federal appellate courts have taken diverse approaches to resolving the conflict[.]" Pet. App. 38a. Furthermore, said the district court, "circuit splits in the absence of a clear statement by the Supreme Court tend to show that a given proposition has not been clearly established." Pet. App. 39a. Nonetheless, citing *Wisehart v. Davis*, 408 F.3d 321 (7th Cir. 2005), the district court held that courts must presume injury upon a showing of improper extraneous communication with jurors. Pet. App. 41a. And, it said, "we are bound by our circuit's previous determination that the law has been clearly established." Pet. App. 41a.

The district court also held that even though *Remmer* requires a hearing to determine prejudice, during which the State carries the burden of proof, the Indiana Court of Appeals' observation that the State would not have been able to carry the burden was a reasonable finding entitled to deference and finality under AEDPA. Pet. App. 45a. The district court therefore granted Hall's petition, ordering that the State must either release Hall or retry him. Pet. App. 45a.

The Seventh Circuit affirmed. The court acknowledged "some ambiguity regarding when the *Remmer* presumption should apply," including disagreement among the circuits on that subject. Pet. App. 24a It stated that "[t]he State is correct that there has been much debate on this issue[,]" Pet. App 20a, but explained that, in its view, cases favoring the State from the Eleventh and Sixth Circuits "constitute an unreasonable interpretation of Supreme Court law[,]" Pet. App 18a, and that "the Ninth Circuit's narrow interpretation" of *Remmer* is both "highly questionable" and "potentially problematic[,]" Pet. App 21a, 23a.

Reviewing this Court's jury-spoliation precedents, the court stated, "together, two conclusions seem inescapable: (1) not all suggestions of potential intrusion upon a jury deserve a presumption of prejudice, and thus the government does not always carry the burden of proving prejudice; but (2) there are at least some instances of intrusion upon a jury

which call for a presumption of prejudice, contrary to the State's contention." Pet. App. 15a. Accordingly, notwithstanding its observations that other circuits had resolved the presumption issue differently, the court held that: (1) *Remmer* constitutes clearly established federal law relating to jury-spoliation claims within the meaning of Section 2254(d)(1); (2) the state appellate court's decision that Hall failed to establish that he was prejudiced when jurors received extraneous information was contrary to that "clearly established" federal law; but that (3) remand was appropriate to allow the State an opportunity to show any possible countervailing facts that might render any error harmless. Pet. App. 24a-28a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Address the Deep, Well-Recognized Lower-Court Conflict over Whether to Presume Injury to the Defendant When Jurors Are Exposed to Extraneous Communications about the Case

Both federal court decisions below acknowledged that lower courts are in conflict over whether and when to presume prejudice when jurors are exposed to extraneous information relating to the case before them. Unfortunately that conflict, which exists not only among federal circuits but also has taken hold among state courts of last resort, has arisen because three decisions from this Court point in different

directions on the issue. As courts and scholars alike recognize this insoluble, recurrent confusion among lower courts, the Court should take this case to address the presumption issue.

A. *Remmer*, *Phillips* and *Olano* have created confusion for lower courts

The Court's divergent opinions in *Remmer v. United States*, 347 U.S. 227 (1954) (*Remmer I*), *Smith v. Phillips*, 455 U.S. 209 (1982), and *United States v. Olano*, 507 U.S. 725 (1993), are the sources of what has become an intractable lower-court split over whether and when defendants should enjoy a presumption of harm once they come forward with evidence of jury spoliation.

In the *Remmer* decisions, a juror reported attempted bribery, so the trial court, without notifying the defense, directed the FBI to investigate. 347 U.S. at 228. The Court ruled that both the alleged attempted bribery and the resulting *ex parte* FBI communications with the jury presumptively prejudiced the defendant's Sixth Amendment right to a fair trial by an impartial jury. *Id.* at 229. A court faced with *ex parte* jury communications, *Remmer I* held, should conduct a hearing at which the government bears the burden of proving that the contact was harmless to the defendant. *Id.*

Later, however, the Court backed away from an absolute rule requiring a presumption of prejudice in jury *ex parte* communication cases, observing that the presumption in *Remmer* was required because of "the paucity of information relating to the entire situation" and "the kind of facts alleged." *Remmer v. United States*, 350 U.S. 377, 379-80 (1956) (*Remmer II*). The implication was that the *Remmer I* presumption was not intended to be broadly applicable.

Accordingly, over the next three decades lower federal courts did not consistently presume prejudice when jurors received improper extrinsic communications. *See Bullock v. United States*, 265 F.2d 683, 696 (6th Cir. 1959) (no prejudice presumed where the jury foreman viewed a news broadcast about the case in violation of the court's admonition); *United States v. Miller*, 381 F.2d 529, 539-40 (2d Cir. 1967) (no prejudice presumed where a man associated with the defendants attempted to intimidate one of the jurors and two others were aware of the situation); *United States ex rel. Tobe v. Bensinger*, 492 F.2d 232, 238 (7th Cir. 1974) (prejudice presumed when a jury asked the bailiff what to do if they were deadlocked and the bailiff replied that they had to go back and find a verdict either way); *United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975) (prejudice presumed where one juror advised others of his personal knowledge that the defendant had been in trouble before); *United States v. Love*, 535 F.2d 1152, 1155-56 (9th Cir.

1976) (no prejudice presumed where two jurors saw the defendant and a fellow juror speaking with one another at a bus stop); *United States v. Boscia*, 573 F.2d 827, 830-31 (3d Cir. 1978) (prejudice presumed when a juror was dismissed at the beginning of the trial because of a death in the family, the defendant called an investigator to get the name of the deceased, and one of the jurors who remained on the trial knew of the phone call).

The Court revisited the presumption issue in *Phillips*, where it expressly narrowed the application of the *Remmer* presumption. There, a juror applied for employment with the district attorney's office during Phillips' trial. On habeas review, the lower federal courts granted relief on the theory that the juror was implicitly biased. The Court reversed and held that, at least on habeas review, it is the defendant's burden, not the government's, to prove actual juror bias and resulting prejudice when there is improper communication during trial between a juror and the district attorney's office. *See Phillips*, 455 U.S. at 215. *Phillips* cited *Remmer*, but declined to continue the practice of rebuttably presuming juror bias, apparently signaling retreat from *Remmer*. *See id.* at 228 (Marshall, J., dissenting) (contrasting *Remmer* and other precedents with the *Phillips* rule).

In the wake of *Phillips*, a number of lower federal courts began to require the defendant to show some "likelihood of prejudice" before the government is

burdened with proving harmlessness. *See* 6 Wayne R. LaFave et al., Criminal Procedure § 24.9(f) (3d ed. 2012). The Sixth Circuit explicitly construed *Phillips* as working "a substantive change in the law," eliminating any presumption of prejudice and placing the burden upon a defendant "to demonstrate that unauthorized communications with jurors resulted in actual juror partiality." *United States v. Pennell,* 737 F.2d 521, 532 n.10 (6th Cir. 1984). The D.C. Circuit, however, rejected *Pennell* and held that "*Remmer*'s allocation of the burden remains the law." *United States v. Butler*, 822 F.2d 1191, 1195 n.2 (D.C. Cir. 1987); *see also*, *e.g.*, *United States v. Littlefield*, 752 F.2d 1429, 1431-32 (9th Cir. 1985) (criticizing *Pennell* and stating that "[q]uite simply, the government (and the Sixth Circuit) misread the *Phillips* 'opportunity to prove actual bias' as a shifting of the burden of proof to the defendant").

The Court in *Olano* again addressed whether to presume prejudice in a jury-spoliation case, and again it vitiated the presumption announced in *Remmer*. *See Olano*, 507 U.S. at 741. In *Olano*, alternate jurors were allowed to attend the jury's deliberations in violation of Federal Rule of Criminal Procedure 24(c). In affirming the convictions, the Court held that the defendants had "not met their burden of showing prejudice[.]" *Olano*, 507 U.S. at 741. *Olano* thus apparently stands for the proposition that in at least some cases of jury

spoliation, the burden of proof concerning actual bias may properly lie with a defendant. *See id.*

Moreover, the Court in *Olano* treated *Remmer* as having *weighed* the likelihood of prejudice rather than as having *presumed* prejudice. *See id.* at 739. The Court explained that in *Remmer* it "remanded for the District Court to determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 738 (internal quotation omitted). And while "[t]here may be cases where an intrusion should be presumed prejudicial," *Remmer* itself was *not* one of those cases, according to *Olano*. *Id.* at 739.

B. *Olano* has only sewn greater confusion among lower courts, and the decision below exacerbates the resulting conflict

Unfortunately, the initial confusion concerning *Remmer*'s underlying rationale, combined with the apparent retreats in *Phillips* and *Olano*, have left the Nation's courts in disarray over the proper Sixth Amendment standard for jury-spoliation claims. *See United States v. Lawson*, 677 F.3d 629, 645 (4th Cir. 2012) ("In resolving the question whether the *Remmer* presumption applies . . . we note that our sister circuits also are divided on this question."). The decision below ruled that the *Remmer* presumption applies in at least some cases where a criminal defendant asserts bias based on jurors'

extraneous communications concerning the case. Pet. App. 24a; *see Remmer*, 347 U.S. at 229. Some circuits have substantially agreed, but others, as the Seventh Circuit acknowledged, have applied a different approach.

Only the Third, Fourth, and Seventh Circuits unequivocally treat *Remmer* as unmodified controlling authority in jury-spoliation cases. *See, e.g.*, *Wisehart v. Davis*, 408 F.3d 321, 327 (7th Cir. 2005) (applying the *Remmer* presumption to extraneous communications regarding a delay in trial due to awaited results of a polygraph examination); *United States v. Console*, 13 F.3d 641, 666 (3d Cir. 1993) (applying the *Remmer* presumption when during jury deliberations a juror had obtained extraneous information about the case); *Fullwood v. Lee*, 290 F.3d 663, 678 (4th Cir. 2002) (applying the *Remmer* presumption when the sentencing jury was not sequestered, was subject to improper contact with third parties, and considered extraneous information); *but see Conner v. Polk*, 407 F.3d 198, 206 n.4 (4th Cir. 2005) (questioning the continued vitality of the *Remmer* presumption).

Meanwhile, nine other circuits have departed from the *Remmer* rule in some fashion. The First, Fifth, Sixth, Ninth, Eleventh, and D.C. Circuits have held that the *Remmer* presumption is improper in all but the most extraordinary and inherently prejudicial circumstances, such as intentional jury tampering. *See United States v. Boylan*, 898 F.2d

230, 261 (1st Cir. 1990) (applying no presumption where a magazine was circulated in the jury room referring to the defense attorney as a specialist in defending extortion and racketeering cases like the one at issue); *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) (applying no presumption where multiple jurors received threatening phone calls and repeated their stories to the entire jury panel); *Pennell*, 737 F.2d at 532 (the Sixth Circuit applying no presumption where five jurors received threatening phone calls); *United States v. Madrid*, 842 F.2d 1090, 1093 (9th Cir. 1988) (applying no presumption where there was an ex parte communication between a juror and a court clerk about a fellow juror); *United States v. Rowe*, 906 F.2d 654, 656-57 (11th Cir. 1990) (applying no presumption where a juror overheard a conversation between other jurors that the defendant could no longer pay his attorney); *United States v. Williams-Davis*, 90 F.3d 490, 496-97 (D.C. Cir. 1996) (applying no presumption where there were communications between the jurors and third parties, jury exposure to extra-judicial information, and a failure on the jurors' part to disclose such information).

The Eighth Circuit likewise has refused to presume prejudice on habeas review of state convictions involving jury exposure to extraneous information. In *Helmig v. Kemna*, the court held that when the jury used a map not admitted into evidence during jury deliberations, the defendant had to prove it was "both extraneous and

prejudicial." *Helmig v. Kemna*, 461 F.3d 960, 963 (8th Cir. 2006) (internal quotation omitted).

In addition, the Tenth Circuit does not apply *Remmer* to habeas cases because it views the rule as one of federal criminal procedure, not federal constitutional law. *See Cannon v. Mullin*, 383 F.3d 1152, 1170 (10th Cir. 2004); *see also id.* at 1180 (Kelly, J., concurring in part and dissenting in part) (further distinguishing the application of *Remmer* in federal criminal appeals and habeas review of state conditions of confinement).

The Second Circuit has held that in habeas cases the *Remmer* presumption must yield to the harmless error standard articulated in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), which effectively requires the habeas petitioner to prove actual bias before obtaining habeas relief. *See Bibbins v. Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994); *see also Loliscio v. Goord*, 263 F.3d 178, 187-88 (2d Cir. 2001) (criticizing the continued application of the *Remmer* presumption post-AEDPA, regardless of harmless error). The Second Circuit's harmonization of *Brecht* and *Remmer* differs fundamentally from a nominally similar approach below because, while the Second Circuit understands the harmless error rule automatically to neutralize a presumption of prejudice, the Seventh Circuit invokes the harmless error rule only to permit the State to rebut presumed prejudice if it can point to effective jury instructions

and overwhelming evidence of guilt. *Compare Brecht*, 507 U.S. at 623, *with* Pet. App. 28a-29a.

As noted, the Eleventh Circuit retreated from the *Remmer* presumption in *Rowe*, holding that "[p]rejudice is not presumed" and "[t]he defendant has the burden of demonstrating prejudice by a preponderance of credible evidence." *Rowe*, 906 F.2d at 655. Nearly a decade later, however, the court alluded to a desire to follow the *Remmer* presumption in *Parker v. Head*, 244 F.3d 831, 839 (11th Cir. 2001). "To safeguard a defendant's constitutional rights, the exposure of a jury to extrinsic information has been deemed presumptively prejudicial." *Id.* (internal quotations omitted). In light of subsequent cases, the court acknowledged the extant circuit conflict over the issue, but found it unnecessary to decide whether the *Remmer* presumption still applied because either way the court would find that habeas relief was properly denied in the case before it. *See id.* at 839 n.6.

This internal Eleventh Circuit tension is itself revealing, as that court's approach "is representative of the overall lack of clarity in the case law on this issue." Eva Kerr, *Prejudice, Procedure, and a Proper Presumption: Restoring the Remmer Presumption of Prejudice in Order to Protect Criminal Defendants' Sixth Amendment Rights*, 93 Iowa L. Rev. 1451, 1464 (2008).

C. State courts also are split over which side has the burden of proof

State supreme courts are also divided over the proper application of federal law on this issue.

The Indiana Supreme Court, as well as the high courts of several other states including Arkansas, Connecticut, Ohio, Kansas, Nebraska and Wyoming, favor placing the burden on the defendant. The Indiana Supreme Court has held that "[a] defendant seeking a new trial because of juror misconduct must show that the misconduct (1) was gross and (2) probably harmed the defendant." *Griffin v. State*, 754 N.E.2d 899, 901 (Ind. 2001); *see also Holloway v. State*, 213 S.W.3d 633, 642 (Ark. 2005) (holding that "[f]ollowing allegations of juror misconduct, the moving party bears the burden of proving that a reasonable possibility of prejudice resulted from any such juror misconduct."); *State v. Rhodes*, 726 A.2d 513, 517-18 (Conn. 1999) (discussing *Remmer* and *Phillips* and refusing to revisit its prior holdings stating that as long as "the trial court was in no way responsible for the juror misconduct . . . a defendant who offers proof of juror misconduct bears the burden of proving that actual prejudice resulted from that misconduct."); *State v. Hessler*, 734 N.E.2d 1237, 1251 (Ohio 2000) (discussing *Remmer* and stating that "more recent cases have determined that the complaining party must show actual prejudice."); *State v. Jones*, 151 P.3d 22, 37 (Kan. 2007) (noting that "the defendant bears the burden of proving actual juror bias, and no presumption of

prejudice arises merely from the fact that improper contact occurred.") (internal quotation omitted); *State v. Anderson*, 564 N.W.2d 581, 585-86 (Neb. 1997) (holding "that a criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial."); *Teniente v. State*, 169 P.3d 512, 519 (Wyo. 2007) (finding that the defendant bears the burden of showing actual prejudice).

Some states, such as Minnesota, Arizona, Maine and North Dakota, hold that the *Remmer* presumption of prejudice is against the State in cases of alleged jury spoliation. *See, e.g.*, *State v. Richards*, 552 N.W.2d 197, 210 (Minn. 1996) ("the government bears the heavy burden of establishing that the contact involving the juror was harmless"); *State v. Miller*, 875 P.2d 788, 792 (Ariz. 1994) ("the burden rests with the government to show that the third party communication did not taint the verdict"); *State v. Royal*, 590 A.2d 523, 525 (Me. 1990) ("Once the defendant has shown that a juror was subjected to extraneous information, a presumption of prejudice is established and the burden of proof shifts to the State which must demonstrate by clear and convincing evidence that the information did not prejudice the case."); *State v. Abell*, 383 N.W.2d 810, 812 (N.D. 1986) (finding "that the prosecution must demonstrate that there is not a reasonable possibility that the jury misconduct

could have affected the verdict to the defendant's prejudice.").

Still other states have taken a third approach, holding "that an objective test, concerned with the effect that the juror misconduct would have had on a 'typical jury,' should be applied in such cases." *People v. Wadle*, 97 P.3d 932, 935 (Colo. 2004). In this objective test, "the relevant question should be whether there existed a 'reasonable possibility' that the extraneous contact or influence affected the verdict to the detriment of the defendant." *Id.*; *see also State v. Henning*, 545 N.W.2d 322, 325 (Iowa 1996) ("The impact of the misconduct is judged objectively to determine whether the extraneous information would prejudice a typical juror.").

Meanwhile, the Connecticut Supreme Court has invoked *Remmer* to justify *both* views of whether to presume harm in jury-spoliation cases. In 1989, the Court stated that "[w]here an accused makes a plausible claim that his constitutional right to a fair trial may be violated because the jury is not impartial, the burden is upon the state to rebut the presumption of prejudice that denies a fair trial." *State v. Rodriguez*, 554 A.2d 1080, 1086 (Conn. 1989). But eight years later the same court stated that it had "repeatedly held that a defendant who offers proof of juror misconduct bears the burden of proving that actual prejudice resulted from that misconduct." *State v. Tomasko*, 700 A.2d 28, 33 (Conn. 1997). In both 1999 and 2010, defendants

asked the Connecticut court to reconcile these conflicting lines of precedent, but the court refused to do so. *See State v. Rhodes*, 726 A.2d 513, 518-19 (Conn. 1999); *State v. Osimanti*, 6 A.3d. 790, 814-15, n.32 (Conn. 2010). Thus, the contradictory lines of precedent continue, creating confusion for defendants and courts alike.

***

Lower court uncertainty over whether (and when) to presume prejudice in cases where jurors are exposed to extrinsic information only grows worse with each new case. Certiorari should be granted so that the Court may once again provide guidance to state and federal courts on this issue.

II. The Seventh Circuit Erred in Finding "Clearly Established" Federal Law and that the State Court Decisions Were "Contrary to or an Unreasonable Application of" Such Law

A fundamental prerequisite for overturning a state court conviction on habeas review is the existence of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This Court's precedents concerning whether and when to presume prejudice in jury spoliation cases have pointed in different directions and applied consistent rules only in the most general terms; consequently, there is no "clearly established" rule that can be

applied here. The decision below, however, not only exacerbated existing lower-court tensions over whether to presume prejudice, it also granted relief despite the implication from the very existence of those conflicts that the prejudice rule is anything but "clearly established."

A. There is no "clearly established" federal law relating to prejudice in jury-spoliation cases sufficient to permit relief under Section 2254

The decision below violated the 28 U.S.C. § 2254(d)(1) standard in multiple ways.

1. A state-court decision is contrary to "clearly established" federal law if it: (1) applies a rule that contradicts a prior Supreme Court case, or (2) reaches a different result than the Supreme Court reached on a materially indistinguishable set of facts. *See Parker v. Matthews*, 132 S.Ct. 2148, 2155-56 (2012). Neither of these standards is met here.

The decision below held that the Indiana Court of Appeals applied a rule contrary to a Supreme Court case, namely *Remmer I*, insofar as it concluded that no presumption of prejudice could apply in jury-spoliation cases. Pet. App. 24a. Yet where multiple Supreme Court precedents point in different directions, the seeming clarity of any one of them is an insufficient basis for granting relief under AEDPA.

In *Lockyer v. Andrade*, for example, the Court recognized that, while it had addressed the relevant constitutional standard on multiple occasions, "in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow" and that circumstance in effect precluded a finding of "clearly established" law. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

Here, similarly, the breadth of *Remmer*'s presumption of injury regarding jury bias claims has never been entirely clear, and *Phillips* and *Olano* have vitiated whatever rule *Remmer* established. *See supra* Part I.A. Accordingly, *Remmer* does not provide an unequivocal rule that should have been applied by the Indiana courts.

What is more, the Seventh Circuit tried to justify its conclusion that Supreme Court precedent was clearly established by comparing the facts of this case to the facts of *Remmer*. It observed, for example, that "this case falls close enough to the facts of *Remmer* to easily earn a presumption of prejudice under the remaining *Remmer*-presumption tests advanced by the circuits." Pet. App. 23a. Furthermore, "this case is closer to *Remmer* than it is to *Phillips* and *Olano*." Pet. App. 23a. Whatever the relative comparability of the facts in this case to the facts in *Remmer*, *Phillips*, and *Olano*, however, in no way are those facts "materially

indistinguishable" from *Remmer*. "Close enough" to *Remmer* is insufficient, and *Remmer* does not provide an unequivocal rule for state courts to apply.

2. The persistence of conflicting decisions among federal and state appellate courts going back more than twenty-five years, *see supra* Parts I.B. and I.C., establishes beyond doubt that there is no longer any "clearly established" *Remmer* presumption, if ever one existed. As the Court said in *Kane v. Garcia-Espitia*, 546 U.S. 9, 10 (2005) (per curiam), federal law is *not* clearly established for habeas purposes where the only basis for the rule being applied is the Court's own dictum and selective authority from a circuit split.

Even before *Kane*, the Fifth and Ninth Circuits had held that habeas relief is inappropriate when there are significant disagreements among the federal circuits over the proper application of a rule. *See Burgess v. Dretke*, 350 F.3d 461, 469 n.20 (5th Cir. 2003); *Hernandez v. Small*, 282 F.3d 1132, 1143 (9th Cir. 2002); *see also Rubin v. Gee*, 292 F.3d 396, 412 (4th Cir. 2002) (Motz, J., dissenting). After *Kane*, the Sixth and Eighth circuits have held that the existence of a circuit conflict on an issue prevents a finding that federal law on that issue is "clearly established." *See Miller v. Colson*, 694 F.3d 691, 698 (6th Cir. 2012) ("[A] disagreement among the circuit courts is evidence that a certain matter of federal law is not clearly established."); *Evenstad v. Carlson*, 470 F.3d 777, 783 (8th Cir. 2006) ("[w]hen

the federal circuits disagree as to a point of law, the law cannot be considered 'clearly established'").

The decision below recognized that "[t]he fact that a circuit split exists on an issue may be indicative of a lack of clarity in the Supreme Court's jurisprudence[.]" Pet. App. 11a. Yet the court went on to conclude that "a split is not dispositive of the question," citing *Morgan v. Morgensen*, 465 F.3d 1041, 1046 n.2 (9th Cir. 2006), and *Williams v. Bitner*, 455 F.3d 186, 193 n.8 (3d Cir. 2006). Pet. App. 11a. Neither of those cases, however, was a habeas case. Both were Section 1983 cases where the courts relied on their own *circuit* precedents to find a clearly established constitutional right, such that "[t]he fact that there was a potential circuit split on th[e] issue does not preclude our holding that the law was clearly established" for Section 1983 purposes. *Morgan*, 465 F.3d at 1046 n.2.; *see also Williams*, 455 F.3d at 193 n.8.

There is a profound difference between a "clearly established" federal right under Section 1983 qualified immunity doctrine and "clearly established Federal law, as determined by the Supreme Court of the United States" under Section 2254(d)(1). In Section 1983 cases, it is well established that circuit precedent can create "clearly established" rights even without definitive Supreme Court resolution. *See McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002) (citing *Wilson v. Layne*, 526 U.S. 603, 617 (1999)); *see also Medina v. City & County of*

Denver, 960 F.2d 1493, 1498 (10th Cir. 1992); *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985). Thus, circuit conflicts over the existence of the right may not preclude a "clearly established" finding where circuit precedent itself is clear.

In Section 2254 cases, however, federal law can be "clearly established" only by reference to *this* Court's precedents, not by reference to individual circuit precedents. 28 U.S.C. § 2254(d)(1). As the Court observed just last term, "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court,' . . . [i]t therefore cannot form the basis for habeas relief under AEDPA." *Parker*, 132 S.Ct. at 2155. This AEDPA restriction makes sense because circuit precedent on matters of federal law does not ordinarily bind state courts within the circuit. *See Rodgers v. Marshall,* 678 F.3d 1149, 1155 (9th Cir. 2012). State courts are free to arrive at their own conclusions as to the meaning of federal law, subject only to review by this Court. *See* 28 U.S.C. § 1257. In *Section 1983* cases, a state supreme court may reject a holding by the regional circuit that a particular right has been "clearly established" without being overridden by the circuit itself. In *habeas cases*, AEDPA's "clearly established" rule ensures the same independent role for state courts to interpret federal law, except where *this* Court has already spoken.

If federal circuits cannot rely on their own precedents to identify "clearly established" federal

law for habeas purposes, it stands to reason that circuit conflicts concerning that law should preclude a "clearly established" finding. And this is certainly a situation where the federal circuits (not to mention state supreme courts) cannot agree on the meaning of this Court's precedents. Under these circumstances, the "clearly established" standard is not met.

B. Even if *Remmer* constitutes "clearly established" federal law, the *result* in the Indiana courts is not "contrary to or an unreasonable application of" that law

According to the Seventh Circuit, "what seems to be 'clearly established' is that federal constitutional law maintains a presumption of prejudice *in at least some* intrusion cases." Pet. App. 21a (emphasis added). Even if "clearly established" by reference to this Court's precedents, however, that rule is far too general to be the basis for a writ to issue. Analytically this point might be relevant either for determining whether a sufficiently specific rule is "clearly established" or for deciding whether the result in the state courts is "contrary to or an unreasonable application of" such a "clearly established"—but highly general—rule. Either way, the decision below is off the mark.

1. As the Court has repeatedly recognized, general propositions of federal law may indeed be "clearly established" and yet remain insufficiently

clear in their application to justify relief under Section 2254(d).

In *Lockyer v. Andrade*, for example, the Court rejected an Eighth Amendment challenge to California's three-strikes law on habeas review because "the only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework is the gross disproportionality principle, the precise contours of which are unclear[.]" *Lockyer*, 538 U.S. at 73. Similarly, in *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012), the Court criticized the Sixth Circuit's grant of a habeas petition where it carried the Court's substantive precedents too far. "The highly generalized standard for evaluating claims of prosecutorial misconduct set forth in *Darden*," said the Court, "bears scant resemblance to the elaborate, multistep test employed by the Sixth Circuit here." *Id*.

In *Lockyer* and *Parker,* the generality of standards announced by the Court's precedents meant that the applicable rule was not "clearly established." In other habeas cases, however, the Court has held that the highly general nature of Supreme Court precedents can prevent a determination that a particular state court application was unreasonable. In *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004), the Court evaluated its precedents relating to custodial interrogation and determined that "the custody test

is general," and that "evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* at 665, 664. Thus, because "the state court's application of our law fits within the matrix of our prior decisions[, w]e cannot grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a *de novo* matter." *Id.* at 665. And in *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009), the Court considered the proper test for ineffective assistance of counsel and held that "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard."

2. The morass of lower court cases struggling to apply *Remmer I* in light of *Phillips* and *Olano* confirms that there is no precise standard against which to judge state-court spoliation determinations on habeas review. Whatever standard *Remmer I* may provide is—as even the Seventh Circuit agrees—quite general. *See* Pet. App. 21a. Yet the Seventh Circuit failed to grant Indiana courts the extra latitude required by *Yarborough* and *Knowles*.

To begin, the decision below faulted the Indiana Court of Appeals not so much for the result it reached as for the process by which it reached that result. "The standard applied by the Court of

Appeals of Indiana," the court said, "requires that a defendant prove that he was probably harmed by an extraneous communication had with a juror, which leaves no room for the potential for a presumption, in contravention of *Remmer* and *Olano*." Pet. App. 21a.

Section 2254, however, permits a writ to issue only where the state proceedings "resulted in a decision" that itself contravenes Supreme Court precedent. 28 U.S.C. § 2254(d)(1). As the Court has made clear, this means that state courts cannot be faulted for applying an incorrect legal standard if they nonetheless reach a result that is consistent with clearly established Supreme Court doctrine. *See Harrington v. Richter*, 131 S. Ct. 770, 784 (2011) (holding that regardless of the state court's analysis, the habeas petitioner must show that "there was no reasonable basis for the state court to deny relief"); *see also id.* at 786 ("Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, *could have supported*, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.") (emphasis added).

The Seventh Circuit, for its part, never asked whether a refusal to presume prejudice—the end result of the state court adjudication—could itself possibly be justified under *Remmer* in the mind of a

hypothetical "fairminded jurist." Rather, the court said, "if the intrusion upon Hall's jury would warrant a presumption of prejudice *under any reasonable reading* of *Remmer* and its progeny, the Court of Appeals of Indiana applied a rule that is contrary to this clearly established federal law . . . ." Pet. App. 21a (emphasis added). Given the deference owed to state courts under AEDPA, this statement of the law is exactly backwards.

In other words, the Indiana Court of Appeals' refusal to presume prejudice can be reversed on habeas only if that decision—regardless of how the court arrived at it—is "contrary to or an unreasonable application of" *Remmer*. Since *Remmer* at most tells us that a presumption of prejudice can apply in some cases (but not which ones), and since the facts of this case are not "materially indistinguishable" from *Remmer*, a refusal to presume prejudice cannot be deemed "contrary to" *Remmer*. And because *Remmer* and its progeny offer so little guidance as to when a presumption of injury applies, there is also no basis for holding that the refusal to presume injury here was "objectively unreasonable." *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

That the Seventh Circuit was able to divine *some* reasonable understanding of *Remmer* under which a presumption of prejudice would be justified is irrelevant. (Indeed, even the Indiana Supreme Court recognizes that, in some circumstances, a

rebuttable presumption is appropriate. *See Griffin*, 754 N.E.2d at 901.) In cases where courts must rely only on their essentially subjective judgments about the "severity" of agreed-upon facts when evaluating whether a defendants' rights were violated, AEDPA requires federal courts to stick with the judgment of the state court (even as posited *post hoc*) unless it is "objectively unreasonable." The Seventh Circuit did not do that, but instead substituted its own view of whether the jury "intrusion" in this case warranted a presumption of prejudice. Pet. App. 21a. In all events, therefore, the decision below failed to afford appropriate AEDPA deference to the Indiana Court of Appeals' adjudication of Hall's jury-spoliation claim.

III. This Case Is an Appropriate Vehicle for the Court to Decide the Issues Presented

Because of the nature of both the jury-spoliation issue and the deference owed to state courts under Section 2254, this case is procedurally well-suited for immediate Supreme Court review. The Seventh Circuit remanded the case for further proceedings, but there is little likelihood the State could yet prevail.

To begin, the State can hardly hope to disprove the presumption that the extraneous information may have impacted the jurors' thinking. The main source for proof on such matters would be the testimony of jurors themselves, but both Federal and

State Rules of Evidence allow jury members to testify only about whether "extraneous prejudicial information was improperly brought to the jury's attention." Fed. R. Evid. 606(b)(2)(A); *see also* Ind. R. Evid. 606(b). Any inquiry concerning the impact of such information on individual jurors' decision-making processes has long been impermissible. *See* Fed. R. Evid. 606 advisory committee's note ("The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment."); *see also Mattox v. United States*, 146 U.S. 140, 149 (1892) (a juror "may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind.").

The Seventh Circuit essentially recognized these limitations, so it remanded to permit the district court to review the now-established constitutional violation for harmless error, per *Brecht*, 507 U.S. at 623. Pet. App. 28a. Generally, harmless error analysis requires a habeas petitioner to demonstrate that a state court constitutional error "had a 'substantial and injurious effect' on the outcome of his case." Pet. App. 25a. Here, however, the Seventh Circuit declared itself satisfied that "[t]hrough affidavits, Hall ha[s] proved that highly prejudicial information about the ultimate question in his criminal case reached several members of his jury," which in turn has established "grave doubt as

to the harmlessness" of the state courts' constitutional error. Pet. App. 29a. Accordingly, said the Seventh Circuit, on remand *the State* has the burden to establish that other factors, such as curative instructions or the overwhelming weight of the evidence, prevent a finding of actual prejudice. Pet. App. 29a.

By remanding on these terms, the Seventh Circuit has in effect used a *Remmer* presumption of prejudice to shift the harmless error burden to the State. This is the inverse of the *Remmer*-presumption harmless-error review provided by the Second Circuit, which used the harmless-error standard to *negate* a *Remmer* presumption of prejudice. *See Bibbins*, 21 F.3d at 16.

In any event, given the Seventh Circuit's independently derived "grave doubt as to the harmlessness" of the asserted constitutional violation, there would seem to be little likelihood that this case may ultimately be resolved in the State's favor on remand. What is more, the issues that demand resolution have to do with clarifying the standard of prejudice applicable to jury spoliation claims and whether the Indiana courts violated "clearly established" federal law on that subject. Remand for review of whether the Indiana courts' supposed violation of Hall's rights was "harmless" can only compound the insult to the integrity of state court criminal proceedings that

AEDPA was designed to prevent. The case is therefore procedurally ripe for immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER
Solicitor General
(Counsel of Record)
STEPHEN R. CREASON
Chief Counsel
ASHLEY TATMAN HARWEL
HEATHER HAGAN MCVEIGH
Deputy Attorneys General

Counsel for Petitioner

Dated: December 27, 2012