No. 12-813

In the Supreme Court of the United States

KEITH BUTTS, SUPERINTENDENT,

Petitioner,

v.

VIRGIL HALL, III,

Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Remmer* v. *United States*, 347 U.S. 227 (1954), which recognizes—in cases of unlawful private communications to the jury "about the matter pending before the jury"—a presumption of prejudice that requires an evidentiary hearing to determine whether the defendant in fact was prejudiced, constitutes "clearly established federal law as determined by the Supreme Court" under 28 U.S.C. § 2254(d)(1).

2. Whether the denial of a *Remmer* hearing in this case was "contrary to" or an "unreasonable application of" the legal principle clearly established by *Remmer*.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

The sole question in this case is whether the Indiana courts violated "clearly established federal law as determined by [this] Court" (28 U.S.C. § 2254(d)) by refusing to hold an evidentiary hearing to determine whether respondent was prejudiced by the transmission to members of the jury of a concededly improper communication regarding the very question of guilt or innocence before the jury. The communication in question was the statement by the stepson of one of the jurors, who was incarcerated in the same prison as respondent, that respondent was not innocent, a reversal of the stepson's initial view, expressed to the juror earlier in the trial, that he thought respondent was innocent.

The court of appeals correctly concluded that the state courts' refusal to hold a hearing violated the due process principle recognized in this Court's decision in *Remmer* v. *United States*, 347 U.S. 227 (1954). The Court there held that, because such an unauthorized private communication to a juror is "presumptively prejudicial," the trial court must hold a hearing to determine whether the defendant was in fact prejudiced by the unlawful communication. Because this Court has never overruled, or even questioned, *Remmer*'s requirement of a hearing, the Indiana courts' determination plainly violated clearly established law within the meaning of Section 2254(d).

Petitioner attempts to manufacture a conflict among the lower courts by citing numerous cases in which a *Remmer* hearing was held but the defendant's claim of prejudice was then rejected, claiming that these cases cast doubt on the vitality of the pre-

sumption recognized in *Remmer*. But the weight to be given to the presumption in the post-hearing prejudice determination is not presented here—the sole question is whether the court of appeals properly required a hearing. And to the extent there is uncertainty in the lower courts regarding the allocation of the burden of proof in a *Remmer* hearing, that issue plainly is not presented here because the court of appeals held that respondent, not the State, bears the burden of demonstrating prejudice and respondent has not sought review of that determination.

With respect to the question of respondent's entitlement to a hearing, the close similarity between the facts here and the facts of *Remmer* is dispositive—if anything, the express statement regarding respondent's guilt by someone who was in a position to interact with respondent and who previously had declared respondent innocent, a statement that was communicated to multiple jurors, carries a much greater risk of prejudice than the potential bribery offer conveyed to one juror that was at issue in *Remmer*. To the extent that lower court decisions are even relevant in determining whether that legal principle is "clearly established," they require the same conclusion. Petitioner is unable to point to any decision with close-to-similar facts in which a lower court failed to undertake its own examination of the jurors in order to make a determination regarding the existence of prejudice. There is no reason for review by this Court of the court of appeals' routine application of *Remmer* in this case. The petition should be denied.

A. State Court Proceedings.

In February 2001, respondent Virgil Hall, III, was tried in an Indiana state court on criminal

charges arising from the death of his young stepson while in respondent's care. Pet. App. 1a. The state's case was circumstantial—it did not call any witnesses to the alleged crime. Respondent testified in his defense that his stepson's injuries were the result of an accidental fall, and expert witnesses testified for both sides regarding whether the stepson's injuries were consistent with an accident or with intentional blows to the stepson's body. *Id.* 2a-4a, 119a-123a. The jury convicted respondent of murder and neglect of his stepson, and he was sentenced to a term of 65 years of imprisonment. *Id.* 3a-4a.

After trial, respondent filed a motion to correct error due to jury misconduct. Pet. App. 4a. Supported by an affidavit from one of the alternate jurors in the case, the motion alleged that a stepson of one of the regular jurors was incarcerated with respondent during the trial and that the juror's stepson told the juror at the beginning of the trial that he thought respondent was innocent. Pet. App. 4a, 153a-154a. Further along in the trial, however, the juror overheard his wife tell another family member that their stepson now no longer believed respondent to be innocent. Pet. App. 4a. The juror in turn shared this information with other members of the jury. *Ibid.*

The trial court denied respondent's motion to depose all members of the jury and, although concluding that extrinsic communications had reached the jury, it ruled that respondent was not prejudiced. The Indiana Court of Appeals affirmed that determination on interlocutory review. Pet. App. 4a-5a.

Respondent then appealed his conviction on the ground that the State should have had the burden to

prove that the contaminating information did not prejudice the verdict. Pet. App. 5a.[1] The Indiana Court of Appeals rejected respondent's claim, believing itself to be bound by precedent of the Indiana Supreme Court that placed the burden on a defendant to show prejudice. *Ibid.* Despite this conclusion, the appellate court expressed concern that respondent had been prejudiced:

> Because of the rule precluding consideration of juror testimony regarding the impact of the extraneous information on the verdict * * * the placement of the burden of proof is *everything*.
>
> In the case at bar, * * * [t]he fact that the inmates lived with Hall and once believed he was innocent, but changed their belief to guilt, renders the impression that the inmates had a special insight into Hall's guilt * * *. As such, if the jury allowed themselves to consider this information, there can be little doubt that the information had a prejudicial impact on the verdict obtained.

Pet. App. 134a-135a. As the Seventh Circuit would later observe, the appellate court "found against [respondent] simply because the burden was on him to prove prejudice." Pet. App. 5a.

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[1] To the extent petitioner asserts (Pet. 6-7) that this issue was not raised on direct review, but rather in respondent's state habeas petition, petitioner is mistaken. The claim upheld by the court of appeals here was raised and rejected on direct review in the Indiana state courts.

B. Federal Habeas Proceedings

1. *The District Court's Decision.* After respondent was denied collateral relief in the Indiana state courts, he filed a habeas corpus petition in the federal district court for the Northern District of Indiana on the ground that the allocation of the burden of proof to show prejudice on respondent—rather than the State—violated "clearly established" law as required for a grant of habeas corpus relief under 28 U.S.C. § 2254. Pet. App. 6a. The district court granted the petition, relying principally on this Court's decision in *Remmer* v. *United States*, 347 U.S. 227 (1954).

In *Remmer*, this Court considered a post-trial claim of juror misconduct arising from an effort by an unknown person to bribe a jury foreman to bring in a verdict favorable to the defendant. *Id.* at 228-229. This Court concluded that "[i]n 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," and that the trial court should convene a hearing to consider the issue of prejudice. *Id.* at 229.

2. *The Court of Appeals' Ruling*. The Seventh Circuit agreed with the district court that that "[t]here is no doubt that *Remmer* itself established a presumption of prejudice applicable when third-party communications concerning a matter at issue in a trial intrude upon a jury." Pet. App. 11a. Citing this Court's decisions in *Smith* v. *Phillips*, 455 U.S. 209 (1982), and *United States* v. *Olano*, 507 U.S. 725 (1993), the court of appeals acknowledged that "not all suggestions of potential intrusion upon a jury deserve a presumption of prejudice," but that "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.

The court of appeals then concluded that "this case falls close enough to the facts of *Remmer* to easily earn a presumption of prejudice" under the interpretations of *Remmer* advanced by the majority of federal circuits, Pet. App. 23a, and "[e]ven under a narrow reading of *Remmer*" advanced by some circuits. Pet. App. 24a. It concluded that "we are confident that despite some ambiguity regarding when the *Remmer* presumption should apply, all reasonable interpretations of *Remmer* and its progeny would lead to a presumption of prejudice" in light of the severity of the jury intrusion involved in respondent's case. *Ibid.* Accordingly, "the trial court that oversaw [respondent's] conviction acted contrary to clearly established law under [28 U.S.C. § 2254]." Pet. App. 24a-25a.

Having concluded that the Indiana courts violated "clearly established" law, the court of appeals then turned to whether respondent could satisfy the burden for obtaining habeas corpus relief from a state conviction under *Brecht* v. *Abrahamson*, 508 U.S. 968 (1993)—demonstrating a substantial and injurious effect from the trial court's failure to accord him the benefit of the *Remmer* presumption. Pet. App. 25a-26a. See also Pet. App. 28a ("[I]t is well established that a habeas petitioner must prove prejudice in order to have his petition granted * * *.").]

Thus, whatever *Remmer* might require with respect to allocation of the burden of proving prejudice in a case on direct review, respondent—because he seeks habeas relief—"must now prove what he allegedly failed to prove to the Indiana courts: that he

was likely prejudiced by the intrusion upon his jury." Pet. App. 25a.

The court of appeals observed that the state court erred, by failing to hold a hearing to receive relevant evidence. Pet. App. 27a (discussing the questioning of jurors that the state court should have permitted). In the absence of such information, the state court "abdicated its duty to make a factual determination regarding the likelihood of prejudice in [respondent's] case." *Ibid*. The court of appeals then noted that "[o]n the limited record before us, it is clear that [respondent] has provided enough of a factual foundation, absent any countervailing evidence, to suggest that he was prejudiced by the information acquired and shared by [the juror whose son was in jail with respondent]." Pet. App. 28a-29a. Such countervailing evidence might include the presence of any curative instructions to the jury and "the strength of the legitimate evidence presented by the State." Pet. App. 29a.

The court of appeals thereupon reversed the district court's grant of habeas corpus relief and remanded to determine "whether [respondent] was actually prejudiced." Pet. App. 30a. The court observed that "[i]t may be a significant challenge" for the State to prevail on that issue given the "highly prejudicial information" that was conveyed to the jury, but that the State was entitled to an opportunity to adduce "countervailing facts [that] would have alleviated concerns of a prejudiced jury." *Ibid*.

REASONS FOR DENYING THE PETITION

28 U.S.C. § 2254(d)(1) permits federal courts to grant habeas relief only when a state court's decision is "contrary to" or an "unreasonable application" of

"clearly established" federal law. *Ibid.* The statute provides that *only this Court's decisions* may create "clearly established" federal law; contrary to petitioner's framing of the question presented, any alleged differences among the courts of appeals are irrelevant for determining a clearly established legal principle under Section 2254. The first question presented—whether this Court's holding in *Remmer*, which this Court has never repudiated or overruled, is still "clearly established" federal law—was correctly answered "yes" by the court below on the basis of this Court's precedents.

The court of appeals also correctly concluded that the state court's failure to hold a *Remmer* hearing here was contrary to this Court's decision and unreasonable. A juror shared, during deliberations, third-party information whose harmful potential is unquestionable. The Indiana state courts' denial of a hearing to determine whether respondent was prejudiced is clearly contrary to any reasonable application of *Remmer*.

A. *Remmer* Constitutes Clearly Established Law For Purposes of Section 2254 And Squarely Governs This Case.

The question here is whether this Court's decision in *Remmer* clearly required the trial court to conduct a post-verdict evidentiary hearing to assess whether respondent was prejudiced by the unlawful communication to the jury. There can be no doubt that the failure to hold a hearing was unreasonable, indeed unjustifiable, in light of this Court's decisions.

This Court in *Remmer* confronted a situation in which a third party had contacted a juror during the course of the trial, mentioned the ongoing trial, and

suggested that the juror could profit from a verdict favorable to the defendant. The juror informed the judge of the incident, which was then investigated by the Federal Bureau of Investigation. 347 U.S. at 228-229.

The defendant, who did not learn of these events until after the return of the jury verdict, moved for a new trial, which was denied on the ground that the defendant had failed to show prejudice resulting from the communications. This Court reversed the court of appeals, holding "presumptively prejudicial" such "private communication[s], contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury." 347 U.S. at 229. "The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Ibid.*

The Court observed that it did "not know from this record, nor d[id] the [defendant] know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless." 347 U.S. at 229. "The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should 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 229-230.

The *Remmer* case returned to this Court following the hearing conducted on remand. This Court observed that its prior opinion

> pointed out that the record we had before us did not reflect what in fact transpired, "or whether the incidents that may have occurred were harmful or harmless." It was the paucity of information relating to the entire situation coupled with the presumption which attaches to the kind of facts alleged by petitioner which, in our view, made manifest the need for a full hearing.

Remmer v. *United States*, 350 U.S. 377, 379-380 (1956) (citation omitted).

Following its review of the hearing record, this Court reversed the lower courts' denial of a new trial. "We think this evidence, covering the total picture, reveals such a state of facts that neither [the juror] nor anyone else could say that he was not affected in his freedom of action as a juror." *Id.* at 381.

This Court's subsequent decisions have not undermined *Remmer*'s holding that an unlawful communication to the jury regarding the matter before the jury gives rise to a presumption of prejudice requiring the trial court to hold an evidentiary hearing. Indeed, this Court has not addressed that issue.

Petitioner asserts that *Smith* v. *Phillips*, 455 U.S. 209 (1982), and *United States* v. *Olano*, 507 U.S. 725 (1993), *sub silentio* limited *Remmer*. But both decisions concerned entirely different questions.

Smith involved a juror who during the trial submitted an application for employment in the district attorney's office. The trial court conducted a post-verdict hearing and found no evidence of prejudice. 455 U.S. at 211-214.

This Court observed that the trial judge had accorded the defendant in *Smith* "precisely the reme-

dy" that the Court had ordered in *Remmer*. 455 U.S. at 216. It refused to go beyond *Remmer* and adopt an unrebuttable presumption of prejudice that would "require a new trial every time a juror has been placed in a potentially compromising situation." *Id.* at 217. Rather, determinations regarding the existence of prejudice "may properly be made at a hearing like that ordered in *Remmer* and held in this case." *Ibid.* Far from undermining *Remmer*, therefore, *Smith* complied fully with *Remmer*—the trial court conducted an evidentiary hearing and determined, based on all of the evidence, that there was no prejudice.

Indeed, neither the federal district court nor the federal court of appeals disagreed with that determination. 455 U.S. at 218-219. Rather, the court of appeals set aside the defendant's conviction based solely on "prosecutorial misconduct"—the prosecutor's failure to disclose the juror's job application until after the trial had concluded. *Id.* at 220. *Smith* held that misconduct of a prosecutor that does not affect the fairness of the trial cannot alone establish a due process violation. *Id.* at 218-221.[2]

In *United States* v. *Olano*, the defendant's counsel did not object to the district court's decision permitting the alternate jurors to remain with the jury during its deliberations. The question was—in this

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[2] Petitioner references Justice Marshall's dissent in *Phillips*, which characterizes the majority holding as "inconsistent with the Court's historical recognition of this 'most priceless' right [to a trial before an impartial jury]." Pet. 12 (citing *Phillips*, 455 U.S. at 228 (Marshall, J., dissenting). But Justice Marshall advocated the adoption of a "conclusive presumption of bias" in certain circumstances (455 U.S. at 232)—a rule that the *Remmer* Court expressly rejected. See page 7, *supra*.

Court's words—"whether the presence of alternate jurors during jury deliberations was a 'plain error' that the Court of Appeals was authorized to correct under Federal Rule of Criminal Procedure 52(b)." 507 U.S. at 727.

The Court held that the district court's decision did not constitute plain error because it did not "affect[] substantial rights." *Id.* at 737. First, the "presence of alternate jurors during jury deliberations is not the kind of error that 'affect[s] substantial rights' independent of its prejudicial impact." *Ibid.*

Second, the defendants failed to satisfy the Rule 52(b) standard by showing prejudice. Indeed, the defendants "never requested a hearing" on the issue. *Id.* at 740. And the Court declined to presume prejudice in the absence of a factual showing: "the District Court specifically enjoined the jurors that 'according to the law, the alternates must not participate in the deliberations,' and reiterated, 'we are going to ask that you not participate.' The Court of Appeals should not have supposed that this injunction was contravened. '[It is] the almost invariable assumption of the law that jurors follow their instructions.'" *Ibid.* (alteration in original) (citations omitted).

Olano thus addressed only the showing necessary to satisfy Rule 52(b), not a defendant's burden to trigger a hearing on a due process violation, and it addressed the Rule 52(b) question *only* with respect to the presence of alternate jurors—not in the context of private communications from third parties, as in *Remmer*.

The legal issue and facts of this case, by contrast—unlike those in *Smith* and *Olano*—are materially indistinguishable from those in *Remmer*. The

legal question here is whether respondent was entitled to a hearing to determine whether communications from a third party transmitted to a juror violated due process—precisely the question before the Court in *Remmer*.

And the facts are very similar as well. During respondent's trial, a juror received extraneous information through his son, who happened to be incarcerated at the same facility as respondent. The juror's son initially believed that respondent was innocent, but subsequently stated that respondent was guilty. The juror (who himself learned of this information by overhearing his wife's conversation with another family member) relayed his son's opinion to the other members of the jury.

Just as in *Remmer*, the claim involves information communicated to a juror regarding the precise matter before the jury—the defendant's guilt or innocence. Indeed, this case is even more egregious than *Remmer* because it is *undisputed that the information was communicated to other jurors*—a fact not present in *Remmer*.

Petitioner's contrary argument appears to rest on the assertion that *Remmer*'s presumption of prejudice triggering the obligation to hold a hearing may not apply depending on whether the potential prejudice from the communication differs from that of the communication in *Remmer*. Therefore, petitioner seems to say, the application of *Remmer* beyond that case's particular facts can never be clearly established. Pet. 14, 15-16. But this Court has squarely rejected that argument: Section 2254(d)

> does not "require state and federal courts to wait for some nearly identical factual pattern

> before a legal rule must be applied." Nor does [it] prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced." The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner.

Panetti v. *Quarterman*, 551 U.S. 930, 953 (2007). The Seventh Circuit therefore did not err in holding that the intrusion at issue here—juror misconduct by private communication carrying a high risk of prejudice concerning the core question before the jury—unambiguously falls within the scope of the presumption recognized in *Remmer*.

B. Lower Court Decisions Cannot Undermine *Remmer*'s Status As Clearly Established Federal Law.

Petitioner next argues that *Remmer* is no longer "clearly established" federal law. Supposedly, various federal and state appellate courts have interpreted and applied *Remmer* differently, which—according to petitioner—means that federal law cannot be considered "clearly established" for habeas purposes. Even if petitioner were correct about the conflict among the lower courts, which it is not, its argument would fail.

Under 28 U.S.C. § 2254(d) (emphasis added),

> [a]n application for a writ of habeas corpus * * * shall not be granted * * * unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly estab-

> lished Federal law, *as determined by the Supreme Court of the United States* * * *.

This statutory language establishes that if the rule announced by this Court is sufficiently clear in its application to the case at hand, that rule governs—regardless of the views of the lower courts regarding the applicable legal standard. *Parker* v. *Matthews*, 132 S. Ct. 2148, 2155 (2012) ("[C]ircuit precedent does not constitute clearly established Federal law, as determined by the Supreme Court." (internal quotation marks omitted)). See also *Johnson* v. *Williams*, 2013 WL 610199, at *2 (U.S. 2013) (holding that, in the context of Section 2254(d), "the views of the federal courts of appeals do not bind * * * and disagreeing with the lower federal courts is not the same as ignoring federal law"); *Renico* v. *Lett*, 130 S. Ct. 1855, 1865-1866 (2010); *Williams* v. *Taylor*, 529 U.S. 362, 412 (2002) ("[Section] 2254(d)(1) restricts the source of clearly established law *to this Court's jurisprudence*" (emphasis added)).

The rule of *Remmer* is plainly applicable here, and the court of appeals correctly determined that respondent was entitled to relief under this statutory standard.

C. There Is No Conflict Among The Lower Courts Regarding The Applicability Of *Remmer* To Require A Hearing On The Facts Of This Case.

Petitioner is also wrong in claiming a conflict among the courts of appeals regarding the applicability of *Remmer* to facts such as those presented here.

1. The lower courts agree on the requirement of a hearing or equivalent investigation by the court with respect to the prejudicial effect of an illegal communication with the jury.

To begin with, petitioner has not cited any appellate decision upholding a trial court's refusal to conduct a hearing, or equivalent factual investigation, when the unlawful private communication to a juror involves facts resembling those presented here.

Numerous courts have held the hearing requirement applicable in such circumstances. See, *e.g.*, *Oliver* v. *Quarterman*, 541 F.3d 329, 334, 339-340 (5th Cir. 2008) (applying *Remmer* where "jurors consulted a specific [Bible] passage that provided guidance on the appropriate punishment for this particular method of murder"); *United States* v. *Vasquez-Ruiz*, 502 F.3d 700, 701 (7th Cir. 2007) (applying *Remmer* where "a juror complained to the district judge that the word 'GUILTY' had mysteriously appeared written in the notebook she had been using during the trial"); *Wisehart* v. *Davis*, 408 F.3d 321, 327-328 (7th Cir. 2005) (applying *Remmer* and finding that "it was the state's burden, given the juror's affidavit" alleging that he had learned of defendant's having been given a polygraph test not admitted at trial, "to present evidence that the jury's deliberations had not been poisoned by the reference" to this polygraph test); *Moore* v. *Knight*, 368 F.3d 936, 943 (7th Cir. 2004) (concluding that the trial court "failed to apply the appropriate presumption" under *Remmer* where the judge had used the bailiff to verbally communicate with the jury and "tell the jurors that their questions [about the defendant's alibi defense] could not be answered"); *United States* v. *Sylvester*,

143 F.3d 923, 931-935 (5th Cir. 1998) (holding trial judge's ex parte examination of jury was insufficient under *Remmer* and remanding for hearing); *United States* v. *Jackson*, 209 F.3d 1103, 1110 (9th Cir. 2000) (remanding for a *Remmer* hearing and instructing that "[i]f the district court determines that the juror (or other jurors) believed at the time of the trial that the phone call might have been an attempt by one of the defendants to hang the jury, the district court shall require the government to show that the threatening phone call was harmless beyond a reasonable doubt"); *United States* v. *Cheek*, 94 F.3d 136, 142, 144 (4th Cir. 1996) (finding the *Remmer* presumption applicable where third-party "confederates had attempted to bribe" a juror—an instance of "devastating, improper, extrajudicial conduct"—and noting that even though the juror never spoke to and was not threatened by the third party, "these observations * * * do not negate the presumption of prejudice"); *United States* v. *Howard*, 506 F.2d 865, 867 (5th Cir. 1975) (applying the presumption where a juror had advised other jurors that he had personal knowledge that the defendant "had been in trouble before"); *United States ex rel. Tobe* v. *Bensinger*, 492 F.2d 232, 238 (7th Cir. 1974) (applying the presumption and noting that that the bailiff's statements urging the jury to make a decision "were not only probably but were presumptively coercive and prejudicial"); *State* v. *Rhodes*, 726 A.2d 513, 519 (Conn. 1999) (trial court conducted evidentiary hearing); *Holloway* v. *State*, 213 S.W.3d 633, 641-645 (2005) (affirming a decision to deny a new trial, following a hearing, based on evidence that a juror at trial suffered from diabetes and believed that she might be denied treatment if she did not vote to convict); *State* v. *Anderson*, 564 N.W.2d 581, 586-587 (1997) (con-

ducting hearing where jurors had read a newspaper headline discussing his retrial on a murder charge).

Indeed, in a case involving a juror whose wife shared her opinion that the defendant was guilty and deserving of the death penalty, the Fourth Circuit remanded for a *Remmer* hearing to determine whether that contact "deprived [the defendant] of a fair trial." *Fullwood* v. *Lee*, 290 F.3d 663, 682 (4th Cir. 2002). That is precisely the same conclusion that the Seventh Circuit reached here.

One case cited by petitioner in which a hearing was not held involve communications much farther afield from to the issue before the jury—completely different from the attempted bribe in *Remmer* and the direct discussion of guilt here. *Griffin* v. *State*, 754 N.E.2d 899, 901 (Ind. 2001) (denying the defendant's motion for a new trial following allegations of improper contact with an alternate juror, on facts that bear a striking similarity to *Olano*'s and not *Remmer*'s; determination of prejudice made on basis of trial record).

Other courts have found a hearing unnecessary because the trial court utilized other procedures to investigate the existence of prejudice as a result of an unlawful communication to a juror. Here of course the trial court conducted no appropriate evidentiary inquiry of any kind. See, *e.g.*, *United States* v. *Miller*, 381 F.2d 529, 539-540 (2d Cir. 1967) (district judge "had developed the facts by interrogating the jurors, with counsel agreeing not to be present"; distinguishing *Remmer*, where "the trial court apparently did not even interview the juror in question and the record did not show 'what actually transpired'"); *United States* v. *Williams-Davis*, 90 F.3d 490, 496-497 (D.C. Cir. 1996) (district court questioned juror

who received communication but declined to conduct more expansive inquiry); *United States* v. *Rowe*, 906 F.2d 654, 656 (11th Cir. 1990) (district court questioned jurors); *United States* v. *Boylan*, 898 F.2d 230, 258-59 (1st Cir. 1990) (district court's inquiry—which involved questioning of jurors by the judge, was "patient, careful, searching, thorough, methodologically sound" and permitting counsel to "suggest[] supplementary questions which were then put to jurors"); *United States* v. *Pennell*, 737 F.2d 521, 529-531 (6th Cir. 1984) (district court questioned all jurors regarding impact of telephone calls received by five jurors); *United States* v. *Boscia*, 573 F.2d 827, 831 (3d Cir. 1978) (jury learned of a phone call from an investigator, who, at the defendant's request, asked an excused juror for the name of her recently deceased boyfriend, after which another juror mentioned the call to other members of the jury; court observed that communications did "not deal directly with guilt or innocence" but "arguably, though indirectly 'about a matter before the jury'"; trial judge's *in camera* interviews of jurors held sufficient investigation and basis for finding lack of prejudice); *United States* v. *Love*, 535 F.2d 1152, 1156 (9th Cir. 1976) (hearing held, but no express finding regarding prejudice; court emphasized *Remmer*'s marked differences from the defendant's "entirely innocent" conversation with a juror at a bus stop about an automobile that had passed by them); *Bullock* v. *United States*, 265 F.2d 683, 696 (6th Cir. 1959) (distinguishing the tampering in *Remmer* from a jury foreman's viewing, through a "neighborly invitation," of a "public" news broadcast; unclear whether hearing was conducted—but the court of appeals observed that "[t]he facts are developed on motion for a new trial"); *People* v. *Wadle*, 97 P.3d 932, 937 (Colo. 2004) (trial court ex-

amined jurors and, in any event, "[t]here has never been a dispute about the information to which the jury was exposed in this case, or the timing or circumstances of that exposure"); *State* v. *Jones*, 151 P.3d 22, 36-38 (Kan. 2007) (trial judge questioned juror to assess existence of prejudice from juror's fears resulting from attention from courthouse observers, who may have been members of defendant's family); *Teniente* v. *State*, 169 P.3d 512, 519 (Wyo. 2007) ("court * * * through the bailiff contacted the juror to ensure that her level of ease at serving on [the] jury was not compromised").

Finally, petitioner points to the Fourth Circuit's recent statement that "[i]n resolving the question whether the *Remmer* presumption applies . . . we note that our sister circuits also are divided on this question." Pet. 14 (quoting *United States* v. *Lawson*, 677 F.3d 629, 645 (4th Cir.), cert. denied, 133 S. Ct. 393 (2012)). But the omitted words in the ellipsis offer a crucial qualification of that statement: the circuits are divided on the question whether the *Remmer* presumption applies "to a juror's use of a dictionary definition during deliberations." *Lawson*, 677 F.3d at 645. A juror's mere use of a dictionary—a publicly available resource—would seem to reach substantially beyond *Remmer*'s purview of "any private communication, contact, or tampering directly or indirectly."

Petitioner is thus unable to demonstrate the existence of a conflict regarding *Remmer*'s requirement of a post-verdict evidentiary hearing on facts such as those here.

Similarly unconvincing is the argument advanced by the *amici* States, who base their claim of a conflict among the courts of appeals on the assertion

that some courts presume prejudice "unless the influence on the jury was innocuous or de minimis"; another presumes prejudice for "egregious violations"; and others employ "the 'substantial prejudice' test." Am. Br. 6, 7. But *amici* cannot, and do not, show that these different verbal formulations produce different results in their actual application—and they do not even attempt to demonstrate that the facts here would produce different outcomes under these standards. Given the Indiana Court of Appeals' observation that "if the jury allowed themselves to consider this information, there can be little doubt that the communication would have "had a prejudicial impact on the verdict" if it was considered by the jurors (Pet. App. 135a), and the Seventh Circuit's characterization of the communication as "highly prejudicial" (*id.* at 30a), there can be no doubt that it would satisfy any of these standards. To the extent there may be a conflict among the lower courts, therefore, it plainly is not implicated here.

2. Any disagreement among the lower courts relates to the allocation of the burden of proving prejudice, an issue that is not presented in this case.

Petitioner rests its claim of a conflict on lower court holdings regarding legal standards governing juror communication claims *other than* the defendant's entitlement to a hearing at issue here. Its principal focus is on cases addressing the burden of proof—whether *Remmer*'s presumption of prejudice imposes on the prosecution the burden of proving the absence of prejudice or the defendant bears the bur-

den of proving prejudice.[3] But the burden of proof issue is not presented in this case because the court of appeals held that respondent, not the State, bears the burden of proving prejudice since this case arises on a petition for habeas relief. See pages 6-7, *supra*. There accordingly is no occasion for this Court to address the burden-of-proof issue.

For that reason, the court of appeals decisions cited by petitioner are entirely irrelevant here. *United States* v. *Rowe*, 906 F.2d at 656 (district court questioned jurors regarding effect of discussion regarding defendant's inability to pay his lawyer; court of appeals placed burden on defendant to show reasonable probability of prejudice);[4] *United States* v. *Pennell*, 737 F.2d at 532 & n.10 (trial judge held a *Remmer* hearing; court of appeals concluded that "*Phillips* worked a substantive change in the law" with respect to the burden of proving prejudice; court did not rely on burden of proof in evaluating district court's finding that there was no prejudice);[5] *State* v.

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[3] Petitioner does not argue that the lower courts have reached conflicting results as to whether a court determining if prejudice (or the absence of prejudice) has been established can accord weight to the presumption of prejudice recognized in *Remmer*. Indeed, none of the cases petitioner cites as supposedly "depart[ing]" from *Remmer* (Pet. 15-16) hold—in a case with facts like this one where the communication was "highly prejudicial information" (Pet. App. 30a)—that the presumption essentially disappears upon the holding of the evidentiary hearing and is irrelevant to the ultimate determination regarding the existence of prejudice.

[4] Significantly, a subsequent Eleventh Circuit panel indicated that this issue was unsettled in that Circuit. *Parker* v. *Head*, 244 F.3d 831, 839 (11th Cir. 2001).

[5] Other courts have rejected the view expressed by the Sixth Circuit. See *United States* v. *Butler*, 822 F.2d 1191, 1195 n.2

Jones, 151 P.3d at 36-38 (trial judge questioned juror regarding effect of attention from courthouse observers who may have been members of defendant's family; court of appeals placed burden of proving prejudice on defendant); *cf. State* v. *Rhodes*, 726 A.2d 513, 519 (Conn. 1999) (declining to address "standard of proof in juror misconduct cases because the defendant cannot prevail, even under the rule he urges us to adopt. Even if it is assumed, arguendo, that the state bears the burden of proving the harmlessness of [the juror's] improper contact * * * beyond a reasonable doubt, the evidence supports the trial court's finding that the state satisfied that burden"). See also *Bibbins* v. *Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994) (pointing out that on habeas the defendant bears the burden of establishing prejudice from the improper communication—the same conclusion reached by the Seventh Circuit here—and holding that the improperly communicated information (one juror's statement based on her own knowledge) was cumulative of evidence that had been introduced at trial); *United States* v. *Madrid*, 842 F.2d 1090, 1093 (9th Cir. 1988) (hearing held regarding effect of ex parte communication with juror by court clerk; defendant bears burden of proving prejudice where communication "did not pertain to 'any fact in controversy or law applicable to the case.'"); *Helmig* v. *Kemna*, 461 F.3d 960, 962 (8th Cir. 2006) (rejecting claim based on

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(D.C. Cir. 1987) ("No other federal appellate court, however, has departed from *Remmer*'s statement of the legal standard for evaluating the effect of an improper judicial contact. We think that *Remmer*'s allocation of the burden remains the law." (citations omitted)); *United States* v. *Littlefield*, 752 F.2d 1429, 1431 (9th Cir. 1985) ("Quite 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.").

jury's consultation of state highway map on the ground that the map was not "extraneous information" because it was subject to judicial notice; court also concluded—in part on basis of post-verdict hearing—that defendant could not establish prejudice).[6]

In the same vein, petitioner confusingly contends that "State courts also are split over which side has the burden of proof" concerning prejudice when there are allegations that a jury has been contaminated with an extrinsic communication or information. Pet. 19. But that argument is misleading and irrelevant because the issue of which side bears the burden of proof of prejudice is analytically distinct from whether a rebuttable presumption of prejudice triggering the requirement of a hearing arises in the first instance when the jury has been contaminated by extrinsic communications.

Quite simply, a defendant may have the benefit of a presumption of prejudice and yet bear the burden of proof to show prejudice. For example, in *Griffin* v. *State*, 754 N.E.2d 899 (Ind. 2001)—the principal case relied on by the petition as evidence of a split among the State courts—the Indiana Supreme Court agreed with the *Remmer* presumption of prejudice, stating that "[j]uror misconduct involving an out-of-court communication with an unauthorized person *creates a rebuttable presumption of prejudice*," *id.* at 901 (emphasis added), while then going on to say that "[a] defendant seeking a new trial because of ju-

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[6] It also is worth noting that virtually all of these cases involved communications far removed from the focus of the matter before the jury, and are therefore wholly distinguishable from this case, where the communication related directly to the central question of guilt or innocence.

ror misconduct must show that the misconduct (1) was gross and (2) probably harmed the defendant." *Ibid.*[7]

Moreover, any disagreement among State courts about who bears the ultimate burden of proof issue is not implicated in this case because, as discussed above, there is no question here that the Seventh Circuit below required respondent to bear the burden to prove actual prejudice (notwithstanding its conclusion that respondent should also have had the benefit of a presumption of prejudice). Pet. App. 27a-30a.

In any event, several of the State cases relied on by petitioner as holding that the defendant bears the burden of proof are not persuasive evidence of a conflict among State courts as they do not cite *Remmer, Phillips*, or *Olano*. See, *e.g., Holloway* v. *State*, 213 S.W.3d 633 (Ark. 2005); *Griffin,* 754 N.E.2d at 901; *State* v. *Anderson,* 564 N.W.2d 581 (Neb. 1997). Moreover, to the extent that any of the remaining State cases cited by petitioner cast doubt on *Remmer* or a presumption of prejudice, they involve facts of jury misconduct or contamination far different and less severe than in respondent's case. See, *e.g.*, *Holloway*, 213 S.W.3d at 266-269 (pre-deliberation statement by one juror to another juror of opinion about defendant's guilt); *State* v. *Rhodes*, *supra* (juror's conversations with her boyfriend regarding

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[7] The petition cites the portion of *Griffin* that places the burden of proof on a defendant (Pet. 19) but conspicuously omits reference to that portion of *Griffin* that acknowledges the presumption of prejudice. Moreover, the misconduct involved in *Griffin* was the jury's consultation with an alternate juror–a form of misconduct and taint far less presumptively prejudicial than the facts in respondent's case.

murder trial where conversations, if anything, were favorable to defendant, there was no indication that the juror shared her boyfriend's comments with other members of jury, and the juror initially held out for acquittal); *State* v. *Jones*, 151 P.3d at 36-38 (no prejudice where someone from defendant's family attempted to talk to a juror during a break at the first day of trial and where the issue was immediately reported to the court by the juror the and court made an inquiry to determine that the juror could still be fair and impartial); *State* v. *Hessler*, 734 N.E.2d 1237, 1247-1252 (Ohio 2000) (private questioning of a reluctant juror by the trial judge with consent of counsel).[8]

In sum, petitioner has failed to demonstrate that another court would reach a conclusion different from the Seventh Circuit regarding respondent's entitlement to a *Remmer* hearing on the facts of this case.[9]

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[8] Petitioner mischaracterizes a decision of the Supreme Court of Wyoming as "finding that the defendant bears the burden of showing actual prejudice" (Pet. 20 (citing *Teniente* v. *State*, 169 P.3d 512, 519 (Wyo. 2007)), when in fact the cited decision cited and quoted *Remmer*'s presumption of prejudice with approval and noted that "prejudice must also be shown," *Teniente*, 169 P.3d at 519, but without stating that a defendant must show it.

[9] Petitioner cites (Pet. 17) *Cannon* v. *Mullin*, 383 F.3d 1152, 1170 (10th Cir. 2004), for the proposition that the Tenth Circuit does not apply *Remmer* in habeas cases. *Cannon* involved a claim of ineffective assistance of counsel based in part on failure to investigate alleged unlawful private communications with the jury; the court remanded the case for further consideration of the claim by the district court. 383 F.3d at 1177. It stated (*id.* at 1170): "Although this court has declined to apply *Remmer* in a [Section] 2254 proceeding to determine wheth-

D. To The Extent There Is Ambiguity Regarding The Scope Of *Remmer*, This Case Offers A Poor Vehicle To Address That Issue.

This Court's decisions in *Phillips* and *Olano* reaffirm the *Remmer* rule, and lower-court decisions do not genuinely question *Remmer*'s continued vitality. When a jury member learns of a defendant's coinmates' belief in his guilt—a third-party opinion on the ultimate issue in the case, offered with the authority of an individual sleeping under the same roof as the defendant—and shares that belief with other jury members during deliberation, that is precisely

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er jury contact was prejudicial, see *Crease* v. *McKune*, 189 F.3d 1188, 1193 (10th Cir. 1999), that is not the issue before us."

In *Crease*, however, the court did not reject the defendant's habeas claim on that ground. That case involved the trial judge's ex parte discussion with a juror; the trial judge informed counsel of his conversations and suggested that counsel question the juror to assess whether his conversation had produced prejudice. Defense counsel declined to engage in questioning. The court of appeals found, based on its review of the facts "no convincing evidence that [the defendant] was prejudiced by the ex parte conversation" and denied the habeas claim on that basis. 189 F.3d at 1194. Indeed, far from holding *Remmer* inapplicable to state habeas claims, the court of appeals found that the defendant had made "a substantial showing of a denial of a federal right" but that his claim ultimately failed for lack of evidence of prejudice. *Ibid*.

Finally, in *Loliscio* v. *Goord*, 263 F.3d 178 (2d Cir. 2001), the court's concern was directed at the continued application of the holding in *Bibbins* regarding the applicability of Federal Rule of Evidence 606(b) in state habeas proceedings. See 263 F.3d at 187-188. The court found it unnecessary to resolve that issue, however, because it concluded that the state court had correctly determined that the defendant failed to establish prejudice because the jurors "did not consider the [information from the unlawful communications] in any meaningful way." *Id*. at 190.

the kind of improper communication that triggers a presumption of prejudice. This case is not an outlier: the third-party intrusion on the jury was an unambiguously compromising development. Accordingly, this case presents a straightforward application of *Remmer* and an inappropriate vehicle to address whatever differences may be trickling through some lower courts about *Remmer*'s precise scope. As the court below observed, "[T]he intrusion upon Hall's jury would warrant a presumption of prejudice under any reasonable reading of *Remmer* and its progeny," making it a poor choice to address any "ambiguity regarding when the *Remmer* presumption applies." Pet. App. 21a.

Two final points merit discussion. First, petitioner claims that it "can hardly hope to disprove the presumption that the extraneous information may have impacted the jurors' thinking." Pet. 33. Yet petitioner's fear about prevailing on remand is not unique to this case, but would be true for whichever party bears the ultimate burden of proving prejudice.[10] In fact, petitioner *could* win at the *Remmer* hearing: the Seventh Circuit expressly noted that "[i]f, hypothetically, the legitimate evidence presented by the State * * * was overwhelming, * * * concerns about the prejudicial impact of extraneous information might be lessened." Pet. App. 29a. See also *Remmer I*, 347 U.S. at 229 ("The presumption is not conclusive * * *."). Petitioner seeks a grant of certiorari as a means of avoiding the need to marshal that legitimate evidence.

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[10] Indeed, the Seventh Circuit noted that the Indiana trial court "found against Hall simply because the burden was on him to prove prejudice." Pet. App. 5a.

In any event, petitioner Indiana and its *amici* States should not be permitted to use Section 2254 litigation as a guise for *changing* this Court's precedents. Rather, the statutory standard limits habeas actions to determining whether a state court's determination violates existing clearly established law. Neither defendants nor States may argue for the adoption by this Court of new legal standards. Rather than permitting such overreach from the States, this Court should encourage them to raise such questions on direct review.

Moreover, while habeas petitioners may often need to draw on numerous precedents of this Court to point to a "clearly established" rule,[11] petitioner here invokes a federal rule that is, in fact, an unambiguous and unanimous holding of this Court establishing respondent's entitlement to a hearing, undisturbed by this Court's subsequent decisions and reaffirmed in a readily identifiable line of cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[11] See, *e.g.*, *Burgess* v. *Dretke*, 350 F.3d 461, 467-468 (5th Cir. 2003) (finding that the Supreme Court "has never held—much less 'clearly established'—that physical evidence derived as a result of a Fifth Amendment violation must be suppressed," despite petitioner's attempt to argue that a series of recent Supreme Court cases suggested the contrary, because "it is not enough, under § 2254, that a Supreme Court case apply 'by extension' to a purported state court violation; the Supreme Court must speak clearly").

Respectfully submitted.

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