No. 12-813

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

REPLY BRIEF FOR THE PETITIONER

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONER 1

I. The Issue Here Is Not the Availability of a Hearing, but Who Must Prove Prejudice in Jury-Spoliation Cases 1

II. The Circuits Divide Over Whether to Presume Prejudice from Extraneous Jury Communications 4

III. The Court Needs to Explain that Relief Is Not Proper Under AEDPA When Lower Courts Are Split Over the Governing Legal Standard 5

IV. This Is a Proper Vehicle for Reviewing the Presumption and AEDPA Issues 8

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Berghuis v. Thompkins,
130 S. Ct. 2250 (2010).....9

Brecht v. Abrahamson,
507 U.S. 619 (1993).....3, 8

Griffin v. State,
754 N.E.2d 899 (Ind. 2001).....7

Howes v. Fields,
132 S. Ct. 1181 (2012).....9

Parker v. Head,
244 F.3d 831 (11th Cir. 2001).....4

Remmer v. United States,
347 U.S. 227 (1954).....4, 5, 6, 7

Smith v. Phillips,
455 U.S. 209 (1982).....4, 6, 7

United States v. Lawson,
677 F.3d 629 (4th Cir. 2012).....4

United States v. Olano,
507 U.S. 725 (1993).....6, 7

FEDERAL STATUTES

28 U.S.C. § 2254(d)(1) 2, 5

OTHER AUTHORITIES

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 (2008) 4, 5

REPLY BRIEF FOR THE PETITIONER

In his Brief in Opposition, Respondent does not seriously dispute the absence of clearly established law on when prejudice should be presumed. Instead, he argues that this case actually presents a different question and that the prejudice issue is no longer relevant. He is wrong on both counts. Certiorari is warranted because the Indiana Court of Appeals reasonably decided not to presume prejudice from improper communications with jurors. The Court's precedents on the matter point in different directions, and as a result the circuits (and state appellate courts) are split over whether to presume prejudice in jury spoliation cases. Under these circumstances, the Seventh Circuit had no grounds for overriding the state court on habeas review. The Court should take the case both to reverse the decision below for affording insufficient AEDPA deference and to provide guidance on the conflict-laden presumption-of-prejudice issue.

I. The Issue Here Is Not the Availability of a Hearing, but Who Must Prove Prejudice in Jury-Spoliation Cases

Respondent states that "[t]he sole question in this case" relates to the Indiana courts' "refus[al] to hold an evidentiary hearing[.]" Br. in Opp. at 1. That was not the question raised by the parties or considered by the courts below, however. Indeed, contrary to Respondent's statement that "the trial

court conducted no appropriate evidentiary inquiry of any kind[,]" Br. in Opp. at 18, the Seventh Circuit expressly found that "Hall's state trial court *did provide him with a hearing* examining the prejudicial effect of the information conveyed to his jury[.]" Pet. App. 9a (emphasis added). So, as the Seventh Circuit stated, the question is whether "the State should have carried the burden of proving that the extraneous information that reached [Hall's] jury was not prejudicial." Pet. App. 2a. The court granted habeas relief not because the state courts failed to provide Hall with a hearing but because, in its view, the Indiana Court of Appeals was objectively unreasonable in not presuming prejudice at that hearing.

Nonetheless, Hall contends that "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." Br. in Opp. at 22 (citation omitted). That misconceives how AEDPA operates and the nature of the Seventh Circuit's remand. Had the Seventh Circuit granted the Indiana Court of Appeals the deference to which it was entitled, it would have denied habeas relief. The Indiana Court of Appeals did not unreasonably apply "clearly established" law when it declined to presume prejudice, so habeas relief should be barred under 28 U.S.C. § 2254(d)(1).

Instead of denying Respondent's habeas petition, however, the Seventh Circuit remanded for a harmless error hearing under *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). Pet. App. 28a-30a. And as explained in the Petition, Pet. at 34-35, the Seventh Circuit declared that Respondent has already satisfied his harmless-error burden because "[t]hrough affidavits, Hall [has] proved that highly prejudicial information about the ultimate question in his criminal case reached several members of his jury," which on its own establishes "grave doubt as to the harmlessness" of the state courts' supposed constitutional error. Pet. App. 29a.

Thus, there is no real burden on Respondent to prove any prejudice on remand. The Seventh Circuit invoked the *Brecht* harmless error rule only to permit the State to rebut *presumed* prejudice by way of citation to curative jury instructions and overwhelming evidence of guilt. *Compare Brecht*, 507 U.S. at 623, *with* Pet. App. 28a-29a. Whether the Indiana courts made a reasonable call against presuming prejudice amidst vague and contradictory Supreme Court precedent and a well-established circuit (and state court) conflict, therefore, remains the dispositive, squarely presented issue in the case.

II. The Circuits Divide Over Whether to Presume Prejudice from Extraneous Jury Communications

It is evident to all (other than, perhaps, Respondent) that there is a deep conflict over whether the defendant or the State must prove prejudice in jury spoliation cases.

The Seventh Circuit defined the "*Remmer* presumption" question to be whether "a presumption of prejudice must attach to this type of extraneous information[,]" Pet. App. 9a, and acknowledged "some ambiguity regarding when the *Remmer* presumption should apply," including disagreement among the circuits on that subject. Pet. App. 24a; *see also* Pet. at 14-22; Pet. App. 20a ("The State is correct that there has been much debate on this issue."). Other courts have also acknowledged the split. *See, e.g.*, *United States v. Lawson*, 677 F.3d 629, 642 (4th Cir. 2012) ("[T]here is a split among the circuits regarding the issue whether the *Remmer* presumption has survived intact following certain later Court decisions."); *Parker v. Head*, 244 F.3d 831, 839 n.6 (11th Cir. 2001) (stating that "[t]he Sixth and Ninth circuits have held, at least in part, that *Phillips* abandoned *Remmer*'s presumption of prejudice" but that "[o]ther circuits have rejected this theory"); *see also* 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) (commenting on the "overall lack of clarity in the case law on this issue").

Respondent asserts that the Petition's discussion of this split is "misleading and irrelevant" because it does not focus on the *Remmer* hearing requirement *simpliciter*, which Respondent deems the main issue. Br. in Opp. at 24-25. But on the issue that lower courts actually considered in this case—*i.e.*, where the burden lies at such a hearing—Respondent says nothing to refute the existence of a conflict.

III. The Court Needs to Explain that Relief Is Not Proper Under AEDPA When Lower Courts Are Split Over the Governing Legal Standard

The conflict outlined in the Petition and recounted above justifies review on its own, but it is also significant for an even more fundamental reason. The Indiana Court of Appeals held that Respondent had the burden to prove he was harmed by the extraneous information that reached the jury in his case, and that he failed to meet that burden. Pet. App. 129a-135a. Federal courts may overturn that decision only if it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). If clearly established federal law existed on whether to presume prejudice in jury spoliation cases, there would not be a well-established split over the issue

in federal and state courts. *See* Pet. App. 39a ("[C]ircuit splits . . . tend to show that a given proposition has not been clearly established."). Accordingly, the Indiana court's decision cannot have been contrary to, or an objectively unreasonable application of, such precedent.

Respondent argues that the Court's post-*Remmer* 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." Br. in Opp. at 10. Again, however, this case has never been about whether to afford a hearing, but about who bears the burden of proof. *Remmer* held that a court faced with *ex parte* jury communications should conduct a hearing where the government bears the burden of proving harmlessness. *Remmer v. United States*, 347 U.S. 227, 229 (1954). But as Respondent recognizes, Br. in Opp. at 11, the Court in *Smith v. Phillips*, 455 U.S. 209, 213-14, 217-18 (1982), refused to presume prejudice and held that the defendant failed to carry his burden at a hearing concerning juror impartiality. And, similarly, the Court in *United States v. Olano*, 507 U.S. 725 (1993), "declined to presume prejudice in the absence of a factual showing[.]" Br. in Opp. at 12.

Regardless of the procedural postures of these cases, their outcomes leave it unclear whether to presume prejudice upon proof of improper

communications to jurors. It is unsurprising, therefore, that lower courts have read *Phillips* and *Olano* to vitiate the presumption of prejudice set forth in *Remmer*. *See supra* Part II; Pet. at 14-22; *see also* Br. in Opp. at 28 (acknowledging that "differences may be trickling through some lower courts about *Remmer*'s precise scope").

When such uncertainty abounds, AEDPA's "clearly established" standard requires deference to state courts' reasonable interpretations of federal law. Even if the Indiana courts decided the presumption issue in error, the opportunity for *de novo* correction was on direct review (even by this Court if necessary), not on federal habeas attack. AEDPA does not permit federal courts to override state court determinations of federal law unless the Court has clearly expressed a rule that the state courts willfully ignored or patently misapplied. The Seventh Circuit did not grant this required level of deference to Indiana's courts, but instead substituted its own view of whether the jury "intrusion" in this case warranted a presumption of prejudice. Pet. App. 21a.

Respondent replies mystically that "a defendant may have the benefit of a presumption of prejudice and yet bear the burden of proof to show prejudice." Br. in Opp. at 24. To support this paradox, Respondent cites only *Griffin v. State*, 754 N.E.2d 899, 901 (Ind. 2001), but as the Indiana Court of Appeals explained, the court in *Griffin* in effect

afforded *no* presumption of prejudice. Pet. App. 125a. Even more to the point, Respondent's "two-tiered standard" is nonsensical, the Indiana court said, because "under such an interpretation, the only way a defendant could receive the presumption of prejudice is by first proving he or she was prejudiced; such a presumption is clearly illusory." Pet. App. 125a n.4.

IV. This Is a Proper Vehicle for Reviewing the Presumption and AEDPA Issues

Because this is an AEDPA-deference case, Respondent's suggestion that it is an inappropriate vehicle for consideration of the relevant issues is off base. The Indiana Court of Appeals refused to presume prejudice, which was reasonable given the panoply of conflicting applications of this Court's divergent teachings on the subject. The state court's decision should therefore stand without resort to the *Brecht* hearing ordered by the Seventh Circuit. The extrinsic communications that took place here were unfortunate, but whether they prejudiced the jury is far from clear. A presumption of prejudice—to the extent one exists—should be reserved for truly abhorrent jury spoliation, such as bribery or threats of retribution.

Respondent also critiques the cert-worthiness of this case on the grounds that "States should not be permitted to use Section 2254 litigation as a guise for *changing* this Court's precedents." Br. in Opp. at

29. It is certainly true that reversal is warranted based on lack of AEDPA deference alone, such that the Court could take this case and yet avoid the merits of the underlying presumption issue. But if Respondent means to suggest that it would be *inappropriate* for the Court to clarify when prejudice should be presumed just because this is an AEDPA case, he is wrong. The Court often clarifies substantive law in habeas cases. *See, e.g.*, *Howes v. Fields*, 132 S. Ct. 1181, 1189, 1192-94 (2012), and *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260-63 (2010). So while the more immediate issue here has to do with AEDPA deference, the Court should likewise take this opportunity to clarify the law.

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 St.
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: March 18, 2013