No. 16-1000

OCTOBER TERM, 2016

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY FILSON, WARDEN Petitioner,

v.

MANUEL TARANGO, JR., Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in light of this Court's clearly established constitutional rule requiring a post-verdict inquiry into a juror's "actual bias" to determine the "impact" an extraneous influence had on a juror, a court can reasonably refuse to consider any evidence of how the influence affected the juror when evaluating its prejudice?

2. Whether, in the absence of any such inquiry by the trial court, it was error to remand for a limited hearing on actual bias when a juror informs the court shortly after the verdict that he voted to convict only because he was intimidated and fearful as a result of an out-of-court encounter with a police car that followed him closely for more than seven miles on his way to deliberations after it became known he was the only hold-out for acquittal?

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I.STATEMENT OF THE CASE

The Court of Appeals for the Ninth Circuit remanded this case for a "limited inquiry" into a juror's actual bias. *Tarango v. McDaniel*, 815 F.3d 1211 (9th Cir. 2016); App. 1-31.[1] The Circuit determined the state courts acted contrary to established law in failing to consider any such evidence when confronted with a claim of juror bias based on an extraneous contact with a police officer.

The Warden's Petition for Certiorari ("Petition") minimizes and misrepresents the facts that compelled the Ninth Circuit to grant Tarango this hearing. Tarango accordingly presents a Statement of the Case laying out all of the relevant facts.

A. Tarango's jury "reached a stalemate" after the first day of deliberations because juror #2 did not believe he was guilty.

On December 5, 1999, several masked men attempted to rob a bar in Las Vegas, Nevada. A band compromised of off duty-police officers happened to be performing at the bar that night, and the bar was filled with other off-duty officers and their families. A shoot-out ensued. One police officer was shot multiple times, but survived, and one robber was shot and killed at the scene. The other robber or robbers escaped. App. 5; see also EOR 349.

Tarango was the only person brought to trial for the offense, six years later. App. 5. "The 2005 trial received considerable local media attention, and numerous Las Vegas Metro police officers attended as both witnesses and spectators." App. 5; see also EOR 1971, 2089, 2361-2372.

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[1] "App." refers to the Appendix submitted with the Petition for Certiorari. "EOR" refers to the excerpts of record filed with the lower court. Some of these excerpts are in a "condensed" format with multiple pages of transcript included on a single page: in such instances, the precise page number is provided in parenthesis after the EOR citation. Pleadings previously filed in the Ninth Circuit in *Tarango v. McDaniel,* case no. 13-17071 are referred to by their docket number.

The State contended Tarango was one of the robbers who escaped. Tarango asserted he was never at the bar and was a victim of a mistaken identification. EOR 345-48. Both sides finished their cases on October 31, 2005, and the jury began their deliberations the next day. EOR 1559-60. After about five hours of deliberation, the jury submitted two notes to the Court: one from the foreperson and one from juror #2.

The foreperson's note read:

> Dear Judge,
> We have reached a stalemate. We have one juror who has made it very clear he does not want to be part of the process. He is refusing to discuss or interact with the other jurors. Could you please direct us as to what we do next.

EOR 1698.

The note from juror #2 read:

> I have doubt, of which I feel is beyond the limit of reasonable doubt. We have deliberated and it is not curing my doubt.

At the bottom of juror #2's note, the foreperson wrote:

Dear Judge,

> This is the problem juror. Please advise.

EOR 1688.

The parties addressed the notes in open court. The foreperson's claim notwithstanding, neither party contended that juror #2 was doing anything improper, and the court made no such finding.[2] The defense moved for a mistrial based on a hung jury. EOR 1626-28. The court denied the request and instead sent a note to the jury ordering them to continue deliberations. EOR 1628-29; 1701. The jury

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[2] There were no alternate jurors left by the time deliberations had begun. EOR 1614. Because Nevada law requires a unanimous verdict of 12 jurors, see *Davidson v. State*, 124 Nev. 892,192 P.3d 1185 at 1190 (Nev. 2008) (citing NRS 175.021(2) and 175.481), juror #2's removal (even if there were any basis for it) would have required a mistrial.

continued deliberating without a verdict until 5:00 when they were released for the day. EOR 1631. The judge indicated she would reconsider the defense's request for a mistrial if the jury remained deadlocked after further deliberation. EOR 1628-29.

B. Juror #2 voted to convict out of "duress" on the second day, after a police car tailed him for seven and half miles on his way to deliberations.

Deliberations resumed the next morning. Despite the previous day's stalemate, the jury returned a verdict of guilty on all counts 12:25 pm that day. EOR 1703.

Two days after the verdict, juror #2 sent a letter to the judge. Juror #2 wrote:

> . . . I am also the juror that wrote you the note during deliberations. It read, "I have doubt beyond the limit of what I consider reasonable doubt. " It also stated, "I did not believe further deliberations would cure that doubt." **Further deliberations, in fact, did not cure my doubt.**
> **However, when returning to re-deliberate Wednesday November 2nd from the Henderson area, a Metro squad car followed me north bound on I-95 and into the downtown area.**
> **I found that action unnerving.**
> I realize the State has much time and money invested in this case. There were no alternative jurors. **I concluded Metro somehow knew who I was and knew of my unwillingness to convict. I had never been in trouble with the law. Therefore, I relinquished my vote under duress**. I only ask, within the law, please show leniency . . .

EOR 1714 (emphasis added).

Receiving no response from the court, juror #2 forwarded a copy of the letter to Tarango's attorney the following week. EOR 1713, 1980. The attorney subsequently moved to overturn the verdict.

The court held a hearing at which the juror further described his contact with the police car on the morning of the last day of deliberations. The juror, an Air Force veteran who worked as a network administer, had lived in Clark County, Nevada,

since 1991. App. 8. He lived in Henderson, an adjoining suburb of Las Vegas, and drove to the courthouse in downtown Las Vegas via Highway US-95. App. 9.

The juror first noticed the police car "[r]ight after I got on the freeway" at the Tropicana St. entrance. App. 9; EOR 2005 (133). The police car was immediately behind him, following so close that the juror "couldn't see his front wheels or bumper." App. 9, EOR 2005 (132-33). Assuming he was about to be pulled over, the juror "signaled and got over to the far right lane." App. 10, EOR 2006 (134). The police car switched lanes with the juror and "stayed tight behind" him. *Id.*

The police car did not pull the juror over, but remained immediately behind him the entire length of the drive. In fact, the police car "actually pulled up closer to prevent anyone from pulling in between our vehicles" when they passed an on-ramp to the highway. App. 10; EOR 2006 (135)

Contrary to the Petition's assertion that the juror was stuck in "rush hour traffic"[3] Petition at i & 25, the juror repeatedly testified that he was traveling near the normal highway speed limit while the police car remained right behind him. When he first saw the police car immediately behind him on the highway, the juror "looked down" to verify he wasn't "exceeding the speed limit." EOR 2005 (133). While remaining in the right lane during the commute with the officer immediately behind him, the juror tried to stay "under the speed limit." EOR 2006 (134). When the juror finally exited, he had to "slow[] down under 50" on the exit ramp. EOR 2006(136).

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[3] The suggestion that the contact with the police car was attributable to "rush-hour traffic" is central to the warden's argument: it appears on the very first line of the questions presented to this Court. Petition at i. The dissenting judge on the lower court panel repeatedly relied upon this misrepresentation. App. 75, 86. Tarango had pointed out this error in a Reply Brief filed three years ago, in which he noted the warden's contention the highway was "crowded" was not supported by the record. See Docket Entry 16, pp. 7-8. The warden has continued to repeat the contention in subsequent pleadings, including the instant Petition, without providing any attribution for it.

The police car "maintained position" behind the juror as he exited the highway. EOR 2006 (136). He continued to follow him down a hill and to a stoplight. *Id.* The officer "remained tight" behind the juror when he turned onto Las Vegas Boulevard and followed him through several stoplights. *Id.* The officer did not stop his pursuit until the juror finally turned into the jurors' parking garage. EOR 2006 (pg. 137). The juror sat in his car for a half an hour afterwards "because I wasn't sure if was going to be left alone," scanning the street for other police officers or cars. EOR 2007 (pg. 138).

The Petition claims the encounter lasted "several miles." Petition at i. In fact, the distance from the Tropicana entrance of US-95 (when the juror first noticed the police car behind him) to the juror's parking garage in downtown Las Vegas (where the pursuit ended) can be easily determined: the pursuit lastly approximately seven and one half miles. App. 11.

The trial court also heard testimony from the prosecutor, who admitted he called the lead police detective after the notes from the foreperson and juror #2 were read in court and informed him there was a "single holdout" on the jury. EOR 1827-29. Although the prosecutor denied it, the defense attorney (who overheard the phone call) testified the prosecutor also conveyed the juror's number and possibly his name. EOR 1735-37, 1978.

C. The State courts denied the claim after refusing to consider any evidence of how this encounter affected the juror.

The trial judge conducted all questioning of the juror herself. Although she allowed the juror to describe the encounter with the police car as set forth above, she refused (despite multiple requests by defense counsel) to question the juror or consider any evidence (such as his letter) regarding how the encounter affected him. EOR 1975-76, 2007-08. Based on her understanding of Nevada law, she used a

"reasonable person test" to determine whether juror #2 should be deemed biased. App. 12.

The trial judge did not discredit juror #2's testimony, and in fact found the juror "was followed closely, tightly, however you want to state it from Tropicana on US-95 to Las Vegas Boulevard to Carson" (i.e., where the juror testified the pursuit began and ended). App. 11. But the court dismissed the claim, stating there was no evidence of "juror misconduct" and describing the alleged conduct as "ambiguous," "vague," and "nonspecific in content" when considered "in light of the trial as a whole," including the "weight of the evidence against Mr. Tarango." App. 11-12.

After the hearing, the juror sent a second letter to the court. The juror apologized for violating his juror's oath by rendering a verdict that was "untrue to my conscience" based on his "fear of reprisal" and asked that his verdict be nullified. App. 12, EOR 2047. Tarango asked the court to reconsider its ruling based on this letter. EOR 2041. The court denied this request and then entered a judgment of conviction against him. EOR 2070, 2093-2097.

Tarango appealed his conviction. He raised the juror issue as the only claim, citing his right to an impartial jury under the Sixth and Fourteenth Amendments of the U.S. Constitution and citing several of this Court's decisions, including *Smith v. Phillips*, 455 U.S. 209 (1982) and *Mattox v. United States*, 146 U.S. 140 (1892). EOR 2107, 2120.

The Nevada Supreme Court (NSC) denied the appeal in an unpublished order, which made no reference to either the federal constitution or this Court's precedent. Interpreting its own precedent, the NSC held that the district court properly limited the hearing to the "objective facts" of the encounter and "properly excluded" evidence of how the juror was actually impacted—including the notes and letters he sent to the Court. App. 112. The NSC then faulted Tarango for failing to prove an "actual communication" and dismissed his claim as "far too speculative." App. 113.

D. The Ninth Circuit concluded the NSC acted contrary to clearly established federal law in failing to consider any evidence of actual bias, and remanded the case for a hearing.

Tarango filed a petition for habeas corpus relief under 28 U.S.C. §2254, principally raising the juror impartiality claim. While ultimately denying relief, the district court (The Honorable Clive Jones) acknowledged the claim was "meritorious" (App. 95) and the state court rulings were "debatable." (App. 101) The court acknowledged, as a fact, that "Juror 2 rendered his verdict based not upon the law and evidence, but because of his perception of a threat." App. 98. And the court recognized that a post-verdict inquiry into a juror's actual bias was necessary under federal law, at least when there is "objectively verifiable evidence of improper influence." App. 99. The district court nevertheless held the state courts did not clearly err in dismissing the police car encounter as "speculative" because (1) the juror had failed to identify the specific police officer following him and (2) the federal judge mistakenly believed the encounter happened on a different highway (I-15, which runs parallel to the "Strip", rather than U.S. 95) and believed (apparently based on his own experiences) that heavy traffic on that highway would have meant that "close following" was not unusual. App. 101-102. The district court acknowledged the police car's "behavior would indeed seem odd" in a different context. App. 102. The district court granted a certificate of appealability on the ruling.

On appeal, the Ninth Circuit reversed. Following a detailed discussion of the § 2254(d) standard of review and this Court's decisions (App. 15-23), the majority determined the state courts' failure to conduct any inquiry into the juror's actual bias based on the record before it was contrary to clearly established federal law. App. 23-27. Tarango asked the Ninth Circuit to grant relief, noting the substantial and uncontroverted evidence of "actual bias" in the state court record (such as the juror's letters) and also noting a 2010 declaration from the juror, in which he reaffirmed that

he was "consumed with fear" because of his encounter and believed he risked being a target of further harassment and intimidation unless he changed his vote. See EOR 2372. The majority, however, remanded the case for an evidentiary hearing on actual bias. App. 27-31. At this hearing, Tarango could introduce "limited evidence" of the juror's perception of the encounter and the "fear" and anxiety" he felt as a result—but could not introduce evidence of the jury's deliberations or ask the juror whether the extraneous contact caused the juror to switch his vote. App. 30-31. Judge Rawlinson dissented. App. 31-44.

The State petitioned for rehearing en banc. None of the Circuit's active judges sought a vote on the en banc request, and the petition was denied.

II.REASONS FOR DENYING THE PETITION

A verdict cannot be "impartial" when based on extraneous influences; a jury must be "capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209 at 217 (1982). In this high-profile trial involving the attempted murder of a police officer, the evidence did not persuade juror #2 of Tarango's guilt. A mistrial loomed after the first day of deliberations when juror #2's doubt, expressed in a note to the court, became known. As juror #2 drove to deliberations the next morning, a police car pulled right behind him and followed him all the way to the courthouse, staying so close that the juror couldn't see his front wheel and bumper, changing lanes with him, and preventing other cars from coming between them. This pursuit lasted *over seven miles*. Juror #2 soon changed his vote. Two days after the guilty verdict, he wrote the judge, describing the "unnerving" incident and explaining that it caused him to relinquish his vote "under duress."

The Nevada courts credited the juror's account of the encounter, yet denied relief because they refused to consider any evidence about how this encounter affected the juror, instead substituting their own objective view of the encounter. The Ninth

Circuit Court of Appeals found the decision "contrary to" this Court's established precedent and remanded the matter for a "limited hearing" to determine whether the juror was actually biased.

There is no error here and no basis for this Court's plenary review. The warden's petition should be denied for multiple reasons.

First, the Nevada Supreme Court's basic error concerned a matter "well understood and comprehended in existing law" settled by this Court. *White v. Woodall*, 134 S.Ct. 1697, 1702 (2014). When confronted with a Sixth Amendment impartiality claim involving an extraneous influence, a court must determine whether the juror was "actually biased," which requires an inquiry into the juror's own state of mind to determine "the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209 at 217 (1982). The Nevada courts ignored this standard and instead used an "objective" standard that was the opposite of what this Court's precedent required.

Second, neither of the two questions raised in the petition were properly presented to the lower courts. Indeed, the arguments the warden now relies upon are contrary to their representations to the lower courts.

Third, there is no confusion in the law about whether the extraneous influence in this case required a hearing considering the juror's actual bias, and required a presumption of prejudice at that hearing. The "circuit splits" presented in the petition either misrepresent the positions of other courts or concern matters not relevant to the grant of relief.

Fourth, the posture of this case makes it a poor vehicle for certiorari review. This habeas corpus case is a poor vehicle to resolve any confusion about the law. To the extent the warden seeks a fact-bound error correction, there is no error, and in any event, it is no reason for this Court to review the facts before they can be fully and properly developed at the evidentiary hearing directed by the Ninth Circuit. And

given the overwhelming evidence of juror #2's actual bias, there is no reason why the assignation of the burden of proof would make any difference at that hearing.

A. The state court's refusal to consider any evidence of actual bias in Tarango's case was contrary to clearly established federal law and necessitated the limited hearing ordered by the Ninth Circuit.

1. This Court has clearly established that a juror's own post-verdict testimony about the effect of an extraneous contact can and must be considered to determine whether a juror was actually biased.

The Sixth Amendment guarantees the right to an "impartial jury." An impartial jury "should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." *Mattox v. United States*, 146 U.S. 140, 149 (1892). When allegations of extraneous influence arise, a court must conduct an inquiry to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial." *Smith v. Phillips*, 455 U.S. 209, 216 (1982), citing *Remmer v. United States (Remmer I)*, 347 U.S. 227 at 230 (1954).

Some types of extraneous influences, including at least "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury," are "deemed presumptively prejudicial." *Remmer I*, 347 U.S. 229. Other types of influences require a hearing at which the defendant must "prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 212 (1982). Wherever the burden of proof lies, however, the "ultimate inquiry" remains: "Did the intrusion affect the jury's deliberations and thereby its verdict?" *United States v. Olano*, 507 U.S. 725, 739 (1993).

This Court has repeatedly recognized that a court must evaluate the juror's own testimony about how an external influence actually affected them, an inquiry which necessarily considers the juror's own state of mind. Under the mandate in *Remmer I*, for example, the district court held an evidentiary hearing regarding the alleged extraneous influences during the trial, where first a 3rd party spoke with a

juror about the defendant and then an FBI agent spoke with the juror about the 3rd party's communication. In that hearing, the juror was permitted to testify he was "disturbed" by the initial communication with the 3rd party and that he told another juror he was "under a terrific pressure" because of these influences. *Remmer v. United States (Remmer II)*, 350 U.S. 377, 380-81 (1956). Reversing the lower court's denial of the impartiality claim, this Court found the juror's own testimony demonstrated he was "disturbed and troubled" by the extraneous communications. *Id.* Not only did this Court approve of this inquiry into the juror's subjective mindset, but it faulted the lower court for taking an overly narrow view of its mandate in *Remmer I*, emphasizing that the court was obliged the consider the "entire picture" of the influence including "the impact thereof" upon [the juror] then, immediately thereafter, and during the trial." *Remmer II* at 379.

In *Parker v. Gladden*, 385 U.S. 363, 363-64 (1966), the Court considered statements about the defendant's guilt made by a bailiff to some jurors. In dismissing the State's argument that the statements were not prejudicial, the Court specifically cited a juror's post-verdict testimony, in response to the trial court's questioning, that "all in all it must have influenced me. I didn't realize it at the time." *Id.* at 470-71 & fn.3.

In *Smith v. Phillips*, a juror submitted, during the trial, a job application with the District Attorney's office that was prosecuting the defendant. 455 U.S. at 212. The state courts denied the claim after a post-verdict hearing at which the juror testified that "he was not influenced by his pending employment application and that he did not attempt to influence the other members of the jury." *Phillips v. Smith*, 485 F.Supp. 1365, 1371 (S.D.N.Y. 1980). On collateral review, the federal district court agreed there was "insufficient evidence to demonstrate [the juror] was actually biased." *Smith* at 455 U.S. at 214. The district court, however, "imputed bias" based on its perception that "the average man" in the juror's position would have felt his

verdict would have affected his job application. *Id.* The Court of Appeals affirmed the grant of relief, noting "it is at best difficult and perhaps impossible to learn from a juror's own testimony after the verdict whether he was in fact 'impartial.' *Id.*

This Court reversed. *Smith* reaffirmed "actual bias" was the proper standard to determine a juror's impartiality. *Id*, 455 U.S. at 215. *Smith* expressly disagreed with the defendant and lower court's contention that "a court cannot possibly ascertain the impartiality of a juror by relying solely upon the testimony of the juror in question." *Id.* The Court agreed an actual bias hearing "will frequently turn upon the testimony of the juror in question," but ruled that was entirely proper and necessary. *Id.* at 217, fn. 7. "[S]urely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter." *Id.*, citing *Dennis v. United States*, 339 U.S. 162, 171 (1950).

The actual bias inquiry mandated by *Smith* and *Remmer* —both of which concern post-verdict juror testimony—considers the juror's perception of how he was *actually* affected by an external influence. A court cannot disregard this evidence for its own perception of how the influence *should* have affected the juror. See *Smith*, 455 U.S. 214-15 (rejecting lower court's reasoning that bias should be "imputed" based on court's perception of how an "average man" would react to the influence); *Remmer II*, 350 U.S. at 381 (cautioning against "speculating" that FBI's agent interview "dispersed the cloud" created by 3rd party contact with juror, when juror's own testimony revealed he was "disturbed and troubled" because of both contacts). By the same token, the inquiry is concerned with the "effect" of a third party external influence and not necessarily the intent of the third party's contact. *Gold v. United States*, 352 U.S. 985 (1957) ("[T]he fact that the intrusion was unintentional does not remove the effect of the intrusion.").

The constitutionally required inquiry into the juror's state of mind to prove the impact of an external influence is an "exception" to the "common-law rule against

admitting juror testimony to impeach a verdict," embodied in state evidentiary rules and in Rule of Evidence 606(b). *Tanner v. United States*, 483 U.S. 107, 117 (1987) (distinguishing *Mattox*, *Parker*, *Remmer*, and *Smith* on this basis). In *Rushen v. Spain*, 464 U.S. 114 (1983), this Court recognized there may be limitations on the *extent* of the "state of mind" evidence allowed to impeach a verdict. See *Id.* at 121, fn. 5 ("a juror *generally* cannot testify about the mental process *by which the verdict was arrived*.") (emphasis added). But *Rushen* recognized that both *Smith* and Rule 606(b) allow jurors to testify "concerning *any mental bias* in matters unrelated to the specific issues that the juror was called upon to decide" and explicitly considered the juror's "repeat[ed]" post-verdict testimony "that upon recollection, the incident did not affect her impartiality" in determining she was not actually biased. *Id.* (emphasis added)

Actual bias is not an easy standard for defendants to meet. As Justice Marshall's dissenting opinion in *Smith* noted, "a juror is unlikely to admit that he had been unable to weigh the evidence fairly." *Id.*, 455 U.S. at 228. Even objectively compelling claims of outside prejudice will fail when jurors aver they could remain unbiased despite the influence. See e.g. *Fields v. Brown*, 503 F.3d 755 at 765, 775-76 (9th Cir. 2007) (finding communications between juror and his wife, in which wife stated belief that defendant had previously assaulted her, "harmless" based on juror's post-verdict testimony he remained unbiased). But in those uncommon situations where jurors credibly testify that an outside influence rendered them impartial, the verdict cannot stand.

2. The state courts' refusal to consider any evidence regarding the impact the external influence had on juror #2 was contrary to clearly established federal law, and properly remedied by a hearing.

The state trial court recognized a hearing was necessary after juror #2 wrote a letter to the judge explaining his verdict was affected (and indeed caused by) an external contact on his way to deliberations. But the state courts strictly limited this

hearing to the "objective facts" about the contact. App. 112. The courts not only refused to consider the ultimate question of whether the influence caused Juror #2 to change his vote or affected the deliberations, but refused to consider *any* evidence about the juror's actual "state of mind" —for example whether he perceived the contact to be an attempt to influence his verdict, whether he was scared or intimidated, and whether he had an unbiased mind. App. 112.

Instead of applying the actual bias standard, the NSC relied on a wholly "objective" standard it had used to assess "jury misconduct" in *Meyer v. State*, 119 Nev. 554, 556 (Nev. 2003). App. 112. *Meyer* held a court "must determine whether the average, hypothetical juror would be influenced by the juror misconduct." *Id.* at 566. Applying this "objective" jury misconduct standard to Tarango's case, the NSC dismissed the out-of-court encounter as "too speculative" to establish prejudice, with no inquiry into juror #2's own perception of the event. App. 113.

The NSC thus did in Tarango's case exactly what this Court found erroneous in *Smith* and *Remmer II*: it substituted its own perception of an external contact for that of the juror. *Smith* and *Remmer II* plainly require a subjective analysis into the juror's "actual bias," considering the juror's own testimony about how the influence impacted him. The Ninth Circuit correctly determined the NSC's failure to assess the "impact" of the contact was "contrary to," and indeed the opposite of, this Court's settled precedent, and that Tarango could overcome the § 2254(d) bar on habeas corpus relief.[4] App. 16-17. See *Lafler v. Cooper*, 566 U.S. 156, 173 (2012) (state court's

[4] Although he clearly presented the claim as a violation of his federal constitutional rights, it is not clear the NSC's decision, which cited neither federal authority nor the relevant federal standards, adjudicated Tarango's federal claim at all. See. *Johnson v. Williams*, 133 S.Ct. 1088, 1096 (2013) (recognizing a "strong but rebuttable presumption" that a federal claim was adjudicated on the merits"). But even assuming that the state court purported to decide Tarango's federal claim, it did so by applying a standard that contradicted the applicable federal standard. Either way, the NSC failed "to apply the proper standard under clearly established federal law," and the federal court thus had to resolve the claim "unencumbered by the

reliance on the "incorrect standard" to resolve claim was "contrary to clearly established federal law.").

The Ninth Circuit did not rule an inquiry into "actual bias," much less a finding of prejudice, was required any time any allegation of extraneous influence was raised. It recognized courts may disregard allegations of prejudice that "unsupported by sufficient evidence" or "implausible or incredible." App. 26. Here, however, where the juror wrote the trial judge two days after the verdict, described an "unnerving" external contact with the police officer, and stated that the encounter caused him to render his verdict "under duress," there was plainly at least a possibly of prejudice that needed to be examined. App. 20, citing *Mattox*, 146 U.S. at 150; EOR 1714. Even the state court agreed the juror's allegations merited a hearing, at which the juror testified in detail about the facts of the encounter. The state court credited that testimony. App. 11. The error occurred when the Nevada Supreme Court "failed to ask the question" this Court's precedents required: whether the juror was actually biased as a result of the influence. See Rippo v. Baker, ___ S.Ct. ___, 2017 WL 855913 at *1 (2017) (per curiam) (unanimously reversing Nevada Supreme Court when it "applied the wrong legal standard" to resolve judicial bias claim).

When a petitioner overcomes the § 2254(d) bar, a federal court may "determine the principles necessary to grant relief." *Lafler*, 566 U.S. at 173. Here, there was plenty of evidence in the state court record (the notes and letters sent to the court) and in the federal proceedings (the 2010 declaration) demonstrating juror #2 was actually biased because of his encounter with the police car. Nevertheless, the Ninth Circuit did not grant relief, but instead remanded the case for an evidentiary hearing

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deference AEDPA normally requires." App. 27, citing *Panetti v. Quarterman*, 551 U.S. 930 at 948 (2007).

on the issue.[5] And consistent with *Rushen*, the Circuit only allowed Tarango to offer "limited evidence" into the juror's mental bias resulting from the encounter, precluding an inquiry into the deliberations and the ultimate question of whether the encounter caused the juror to change his vote (as he has repeatedly said it did, EOR 1714, 2372).

The hearing directed by the Ninth Circuit allows exactly what this Court determined necessary to "guarantee" a "defendant's right to an impartial jury" —an inquiry into actual bias. *Smith*, 455 U.S. at 216. There is no error here.

B. The Warden has waived both of the questions by failing to properly raise them in the lower courts.

The warden's arguments have been a moving target throughout the history of this federal litigation. Initially, the warden's argument was that the Sixth Amendment claim was never exhausted in the state courts and thus never decided on its merits. (EOR 2374, 16). When that contention failed, the warden changed tack and presented a fact-bound argument contending the NSC had reasonably denied the claim because it did not merit inquiry. See Appellee's Answering Brief, Docket Entry 10. When that argument failed in the Ninth Circuit, the warden filed a rehearing petition contending that en banc review was necessary to resolve several alleged conflicts amongst the circuits regarding legal standards for bias inquiries. See Appellee's Petition for Rehearing and Rehearing En Banc, Docket Entry 36.

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[5] There is no contention that the hearing was barred by *Cullen v. Pinholster*, 563 U.S. 170 (2011); unlike that case, the Ninth Circuit found error under § 2254(d)(1) solely based on the state court record and *then* directed the hearing to resolve the question that the state courts unreasonably failed to address. Nor has there ever been any contention that Tarango was insufficiently diligent in seeking such a hearing; his lawyers repeatedly sought and were denied an opportunity to explore the juror's actual bias during the state court evidentiary hearing. EOR 1975-76, 2007-08; *(Michael) Williams v. Taylor*, 529 U.S. 420, 432 (2000) (holding § 2254(e)(2) does not bar evidentiary hearing when there was no "lack of diligence" in seeking hearing in state court)

At no point, however, did the warden present the argument they now advance in the first question, in which they contend a court can reasonably refuse to conduct any post-verdict inquiry into the effect an external contact had on a juror. Indeed at oral argument in the Ninth Circuit, the warden conceded the point. At that stage of these proceedings, the warden's position was that the police car's seven-mile tailgating of juror #2 somehow did not qualify as an "external contact." But the warden acknowledged if there *was* an external contact, then the trial court "should have found a due process violation." See Recording of Oral Argument in case no. 13-17071, December 12, 2014 at 12:26-12:50.[6] In evaluating the prejudice of such a violation, the warden agreed that the court had to ask the juror whether the external contact affected his ability to remain "fair and impartial" in the post-verdict hearing. See *Id.* at 15:00-15:47. *See generally id.* at 12:26-16:00.[7]

The Warden's question now concedes an "extraneous juror contact" took place, Petition at i, but faults the Ninth Circuit for addressing that contact in exactly the way they conceded it should be addressed. This complaint is not appropriate for certiorari review.

The warden did allege a "circuit split" concerning the standard for a presumption of prejudice, albeit for the first time in a rehearing petition in the Ninth Circuit. See Appellee's Petition for Hearing, Docket Entry #39, pg. 19-25. The argument presented to the lower court, however, was markedly different from and contrary to what is now alleged in the second question of the Petition. See Petition p. 19-25. Originally, the complaint was that the Ninth Circuit "rigidly appl[ies] this presumption in all cases;" now the warden acknowledges the Ninth Circuit does not

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[6] Available at https://www.youtube.com/watch?v=6JQ9V-NIymw

[7] Even the dissenting opinion in Tarango's case agreed that "further inquiry" might be necessary if the "external jury contact" was purposeful jury tampering. App. 32.

do so, *compare* Rehearing Petition at 19 *with* Certiorari Petition at 19-20. Originally, the warden alleged a three-way split of authority; now they claim a "four-way-split, " *compare* Rehearing Petition at 19 *with* Certiorari Petition at 19-20. Originally, the warden claimed the Ninth Circuit "stood alone" in its position; now they say it is "joined" by four other Circuits. *Id.* Originally, the Fourth and Seventh Circuits were alleged to differ from the Ninth; now, they are described as being on the same side of the "split," *compare* Rehearing Petition at 21, 23 *with* Certiorari Petition at 19-20. The warden claims in each pleading that three Circuits refuse to apply the *Remmer* presumption because it is not controlling law, but can't agree on *which* three, *compare* Rehearing Petition at 24-25 with Certiorari Petition at 19-20, and in any event the warden had previously conceded that *Remmer I* is the "the controlling Supreme Court decision" for purposes of the 28 U.S.C. § 2254(d) standard. See Appellee's Answering Brief, Docket Entry 10, pg. 4.

All versions of the warden's arguments have lacked merit, but the Court should not review the questions currently set forth in the Petition because they were not presented to the lower courts. *Ford Motor Co. v. United States*, 134 S.Ct. 510 (2013) ("This Court is one of final review, not of first view."); *United States v. Ortiz*, 422 U.S. 891, 898 (1975) ("We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari."). *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("Upon reviewing the record, however, it appears that these broad questions were not raised by the petitioner below nor passed upon by the Arizona Supreme Court, We cannot decide issues raised for the first time here.") At the very least, the warden's ever-shifting arguments demonstrate this case would not present a clean vehicle for review.

C. There is no confusion in this Court's precedent or in the Circuits that an external contact such as that in Tarango's case requires an actual bias inquiry.

1. There is no cause for confusion in this Court's precedent about whether an inquiry into actual bias is necessary to determine the effect of an extraneous influence.

Petitioners now assert there is a "split" of authority in the Circuits regarding whether a juror's testimony about his "state of mind" may be considered when assessing the effect of an "extraneous contact" in a post-verdict hearing. Petition at i, 11. Presumably, the warden asks this Court to side with the NSC's ruling that any and all testimony about a juror's state of mind can be precluded or disregarded.

The Ninth Circuit's decision in Tarango's case, of course, was necessarily based on *this* Court's precedent, not its own precedent. See App. 15-27.[8] As explained above, an inquiry into a juror's subjective state of mind is precisely what this Court's decisions in *Smith* and *Remmer* require, even when the influence is not discovered until after the verdict. The discussion the warden presents in support of the first question presented does not cite these cases, let alone explain how any court could correctly, or even reasonably, interpret these decisions to preclude an inquiry into a juror's actual bias to determine whether he was affected by an extraneous contact.

Nor do petitioners cite any case from this Court that would undermine the necessity of an actual bias hearing. Petitioners suggest this Court's decision in *Tanner v. United States*, 483 U.S. 107, supports their position. Petition 11-12. But *Tanner* expressly recognizes a distinction between "internal" and "external"

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[8] The Ninth Circuit only cited its own precedent *after* finding error in the state court under § 2254(d) based solely on this Court's precedent. App. 27-31. At this point, the court's analysis was "unencumbered by the deference AEDPA normally required." App. 27-28, citing *Panetti*, 551 U.S. at 948. In any event, and as further explained below, the remedy ordered by the Ninth Circuit was entirely consistent with the clearly established requirements of this Court's law.

influences. *Id.* at 117. Alleged "internal" influences are generally subject to the common law and evidentiary preclusions on juror testimony to impeach the verdict.[9] Alleged "external" influences such as those involved in *Smith*, *Remmer*, and *Parker,* however, are "exceptions" to this rule. *Id.* Rules of evidence, of course, cannot trump a constitutionally mandated inquiry. But as *Tanner* noted, the rule requiring an evidentiary hearing to determine whether "extrinsic influence or relationships have tainted the deliberations," is in harmony with the policy for *precluding* an inquiry into the jury's deliberative process absent such alleged influences.[10] *Tanner* at 120. In both instances, the court ensures that jury proceedings are not "jeopardized by unauthorized invasions." Id, citing *Remmer I*, 347 U.S, at 229. This Court has since reiterated that the broadest version of the common-law "anti-impeachment rule" did not bar evidence necessary to demonstrate that an "'extraneous matter' had influenced the jury."[11] *Warger v. Shauers*, 135 S.Ct. 521, 526 (2014).

Even the warden does not appear to dispute an inquiry into the juror's impartiality would be necessary in a hearing conducted *before* the verdict. But this Court's rules in *Smith* and *Remmer* draw no such distinction, and specifically

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[9] Even then, this Court has recently held that some allegations of "internal" influences may require an exception to the common-law rule. See *Pena-Rodriguez v. Colorado*, ___ S.Ct. ___, 2017 WL 855760 (2017) (allegations of racial animus amongst jurors required inquiry into deliberations)

[10] Indeed, precluding juror #2's testimony about the effect of the influence in this case would not serve any of the five policy interests listed at, pg. 11 of the Petition, except perhaps a naked interest in finality. The external contact was related to the trial court and parties by the juror himself, and the "limited inquiry" allowed by the Ninth Circuit will not invade or concern the jury's "deliberations" at all. Barring a juror from relating the effect the tampering had on him would increase, rather than reduce, the "incentive for tampering." Petition at 11.

[11] In its recent survey of state court "anti-impeachment" rules, this Court found that 42 states followed some version of the broader "federal rule." See *Pena-Rodriguez v. Colorado*, ___ S.Ct. ___, 2017 WL 855760 at *9 (2017). Those states that differ generally apply the "Iowa rule" which is more generous in allowing juror testimony than the federal rule. Id at *7, 9.

establish rules for *post-verdict* inquiries and testimony. Indeed, the "limited inquiry" directed by the Ninth Circuit, in which questioning about the deliberations or the ultimate effect the influence had on the verdict is not permitted, App. 29-31, does no more than replicate the inquiry that would be conducted if the extraneous influence had been discovered prior to the verdict.[12]

2. Lower courts accordingly recognize the necessity of an actual bias hearing to determine the effect of an extraneous influence.

In cases involving extraneous influences, every Circuit applies *Smith* and *Remmer*'s rule that the inquiry must consider how and whether the influence affected the jurors' state of mind. See e.g. *U.S. v. Butler*, 822 F.2d 1191, 1195-96 (D.C. Cir. 1987) (Bork, J.) (approving of post-verdict hearing, under *Smith* and *Remmer*, where judge asked jurors "whether each one knew of the improper contact, what was known about the contact, and whether this knowledge had any effect on the juror's ability to reach a fair and impartial verdict."); *U.S. v. Boylan*, 898 F.2d 230, 261-262 (1st Cir. 1990) (court conducted proper *Smith* hearing when it questioned jurors and credited their "assertions of continued impartiality."); *U.S. v. Blume*, 967 F.2d 45, 48 (2nd Cir. 1992) (approving of hearing where judge questioned jurors about extraneous influence, and excused juror who "reported that he could not remain impartial."); *U.S. v. Coleman*, 805 F.2d 474, 482 (3rd Cir. 1986) (approving of hearing, under *Remmer*, at which judge "thoroughly examined each juror to determine extent to which s/he was influenced" by extraneous communication between witness and juror."); *U.S. v. Cheek*, 94 F.3d 136, 144 (4th Cir. 1996) (considering evidence of juror's "mental

[12] Aside from being contrary to this Court's precedent, having different standards for pre- and post-verdict hearings would make little sense. What if a trial court erroneously failed to inquire into actual bias in a pre-verdict hearing regarding an extraneous influence? Under the warden's view, a reviewing court would be powerless to correct the error, as the verdict would have already happened by that point.

condition during the trial," including his "own testimony that he was devastated and fearful," in concluding he was actually biased by extraneous communication); *U.S. v. Sylvester,* 143 F.3d 923, 931-35 (5th Cir. 1998) (remanding case for hearing pursuant to *Remmer* and *Smith*, at which jurors would be examined by parties to determine whether alleged tampering "influenced" and "prejudiced" the verdict); *United States v. Herndon*, 156 F.3d 629, 637 (6th Cir. 1998) (court failed to conduct proper inquiry into actual bias when it failed to inquire where external influence "would affect their ability to be impartial"); *Hunley v. Godinez*, 975 F.2d 316, 318 (7th Cir. 1992) ("in most cases, the redress for assertions of jury bias is a hearing in which the defendant is afforded the chance to prove actual bias"); *Goeders v. Hundley*, 59 F.3d 73, 76 (8th Cir. 1995) (rejecting claim of juror bias when juror testified at a post-trial hearing "that he was able to, and did, return a fair and unbiased verdict."); *Crease v. McKune*, 189 F.3d 1188, 1194 (10th Cir. 1999) (claim of tampering properly denied based on juror's testimony that ex parte communication with judge "did not prejudice her against Mr. Crease, that she did not feel he indicated to her how to vote, and that she felt no pressure from the judge to vote to convict."); *U.S. v. Rowe*, 906 F.2d 654, 655-57 (11th Cir. 1990) (court properly asked jurors "whether their ability to decide the case solely upon the evidence presented at trial was in any way compromised or impaired by out of court statements."). The necessity of this inquiry is "well understood and comprehended in existing law." *White v. Woodall*, 134 S.Ct. at1702.

Likewise, multiple circuits have recognized a state court's failure to conduct an actual bias hearing to determine the actual effect an influence had on a juror mandated habeas relief under the § 2254(d) standard. See *Nevers v. Killinger*, 169 F.3d 352, 374 (6th Cir. 1999), *cert denied* 527 U.S. 1004 (1999), *abrogated on other grounds by Harris v. Stovall*, 212 F.3d 940 (6th Cir. 2000) (Michigan court acted "contrary to" clearly established law when it "effectively prevented [defendant] from

demonstrating with specificity that the extraneous information the jury possessed did in fact impair the ability to decide the case solely on the evidence."); *Stouffer v. Trammel*, 738 F.3d 1205, 1218 (10th Cir. 2013) (remanding for hearing when state court failed to "adequately investigate" the facts and circumstances of extraneous communication, including whether the communication "influenced [the juror's] decision or other juror's decisions about Mr. Stouffer's sentence.")

The Petition now cites *U.S. v. Honken*, 541 F.3d 1146, 1168 (8th Cir.2008), where the Eighth Circuit claimed there was a "split" amongst the Circuits regarding the scope of Fed. Rule of Evidence 606(b). App. 12. *Honken* is poor authority to support the warden's position: it confines itself solely to the question of Rule 606(b)'s scope; it does not cite *Smith v. Phillips* or its "actual bias" rule; it does not acknowledge *Tanner*'s recognition that the *Smith* inquiry is an "exception" to the limitation in Rule 606(b); and ultimately relies upon Eighth Circuit authority decided *before Smith*. *Id.* at 1168. And even then, *Honken* didn't reject an inquiry into the juror's state of mind: it found no error when the trial court to deny relief based on its conclusion, following extensive questioning of the juror before and after the verdict, that he "was not troubled or upset" by the alleged external influence. *Id.* at 1166. In other contexts, the Eighth Circuit has endorsed *Smith*'s "actual bias" standard. See *Goeders v. Hundley*, 59 F.3d 73, 76 (8th Cir. 1995) (deferring to juror's post-verdict testimony "that he could return a fair verdict, and that he did return a fair verdict" despite alleged bias).

The purportedly conflicting cases noted in *Honken* and the Petition are inapposite. Many of the cases do not concern "external" or "extraneous" influences of the type involved in Tarango's case. In *United States v. Krall*, 835 F.2d 711, 715-16 (8th Cir. 1987), for example, the defendant sought a new trial based on an allegation that a juror voted for conviction based upon fear of an I.R.S. investigation. But that fear was not based on any "objective event[] or incident[]" that happened *during* the trial,

but based solely on her own pre-existing "thought process and subjective prejudices," which could have been explored during the initial voir dire. *Krall* at 716. *Krall* expressly recognized that influences based on an "outside influence" would be an "exception" to the rule precluding inquiry into the verdict, but that was concededly not the case there. *Id.*

Similarly, the influence in *United States v. Greer*, 285 F.3d 158, 166 (2nd Cir. 2002) involved a juror's *pre-existing* relationship with his brother, whose name subsequently arose during the trial testimony. There was no allegation that the brother or any other third party had any contact or communication with the jury *during* the trial. Compare *U.S. v. Stephenson*, 183 F.3d 110, 116 (2nd Cir. 1999) (approving of hearing where judge asked "asked each juror if he or she was prejudiced" by brief contact with government agents during deliberations, and "[e]ach juror replied in the negative."). To the extent the claim of bias involved the juror's failure to disclose the relationship during voir dire or the juror's internal discussions of the relationship with other jurors during the trial, see *Greer* at 169-173, the influence would be properly understood as an "internal" rather than an "external" influence. See *Warger v. Shauers*, 135 S.Ct. 521, 528-30 (claim of impartiality involving juror's dishonesty about pre-existing bias during voir dire and his subsequent communications with other jurors not subject to the "extraneous information exception").

Meyer v. State, 119 Nev. 554 (Nev. 2003), which the NSC relied upon to deny Tarango's claim, may also differ on this basis. *Meyer* concerned no third party contact, but rather "juror misconduct" based on allegations that jurors had improperly relied upon their own specialized knowledge and independent research during deliberations. *Id.* at 568-72. And even then, the Nevada Supreme Court has not been consistent in barring subjective juror testimony about such influences, see *Lane v. State*, 110 Nev. 1156, 1163 (Nev. 1994), *overruled on other grounds by Leslie*

v. Warden, 118 Nev. 773 (Nev. 2002) (approving of hearing where jury was questioned about juror's reading of nullification booklet, in which they "indicated that they were not influenced by Lacey or the booklet, that they would abide by their oaths as jurors, that they would follow the law as instructed, and that they would decide Lane's case based upon the facts and evidence adduced at trial."); *Hui v. State*, 103 Nev. 321, 323-25 (Nev. 1987) (citing juror's responses to questions about subjective bias as evidence that exposure to newspaper article not "harmless," when juror expressed uncertainty about effect it could have on his decision), or for that matter, in assessing the impact of "private communications," see *Conforte v. State*, 77 Nev. 269, 271-72 (Nev. 1961) (approving of hearing where juror was asked whether private communication with bailiff "had influenced her.").

U.S. v. Simpson, 950 F.2d 1519, 1521 (10th Cir. 1991), concerns no extraneous third party contact, but rather an "allegation of extraneous prejudicial information," involving the jury's accidental viewing of the defendant in handcuffs. In cases that involve extraneous contact with third parties, the Tenth Circuit has recognized that a court must explore not just the "facts and circumstances of the contact," but whether it "influenced [the juror's] decision or other juror's decisions "*Stouffer v. Trammel*, 738 F.3d at 1213-19 (remanding for hearing in habeas corpus case to determine effect of communication juror had with her husband during penalty phase of capital trial).

In *Virgin Islands v. Gereau*, 523 F.2d 140, 152-54 (3rd Cir. 1975), the alleged influence primarily concerned "rumors" about the case purportedly circulating amongst the jury. The Third Circuit recognized that the scope of the inquiry would depend on whether an "extraneous influence" occurred, which it recognized to include "communications or other contact between jurors and third persons." *Id.* at 149-50. The Circuit found that the rumors involved in *Gereau* did not qualify under this exception because there was no evidence that "any contact, either direct or indirect, with any non-juror" had brought the rumors to the jury's attention and that the

"jurors appeared to regard them as coming from other jurors." *Id.* at 152. Conversely, *Gereau* recognized that an alleged influence involving conversations between jurors and third parties qualified as an extraneous influence—and recognized that the prejudice of such an influence could be properly resolved by the juror's own averment "that he had not been affected" by the influence. *Id.* at 154.

Hough v. Jones & Laughlin Steel Corp., 949 F.2d 914 (7th Cir. 1991), is a civil case that does not implicate the Sixth Amendment. In the criminal context, the Seventh Circuit recognizes the *Smith/Remmer* actual bias standard applies in "most cases" of external influence. *Hunley v. Godinez*, 975 F.2d 316, 318. (7th Cir. 1992). In that case, where the defendant was accused of burglary, several jurors were the victims of a burglary during their sequestered deliberations. *Id.* at 317. The trial judge remedied the claim of bias by conducting a post-trial hearing, at which "both the trial judge and defense counsel questioned each juror individually concerning the burglary and its impact on his or her decision," and denied relief when each juror "stated that the burglary did not affect his or her decision to return a guilty verdict." *Id.* *Hunley* recognized this inquiry was proper to resolve the question of actual bias, but held this was an "extreme" situation where bias should be imputed despite the jurors' denials. *Id.* at 318-320, citing *Smith*, 455 U.S. at 223 (O'Connor, J., concurring). Neither *Hunley* nor Justice O'Connor's concurrence, however, suggested that a court could refuse to conduct an actual bias inquiry, much less disregard affirmative evidence of actual bias for the court's opinion that the influence was not sufficiently prejudicial.

Other cases cited in the Petition place limitations on the actual bias inquiry consistent with those recognized by *Rushen* and the Ninth Circuit. The Fourth Circuit, for example, precludes testimony about a juror's "mental processes *in connection with the verdict*." see *U.S. v. Cheek*, 94 F.3d 136, 144 (4th Cir. 1996) (emphasis added) (ruling it impermissible to ask the juror about his "mental processes about the sufficiency of the evidence in reaching his personal verdict");

accord App. 32 (forbidding inquiry into juror #2's statement that "he relinquished his vote under duress"). But *Cheek* still considered evidence of the juror's "mental condition during the trial." *Id. Cheek* allowed evidence that the juror was "concerned about his safety and his integrity" and considered the juror's "own testimony that he was devastated and fearful" because of the extraneous influence to support its conclusion that "he was in no condition to sit on a jury." *Id.* This is precisely the sort of actual bias testimony that the NSC refused to consider in Tarango's case and that the Ninth Circuit directed to be considered on remand.

The Petition seeks to sow confusion about a settled area of the law. Even settled law may sometimes be ignored by individual courts or judges (as the NSC did here), but the mere presence of such errors would not justify this Court's plenary review or change that *this* Court's clearly established precedent required an actual bias hearing to resolve Tarango's claim.

D. There is no confusion in this Court's precedent or in the lower courts that an external contact such as that in Tarango's case requires a presumption of prejudice.

1. The extraneous influence in this case plainly falls within the scope of the presumption recognized in *Remmer I.*

The petition also seeks to create confusion regarding the presumption standards cited in *Tarango* and in the lower courts. Petition 16-25. The undisputed record in this case, however, requires a presumption of prejudice under any reasonable application of this Court's standards.

The warden has previously acknowledged *Remmer I* is "the controlling Supreme Court decision" for purposes of the 28 U.S.C. § 2254(d) standard. See Appellee's Answering Brief, Docket Entry 10, pg. 4; see also *Joyner v. Barnes*, 135 S.Ct. 2643, 2647 (2015) (Thomas, J., dissenting from denial of certiorari) (agreeing *Remmer I* was "clearly established Federal law.") *Remmer I* established a clear minimum threshold 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." *Id.,* 347 U.S. 229. The standard does not necessarily require that an "actual communication" take place (as the NSC's decision required, see App. 113), nor that a police officer "intentionally sought to influence" a juror. Petition 25. This Court has found law enforcement contacts sufficiently prejudicial to warrant relief even absent proof they intended to tamper with the jury. See *Remmer II*, 350 U.S. at 381 (finding FBI agent's communication with juror prejudicial, "whatever the government may have understood its purpose to be."); *Gold*, 352 U.S. at 985 (summarily reversing under *Remmer II* following FBI's contact with jurors and noting "the fact that the intrusion was unintentional does not remove the effect of the intrusion.")

That said, the only reasonable conclusion to be drawn from juror #2's state court testimony is that he was subject to an intentional (and successful) attempt to influence his verdict, an act which even the warden would acknowledge to be "egregious." Petition 25; *see also* App. 32; *Brumfield v. Cain*, 135 S.Ct. 2269, 2276 (2015) (granting relief when state court's rejection of claim resulted from an "unreasonable determination of the facts" under § 2254(d)(2)). The police car followed juror #2 for over seven miles, on and off a highway, through turns and stoplights until he pulled into the jurors' parking garage. All the while the police car stayed so close the juror couldn't see its bumper or front wheels, despite the fact the juror was traveling near the speed limit. When the juror changed lanes, the police car changed lanes with him, and when other cars sought to merge in their lane, the police car moved up even further to prevent them from doing so.

Plainly, the juror was describing a police car intentionally following him. And just as plainly, it was not a remarkable coincidence this intentional following occurred in the midst of deliberations, the morning after juror #2 was revealed as the lone hold-out for acquittal in a high profile trial involving the attempted murder of a

police officer.[13] App. 12; EOR 2047. The juror himself had no trouble recognizing that the pursuit was an intentional attempt to influence his verdict—that was the reason he felt it necessary to bring it to the court's attention. EOR 1714. *Remmer I*'s holding that a presumptively prejudicial contact may be accomplished "directly or indirectly" recognizes that persons who choose to illegally tamper with jurors in the hopes of swaying their verdict should not be expected to makes themselves identifiable to facilitate later investigation of their conduct. The Petition's suggestion that Tarango was required to prove his claim with something other than the juror's clear, uncontradicted and credited testimony imposes an unrealistic and unfounded burden on jury tampering claims.

2. Lower courts agree this influence would merit a presumption of prejudice.

The warden now alleges a "four-way split" amongst the Circuits regarding application of the *Remmer* standard for presuming prejudice. Petition 19. The current version of this argument acknowledges the Ninth Circuit is consistent with other Circuits, specifically, the Fourth, Seventh, Tenth, and Eleventh Circuit, that require a threshold showing of likely prejudice before applying the *Remmer* presumption. Petition 19-20; see also *Caliendo v. Warden*, 365 F.3d 691, 696 (9th Cir. 2004) (requiring petitioner to make threshold showing "that the communication could have influenced the verdict before the burden shifts to the prosecution."). Indeed, the Seventh Circuit has noted the Ninth Circuit takes the "narrowest" view of the

[13] The state court record establishes the police officers regularly attended the trial, that the issue with the lone hold-out was discussed in open court the day before the police car followed him, and that juror #2's note was immediately admitted into the record (EOR 1626-28). It would not have been difficult for an interested party to learn juror #2's identity; in fact, the prosecutor testified he informed the lead police detective during the first day of deliberations there was a single "hold-out" juror. EOR 1827-29.

presumption's scope, in that it limits the presumption to "jury tampering" cases. See *Hall v. Zenk*, 692 F.3d 793, 803 (7th Cir. 2012)

The Circuits now alleged to have differing positions do not differ in substance from the Ninth Circuit's approach. The Fifth Circuit, for example, is asserted to have rejected the *Remmer* presumption, but that Circuit still "requires the defendant to show a likelihood of prejudice before the burden shifts to the government." App. 21, citing *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998). The First Circuit acknowledges the presumption is appropriate when the influence is sufficiently "egregious." *U.S. v. Dehertogh*, 696 F.3d 162, 167 (1st Cir. 2012).

Other Circuits don't require an additional threshold before applying the presumption in *Remmer I*, which already describes an objective basis for triggering the presumption. The Third Circuit endorses the "generally applicable principle that *any* communication or contact with a juror during a trial about the matter pending deemed presumptively prejudicial," *U.S. v. Coleman*, 805 F.2d 474 at 482 (emphasis added). And still other courts, including the Eighth and Second Circuit, have "extended" *Remmer*'s rule to apply "claims alleging juror exposure to extraneous information, including claims of mid-trial media exposure" *Turnstall v. Hopkins*, 306 F.3d 601, 610-11 (8th Cir. 2002) (explaining the split over the issue of this extension). [14] To the extent these courts differ, they apply the *Remmer* presumption more *broadly* than the Ninth Circuit does.

Ultimately, of course, it is *this* Court's clearly established precedent that must be (and was) applied by the Ninth Circuit in this case. As explained above, the facts

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[14] The only case cited by the warden that calls *Remmer I* into doubt is the 33-year-old decision in *U.S. v. Pennell*, 737, F.2d 521, 532 (6th Cir. 1984), which held over a dissent that *Smith* overrules *Remmer*'s presumption of prejudice. *Pennell* predates this Court's decision in *Olano*, 507 U.S. at 738-39, which cited *Remmer* without any suggestion it was overruled, and stated there "may be cases where an intrusion should be deemed prejudicial." The warden can hardly argue in favor of *Pennell* in this litigation where it has previously conceded that *Remmer I* is "the controlling Supreme Court decision." Appellee's Answering Brief at 4.

of this case clearly fit within the letter of *Remmer I's* presumption, without any need for an "extension" of that rule. And even if some additional threshold requirement of "likely prejudice" or "substantial prejudice" or "egregious" jury tampering were necessary, this case easily met that threshold. App. 25. Under any reasonable standard, this case merited a presumption of prejudice.

E. This case's posture makes it a poor vehicle for certiorari review.

For multiple reasons, this case is not an appropriate vehicle to review either of the questions presented in the certiorari petition.

This habeas corpus case is not an appropriate vehicle for plenary consideration of either of the questions presented. The issue under the § 2254(d) standard is not what the law should be, but what was clearly established when the Nevada Supreme Court denied Tarango's claim. Resolving this case in Tarango's favor would only affirm what should already be clear from this Court's precedent. Resolving this case in the warden's favor would do nothing to clarify any "confusion" in the law; to the contrary, it would create confusion where none should exist.

To the extent the warden claims the case should be reviewed because the Ninth Circuit misapplied this Court's precedent or the §2254(d) standard, it presents at most a request for error correction in a fact-bound case that should not be heard by this Court. See *Martin v. Blessing*, 134 S.Ct. 402, 405 (2015) (Alito, J. statement respecting the denial of certiorari) ("We are not a court of error correction"). And even if the court were to entertain such a request, there is no error. As explained supra, the undisputed facts in this case clearly merited both an inquiry into the juror's subjective state of mind, and a presumption of prejudice.

But even if there is room for doubt about precisely what happened, the courts were still obliged to determine whether this incident caused the juror to be actually biased. *Remmer I* directed such a hearing even though the facts known to the court regarding both the influence and its effect were far more vague and undeveloped than

what was before the Ninth Circuit. See *Id.*, 347 U.S. at 229. ("We do not know from this record, nor does the petitioner know, what actually happened."); see also *Wellons v. Hall*, 558 U.S. 220, 221 (2010) (remanding for further proceedings when lower courts failed to determine "exactly what went on" regarding allegations of unusual ex parte contacts between jurors and court). The Petition's insistence this influence was too speculative to demonstrate the potential for prejudice cannot be squared with any reasonable reading of the record. In any event, it is not a justification to prevent the evidentiary hearing that the Ninth Circuit ordered to resolve this very question.

F. The facts of this case make it an especially poor vehicle for reviewing the standard of proof applicable at a hearing

Much less is this case an appropriate vehicle for a fact-bound dispute over the burden of proof that would apply at the remand hearing, as per the second question presented. Whether there is a rebuttable presumption of prejudice under *Remmer I*, 347 U.S. at 229, or whether the defendant has the burden of proving actual bias under *Smith*, 455 U.S. at 215, the "ultimate inquiry" remains the same. *Olano*, 507 U.S. at 739. Whichever standard applies, a court must determine the actual "impact thereof upon the juror." *Olano*, 507 U.S. at 739; *Smith,* 455 U.S. at 216 (1982), *Remmer I*, 347 U.S. at 230. Thus, any dispute about these cases would at most concern which party should begin with the burden of proof at the hearing directed in Tarango's case, and not *whether* such a hearing needed to held in the first place.

This would be a narrow basis for seeking this Court's certiorari review under any circumstances, but in this case, there is no reason the initial burden should make any difference in the outcome. Juror #2's prior statements in his letters and affidavit are overwhelming evidence of actual bias. Even excluding those statements the Ninth Circuit ruled could not be considered at the limited hearing, Juror #2 has explained that the police car's pursuit was "unnerving," EOR 1714, that he thought "Metro somehow knew who I was and knew of my unwillingness to convict," *Id.*, that

he had a "fear of reprisal," EOR 2047, and that his "hold-out" status had "put myself and my family at risk of "further harassment and intimidation from police." EOR 2372. Indeed, the warden has never disputed and does not now dispute either the truth of these statements, or the fact the juror was actually biased, or the district court's conclusion that "Juror 2 rendered his verdict based not upon the law and evidence, but because of his perception of a threat." App. 98. Nor has the warden ever contended (to the extent this would be relevant to an actual bias inquiry) that the strength of the evidence at trial was so great it would mitigate any prejudice from his bias. Juror #2 plainly found the State's case at trial unconvincing: in his only communication to the court prior the verdict, he wrote that he had "doubt, of which I feel is beyond the limit of reasonable doubt," and that deliberations had failed to cure it. EOR 1688.

Given the lack of dispute over the controlling issue of actual bias, the Ninth Circuit might have properly granted relief outright instead of giving the warden another opportunity to contest that issue after a hearing. This case is not an appropriate vehicle for the warden to complain about the initial burden of proof at this hearing. The juror's testimony, if credible and consistent with his numerous earlier statements, would be sufficient to establish actual bias under any standard of review.

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III. CONCLUSION

The Court should deny the Petition for Certiorari,

DATED this 20th day of March, 2017.

Respectfully submitted,

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IV.CERTIFICATE OF SERVICE

I hereby declare that on 20th day of March, 2017, I served this Petition for Writ of Certiorari, including the appendix, on the State of Nevada by depositing an envelope containing the petition in the United States mail, with first-class postage prepaid, addressed as follows:

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