No. 16-1000

In the Supreme Court of the United States

TIMOTHY FILSON, WARDEN, ET AL., PETITIONERS

v.

MANUEL TARANGO, JR.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND NINE OTHER STATES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether allegations of extraneous juror contact arising post-verdict compel a trial court to question a juror about his subjective mindset in addressing the possibility of any prejudice.

2. Whether an "external contact with the jury" requires a court to apply a presumption of prejudice, "whether or not the contact was intentional, . . . involved a verbal communication," "concern[s] a matter pending before the jury," or whether or not the court even "knows 'what actually transpired.' "

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INTEREST OF *AMICI CURIAE*

One of the chief responsibilities of the States is to protect the safety of the community. This includes securing criminal convictions and defending the constitutional validity of proper criminal convictions that have been obtained in state court when challenged in federal habeas corpus review. In safeguarding this duty, the *amici* States have two distinct interests in having this Court review Nevada's petition.

First, the *amici* States seek to ensure that the standards of the Antiterrorism and Effective Death Penalty Act of 1996 are properly applied. AEDPA bars the federal courts from vacating state criminal convictions unless the state-court decision is contrary to this Court's "clearly established" law. Clarity is absent here because this Court has issued decisions with conflicting standards on the main issue presented in this appeal—how to determine whether a criminal defendant is entitled to relief where there are claims of extraneous influences on the jury.

Second, this Court should grant certiorari to clarify the proper standard on the issue of external influences, thereby giving the necessary guidance to the lower courts. This issue is a recurring problem, one that this Court has not addressed in almost 25 years. Given the conflicting standards in the courts below, this habeas case would provide an excellent vehicle to articulate the rule of law in this area.[1]

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[1] Consistent with Rule 37.1, more than 10 days in advance of filing, counsel for the *amici* States contacted attorneys for Nevada and for respondent to inform them of the intent to file.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue whether a legal principle is "clearly established" by this Court under 28 U.S.C. § 2254(d) is a critical threshold question for examining a state-court decision. Here, the principle is not clearly established; rather, as the circumstances of this case show, this case involves a paradigmatic example of an area of the law that requires clarification.

The Court has issued three decisions addressing the standard for evaluating external influences on juries, and these decisions have yielded no fewer than four competing lower-court standards: (1) presumption of prejudice for egregious violations; (2) presumption of prejudice for factual claims not presented to the jury; (3) presumption of prejudice unless the influence was innocuous; and (4) a "substantial prejudice" test in which the criminal defendant has the burden of proving that the extraneous influence would have prejudiced a hypothetically average juror.

In granting habeas review in other cases, this Court has taken the opportunity to clarify the area of law and establish a rule that is workable and consistent with constitutional standards. The Court should grant review here and adopt the "substantial prejudice" test. The "substantial prejudice" test reflects the fact that external influences are amenable to review, and it properly balances the parties' interests. It also reflects what is really occurring in the other circuits. Egregious violations are prejudicial, and innocuous ones are not. There should be a single, governing test.

ARGUMENT

I. The Court's conflicting precedents regarding the standard for evaluating external juror influences have created a prominent and longstanding circuit split.

The *amici* States address the second issue raised in Nevada's petition as it raises the paramount issue of the case: the standard for reviewing whether a conviction may remain where a juror was subject to an external influence. This issue, raised here through the prism of federal habeas review, stems from three decisions of this Court involving external jury influence. *Remmer* v. *United States*, 347 U.S. 227 (1954), *Smith* v. *Phillips*, 455 U.S. 209 (1982), and *United States* v. *Olano*, 507 U.S. 725 (1993). As the split among the circuits attests, these cases do not clearly establish the test for analyzing external influences on juries.

To begin, in *Remmer*, the Court held that "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.* at 229 (emphasis added). Nevertheless, the Court emphasized that the "presumption is not conclusive," and 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." *Id.* at 229. The juror contact was that a "person unnamed had communicated with a certain juror, who afterwards became the jury foreman, and remarked to him that he could profit by bringing a verdict favorable to the petitioner." *Id.* at 228. This Court vacated the affirmance of the conviction.

Nearly three decades later, this Court seemingly disposed of the prejudice presumption in *Phillips*, 455 U.S. 209. There, the Court noted that it had "long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity *to prove actual bias*." *Id.* at 215 (emphasis added). The Court went on to hold that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.* at 217. The occurrence in *Phillips* related to a juror who had submitted an application to the district attorney's office as an investigator, a fact that had not been disclosed to the defense counsel and the court. *Id.* at 212–13. Because this fact did not "impair his ability to render an impartial verdict," *id.* at 220, this Court found that Phillips was not deprived of a fair trial.

Another decade after *Phillips*, the Court again addressed the external-jury-influence standard in *Olano*, 507 U.S. 725. The Court began by endorsing the *Remmer* presumption: "[t]here may be cases where an intrusion should be presumed prejudicial . . . ." *Id.* at 739. But the Court ultimately determined that "a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" *Id.* In fact, the Court clarified in the case that "we generally have analyzed outside intrusions upon the jury for prejudicial impact," and called *Remmer* "a prime example" of that principle. *Id.* at 738.

Understandably, the circuits have struggled with the *Remmer* presumption in the wake of *Phillips* and *Olano*. See *Barnes* v. *Joyner,* 751 F.3d 229, 245 (4th Cir. 2012) ("we have recently observed, there is a split among the circuits regarding whether the *Remmer* presumption has survived intact following the Supreme Court's decisions in *Phillips* [ ] and *Olano* [ ]") (internal quotes omitted); *United States* v. *Dehertogh*, 696 F.3d 162, 167 (1st Cir. 2012) ("the circuits are divided on whether *Remmer* represents the current thinking of the Supreme Court"); see also *Teniente* v. *Wyoming Atty. Gen.*, 412 F. App'x 96, 103 n.4 (10th Cir. 2011) (holding *Remmer* is not clearly established for purposes of habeas review given the "lively debate among [and within] federal courts . . . ."). In a similar vein, the Sixth Circuit has held that *Phillips* "worked a substantive change" in *Remmer*, requiring that the criminal defendant prove "actual juror partiality." *United States* v. *Pennell*, 737 F.2d 521, 532 n.10 (6th Cir. 1984). The conflicting language from these three decisions has resulted in competing standards that fall into four distinct categories.

First, the Second, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits still presume prejudice unless the influence on the jury was innocuous or *de minimis*. *United States* v. *Farhane*, 634 F.3d 127, 168–69 (2d Cir. 2011); *Barnes,* 751 F.3d at 245 (4th Cir. 2012); *United States* v. *Martin*, 692 F.3d 760, 765 (7th Cir. 2012); *Tong Xiong* v. *Felker*, 681 F.3d 1067, 1076 (9th Cir. 2012); *United States* v. *Scull*, 321 F.3d 1270, 1280 n.5 (10th Cir. 2011); *McNair* v. *Campbell*, 416 F.3d 1291, 1307–08 (11th Cir. 2005).

Second, the Eighth Circuit presumes prejudice only for factual claims not presented to the jury. *United States* v. *Honken*, 541 F.3d 1146, 1167 (8th Cir. 2008) ("We have consistently held the *Remmer* presumption of prejudice does not apply unless the alleged outside contact relates to factual evidence not developed at trial.").

Third, the First Circuit presumes prejudice, but only for egregious violations. *Dehertogh*, 696 F.3d at 167 ("This court continues to assume that a presumption of prejudice exists but only where there is an egregious tampering or third party communication which directly injects itself into the jury process.").

Fourth and finally, the Third Circuit employs the "substantial prejudice" test, which puts the onus on the defendant to prove the external influence would have prejudiced a hypothetical average juror." *United States* v *Fumo*, 655 F.3d 288, 304 (3d Cir. 2011).

In light of these varying approaches, the law on external juror influences cannot be fairly said to be clearly established even among the circuits, much less from this Court. See *Price* v. *Vincent*, 538 U.S. 634, 643 n.2 (2003); accord *Miller* v. *Colson*, 694 F.3d 691, 698 (6th Cir. 2012) ("[A] disagreement among the circuit courts is evidence that a certain matter of federal law is not clearly established."). But see *Hall* v. *Zenk,* 692 F.3d 793, 799 (7th Cir. 2012) ("a split is not dispositive of the question," citing two cases applying the *qualified-immunity* test for clearly established law, not the *habeas* test). So, the Nevada Supreme Court decision that the claim here was too attenuated to en-

title Tarango to relief was not an unreasonable application of clearly established law as determined by this Court.

II. This Court should grant leave and adopt the "substantial prejudice" test.

Given the regularity with which issues about external influences arise, it is vital that the lower courts have a clear standard to apply. Even though this case is postured as a review in habeas, it does not foreclose this Court from clarifying the proper standard. See, e.g. *Howes* v. *Fields,* 565 U.S. 499, 514–17 (2012) (finding no clearly establish precedent in habeas but also reaching the substantive issue). There is a need for development in this area of law.

This Court's decisions in *Remmer* and *Phillips,* as well as the lower courts' efforts to faithfully apply these standards, really reflect an endeavor to ensure that the jurors were not prejudiced by the external influences. The standards articulated in this Court's decisions, and the underlying considerations of the competing standards, are best reflected in the Third Circuit's jurisprudence. This Court should adopt the Third Circuit's "substantial prejudice" test.

A. This Supreme Court may clarify constitutional rules on habeas review.

The body of law that is relevant for reviewing a state-court merits decision is this Court's clearly established precedent at the time of the decision. See *Greene* v. *Fisher*, 132 S. Ct. 38, 44 (2011). Thus, in reviewing a state conviction in habeas, this Court can (1) disagree with the state and conclude that the Court *had* clearly established law in the area, or (2)

agree with the state and either (a) clarify the law as a means to showing that the state court got it right or (b) simply hold that habeas relief should have been denied due to the absence of clearly established law.

Given the ambiguity in this Court's precedents and the significant, four-way circuit split, possibility (1) is not an option. But the Court can and should vacate the Ninth Circuit's decision, clarify the law, and hold that habeas relief was inappropriate given the absence of clearly established Supreme Court precedent.

B. The "substantial prejudice" test ensures that the Sixth Amendment right to an impartial jury is properly vindicated.

The overarching principle supporting this Court's decisions in *Remmer* and *Phillips* is the question whether the jury's ability to be fair was compromised. As recognized by these decisions, there is a fundamental difference between a juror who has been the subject of a bribery offer, as in *Remmer*, and one who sought a job and had some communications with the prosecuting agency's office, as in *Phillips*. Some external influences will likely impair the ability of an ordinary juror to be impartial, while other influences will not.

The standard from the Third Circuit effectively captures this dynamic by measuring this influence against the "hypothetical average juror." *Fumo,* 655 F.3d at 304; cf. *Pennell,* 737 F.2d at 532 ("In light of Phillips, the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality"). The *Fumo*

test provides for a consideration of the relevant factors:

> (1) "the extraneous information relates to one of the elements of the case that was decided against the party moving for a new trial";
>
> (2) "the extent of the jury's exposure to the extraneous information";
>
> (3) "the time at which the jury receives the extraneous information";
>
> (4) "the length of the jury's deliberations and the structure of the verdict";
>
> (5) "the existence of instructions from the court that the jury should consider only evidence developed in the case"; and
>
> (6) "whether there is a heavy volume of incriminating evidence." [*Id.* (internal quotes, citations omitted).]

The point of reference is the "hypothetical" juror, and this emphasis on the ordinary juror places the focus in exactly the right place for three reasons.

First, it ensures that there will be no inquiry into the actual internal deliberations of the jurors consistent with the general rule against impeaching a jury's verdict. *Fumo,* 655 F.3d at 304 ("the court may inquire only into the existence of extraneous information and not into the subjective effect of such information on the particular jurors.") (internal quotes, citation omitted). As provided in the federal rules of evidence, the jurors' subjective decisions on a criminal matter should be beyond the scope of judicial inquiry. Fed. R. Evid. 606(b)(1) ("During an inquiry into the

validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."). These are sacrosanct matters that may be invaded only for the gravest of reasons. See *Pena-Rodriguez* v. *Colorado,* —— S. Ct. ——, (2017) WL 855760, *14 (2017) (the no-impeachment rule yields where a juror makes a clear statement that indicates the juror relied on racial stereotypes or animus in rendering a verdict); see also Fed. R. Evid. 606(b)(2) (allowing inquiry into whether extraneous prejudicial information was improperly brought to the jury's attention or an outside influence was brought to bear on any juror).

Second, this test would eliminate the confusion caused by the different kinds of presumption-of-prejudice standards that the circuits are employing by looking to the fairness of an ordinary juror. There is no reason to create a separate category of influences that were either "egregious" or not "innocuous" or related to facts not presented at trial. Instead, the proper question is whether the criminal defendant has proven that the influences would have compromised the fairness of an ordinary juror. If so, the criminal defendant would be entitled to a new trial. This is a workable standard.

Third, it effectively navigates the considerations between the usual obligation to prove prejudice and presuming prejudice. It does not examine the actual deliberations, but considers the "hypothetical" juror. The proper prejudice framework examines prejudice *to the process,* not to the trial outcome for this actual

jury. This is a critical feature and would clarify the confusion on the meaning of prejudice in this area.

Jury tampering may be harmless. In focusing on the process, this standard recognizes that there are some circumstances that even where the evidence at trial is overwhelming, the nature of the external influence would compromise the juror's fairness. The bribery example from *Remmer* is the case in point. Although *Fumo* does provide for an analysis on the "outcome of the trial," it evaluates prejudice based on the "probable effect" on the *hypothetical* juror. *Fumo,* 655 F.3d at 304. The Ninth Circuit has described the point by evaluating whether the jury tampering affected the "freedom of action" of the juror. *United States* v. *Henley,* 238 F.3d 1111, 1118 (9th Cir. 2001) (quoting *Remmer,* 350 U.S. at 381 (no one could say that "he was not affected in his freedom of action as a juror")).

Ordinarily, the Court presumes prejudice only for structural errors precisely because they are not amenable to harmless-error analysis. That is because the nature of the error does not allow a determination about whether the verdict would have been different based on the error. *Fulminante* v. *Arizona,* 499 U.S. 279, 309 (1991). An example of this point is the deprivation of a right to a public trial. See *Presley* v. *Georgia,* 130 S. Ct. 721, 724 (2010). Once violated, there is no way to determine whether this error affected the outcome of the trial because it does not relate to any of the evidence from the trial. Hence, the error is categorized as "structural." See, e.g., *United States* v. *Agosto-Vega,* 617 F.3d 541, 543 (1st Cir. 2010) ("we

find that the District Court committed a structural error by excluding the public from the courtroom during the selection of the jury.").

Consistent with *Remmer* and *Phillips,* the claim of jury tampering is *not* a structural defect but is subject to a prejudice analysis. The standard thus properly dispenses with the presumption of prejudice. *Fumo,* 655 F.3d at 304. *Fumo* requires the court to examine the "hypothetical average juror"; and the proper focus is not whether the trial verdict would have been different for this actual jury, but rather whether an ordinary juror would no longer have been able to be fair. That is the right inquiry.

The most significant feature of the proper standard in this area of law is the nature of the prejudice inquiry. The standard here would ask whether the influence would have compromised the fairness of the jury, not whether the specific jury would have reached a different verdict. The Nevada Supreme Court rejected Tarango's claim of external influence as being too "speculative" to warrant the application of a presumption of prejudice. App. 112–13. Such a conclusion is consistent with rejecting a claim that external influence prejudiced the process.

If this Court adopted the Third Circuit's formulation, this would be a significant clarification, effectively creating a new rule. *Teague* v. *Lane,* 489 U.S. 288, 310 (1989). Yet under existing law, the Nevada court's resolution was not unreasonable. *Price,* 538 U.S. at 643 n.2. For this reason, this Court should grant the petition, reverse the judgment, and clarify this area of the law.

CONCLUSION

The *amici* States ask this Court to grant the State of Nevada's petition for certiorari.

Respectfully submitted,

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