No. 18-6899

I N T H E

SUPREME COURT OF THE UNITED STATES

October Term, 2018

ORIGINAL

JOHN URANGA, III,

Petitioner

-vs-

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent

PETITION FOR WRIT OF CERTIORARI
T O T H E
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN URANGA, III, pro se
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12071 FM 3522
Abilene, Texas 79601-8799

Petitioner

QUESTIONS PRESENTED

I. Where there exists intra and inter-circuit splits among the federal courts of appeals on a question of exceptional importance concerning "structural erros," should the Supreme Court grant a writ of certiorari to resolve the issue of whether the implied bias doctrine constitutes clearly established federal law?

II. Where the Supreme Court has repeatedly held in a multitude of cases, that "violations of constitutional magnitude can never be de minimis," in the context of juror bias where the defendant on trial had committed a crime previously against the juror, should a determination of bias be predicated on whether or not the crime involved a de minimis loss to the victim/juror?

LIST OF PARTIES

All the parties in this action appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2018

JOHN URANGA, III, Petitioner

-vs-

LORIE DAVIS, Director, T.D.C.J., C.I.D., Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW John Uranga, III ("Uranga"), pro se, to respectfully petition this most Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, in which a two-judge panel of the Court, on rehearing with one judge dissenting, withdrew its prior opinion and reversed its original judgment, and affirmed the District Court's denial of habeas relief.

OPINIONS BELOW

1. The United States Court of Appeals for the Fifth Circuit's opinion on rehearing is published at Uranga v. Davis, 893 F.3d 282 (5th Cir. 2018), and is attached hereto at APPENDIX A.

2. The United States Court of Appeals for the Fifth Circuit's original opinion is published at Uranga v. Davis, 879 F.3d 646 (5th Cir. 2018), and is hereto attached at APPENDIX B.

3. The United States Court of Appeals for the Fifth Circuit DENIED a petition for rehearing en banc on August 23, 2018, and a copy of the Court's order denying the petition is attached hereto at APPENDIX C.

4. The Report and Recommendation of United States Magistrate Judge Robert K.

Roach is attached hereto at APPENDIX F.

5. The opinion of the Court of Criminal Appeals of Texas, on Uranga's state application for a writ of habeas corpus is unpublished, but it is available at Ex parte Uranga, 2011 WL 2473400 (Tex. Crim. App. Jun. 22, 2011), and is attached hereto at APPENDIX G.

6. The opinion of the Court of Criminal Appeals of Texas, on discretionary review of Uranga's direct appeal, is published at Uranga v. Texas, 330 S.W.3d 301 (Tex. Crim. App. 2010), and is attached hereto at APPENDIX H.

7. The opinion of the Court of Appeals for the Sixth Appellate District of Texas, on Uranga's direct appeal, is published at Uranga v. Texas, 247 S.W.3d 375 (Tex. App.- Texarkana 2008), and is attached hereto at APPENDIX J.

JURISDICTION

1. The date onb which the United States Court of Appeals denied Uranga's petition for rehearing en banc was August 23, 2018. This instant petition for a writ of certiorari was required to be filed on or before November 21, 2018, and as it was submitted prior to that date, it has been timely filed on the Prison Mailbox Rule.

2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

A. UNITED STATES CONSTITUTION, Amendment VI

The Sixth Amendment to the Constitution of the united States provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,....

B. UNITED STATES CONSTITUTION, Amendment XIV

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Uranga is a Texas prisoner who is serving a life sentence for possession of methamphetamine. See Uranga v. Davis, 879 F.3d 646, 647 (5th Cir. 2018). At the sentencing phase of Uranga's trial, the prosecutor showed the jurors a video of a prior crime committed by Uranga. While viewing that video, one of the jurors in Uranga's trial realized that it had been Uranga that had been the driver of a car that had driven over and damaged the juror's lawn.[1] Id. at 651. The video had been presented as evidence to support the habitual offender sentence that the State sought to impose.

The juror reported to the judge that he was personally involved in the facts underlying the State's arguments at sentencing. Id. Rather than impaneling an impartial jury, or declaring a mistrial, the trial judge asked the juror if he would be impartial. See Uranga v. Texas, 330 S.W.3d 301, 303 (Tex. Crim. App. 2010). Upon assurances that he would, the trial judge permitted the juror to decide the case. Id. As noted by Judge Haynes in his dissent, the "prosecution describe[d] Uranga's criminal history and **specifically** mention[ed] the car chase **immediately** before stating: 'I'm asking that you, with his history, give him a life sentence.'" Slip Op. at 12 (HAYNES, J., dissenting). The jury accepted the prosecutor's invitation and imposed a life sentence.

Uranga brought a habeas petition in Texas state court, arguing, inter alia, that his sentencing violated the United States Constitution because he had been denied an impartial jury, and that bias could be implied under the unusual circumstances present in his case. See Uranga, 330 S.W.3d at 303. After the Texas Court of Criminal Appeals denied habeas relief, Uranga brought a petition under 28 U.S.C. § 2254 in the United States District Court for the Northern District of Texas. See Uranga, 879 F.3d at 647.

In an initial opinion, a Fifth Circuit panel determined that the doctrine of implied jury bias applied to Uranga's case, and that he was entitled to re-

sentencing. As the panel explained, "[a]lthough the resulting property damage" caused by Uranga during the cross-lawn car chase "may have been minimal, [that] nonetheless was personal to the juror as it affected the premises of his home. Moreover, the juror was unaware of how the damage had been caused and learned, for the first time, upon viewing the videotape during the punishment phase of the trial, that Uranga was the perpetrator of the damage." Id. at 653. These facts had "'inherently create[d] in [the] juror a substantial emotional involvement, adversely affecting [his] impartiality' toward Uranga." Id. (quoting Solis v. Cockrell, 342 F.3d 392, 399 (5th Cir. 2003). Accordingly, Uranga's case had presented the type of "extreme situation" foreseen in Smith v. Phillips, 455 U.S. 209, 222, 102 S.Ct. 940 (1982), and Brooks v. Dretke, 444 F.3d 328, 332 (5th Cir. 2006), wherein it was determined that a juror's involvement would violate the defendant's Sixth Amendment rights.

The State petitioned for an en banc reconsideration, asking for the Fifth Circuit to overrule Brooks, and find that the implied juror bias doctrine is not clearly established federal law as determined by the Supreme Court under 28 U.S. C. § 2254(d)(1). The State did not dispute the fact that if Brooks is good law, Uranga would be entitled to resentencing.

In lieu of en banc reconsideration, the panel treated the State's Petition for Rehearing En Banc as a Petition for Panel Rehearing and granted that petition. See APPENDIX A at 1. The panel majority determined that even if Brooks had been correctly decided, Uranga's case did not warrant a finding of implied juror bias. Id. at 10. The panel majority pointed to the fact that Uranga's drive across the juror's yard had "caus[ed] damage that could be repaired for less than $500," and that the juror had "testified that he did not intend to pursue any charges and that he could fix the damage himself." Id. at 10-11. Accordingly, the panel majority concluded that the damage had not been severe enough, or the facts "extreme" enough, for imputing juror bias. In dissenting, Judge Haynes

concluded that the panel's "original opinion correctly determined that this situation was sufficiently extreme to warrant relief.... The juror in this very case was a victim of this very defendant in a crime deemed relevant by the prosecution [for] sentencing this defendant to life. [This is p]retty extreme, it seems to me!" Id. at 13.

Uranga now files this petition for a writ of certiorari, asking for the Supreme Court of the United States to review his case for resolving and disposing of the intra and inter-circuit splits of both, the federal and state courts throughout the United States, on the issue regarding whether the implied juror bias is "clearly established federal law;" and whether the facts underlying an implied juror bias allegation or finding are subject to a de minimis standard, an important question of federal law that falls within the core principles of Carey v. Piphus, 435 U.S. 247, 254, 98 S.Ct. 1042 (1978), that has not been, but should be, settled by the Supreme Court.

1 In fact, Uranga argued in his initial Brief of Appellant to the Fifth Circuit that the juror in question was biased against him throughout the full trial. The juror lived across the street from Uranga, that the juror held animosity against Uranga, and had repeatedly called the police to allege that Uranga was selling drugs out of his home. BRIEF OF APPELLANT at (5), 879 F.3d 646 (5th Cir. No. 15-10290).

REASONS FOR GRANTING THE PETITION

I. DOES THE DOCTRINE OF IMPLIED JUROR BIAS CONSTITUTE "CLEARLY ESTABLISHED FEDERAL LAW" IN LIGHT OF THE FACT THAT THE UNITED STATES SUPREME COURT HAD LONG AGO HELD SO?

The Supreme Court of the United States had recognized long, long ago, that a juror's bias "may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a] matter of law." United States v. Wood, 299 U.S. 123, 134, 57 S.Ct. 177 (1936). In Brooks, the Fifth Circuit determined that in United States v. Remmer ("Remmer II"), 350 U.S. 377, 381, 76 S.Ct. 425 (1956), the Supreme Court applied a principle of implied bias, under which neither any post-verdict hearing nor a juror's "sincere and credible assurances ... that he can be fair," are sufficient to protect the defendant's Sixth Amendment guarantee of an impartial jury, and the court may determine that a juror is biased as a matter of law. Brooks v. Dretke ("Brooks I"), 418 F.3d 430, 434 (5th Cir. 2005); see Brooks v. Dretke ("Brooks II"), 444 F.3d 328 (5th Cir. 2006). In Remmer II, an outsider had attempted to bribe the jury foreman during the trial; the foreman reported the bribery attempt and it was investigated by the FBI. The district court held a hearing and determined that the "incident" was "entirely harmless:" the jury foreman testified that the attempted bribe "in no way affected his state of mind or his vote in arriving at the verdict," and the district court accepted that assurance. United States v. Remmer, 122 F.Supp. 673, 675 (D. Nev. 1954), aff'd, 222 F.2d 720 (9th Cir. 1955), vacated, 350 U.S. 377, 76 S.Ct. 425 (1956). Though the foreman told another juror that "he had been under great pressure" during the trial, the district court rejected the argument that the "pressure" related to the attempted bribery -- the comment "obviously referred to the strain of several months of trial .... Since the foreman had relieved his mind by promptly reporting the [bribery] incident to the trial judge, it is obvious that he was not referring to it, as a 'pressure.'" Id. at n. 5.

The Supreme Court disagreed. Under the circumstances, it held that "nei-

ther [the foreman] nor anyone else could say that he was not affected in [their] freedom of action as a juror." Remmer II, 350 U.S. at 381, 76 S.Ct. 425 (emphasis added). The Court did not use the term "implied bias," but it applied that approach: despite the assurances given by the foreman during the hearing that the attempted bribe did not affect his vote, the Court determined that in these extreme circumstances, no person could remain unaffected. Id. As the Fifth Circuit reiterated in rejecting the State's petition for an en banc rehearing in Brooks: "Remmer II illustrates that there are certain factual circumstances ... in which no reasonable person could not be affected in his actions as a juror, and in which the Constitution refuses to accept any assurances to the contrary." The Fifth Circuit panel concluded that "Remmer II is an application of the implied bias doctrine; it is clearly established Federal law as determined by the Supreme Court." Brooks II, 444 F.3d at 331-32. The panel's decision in Brooks is an example of "the case-by-case application [of] a well-established constitutional principle" that was demanded by the Supreme Court in Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000); and Carey v. Musladin, 549 U.S. 70, 127 S.Ct. 649 (2006).

Contrary to the State's contention in its Petition for Rehearing En Banc, there is nothing in Phillips that negates the applicability of the implied bias doctrine in the rare cases where it is implicated; Phillips simply was not such a case. See STATE'S PETITION at 10 (citing Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940 (1982)). The juror in Phillips submitted an application to work for the prosecutore's office during the course of the trial. The trial court held a hearing and determined that the juror's conduct was an "indiscretion," but it had no impact on the juror's partiality or ability to serve. Id. at 213. The Supreme Court agreed, that a determination of a juror's bias "may properly be made at a hearing like that [as was] held in this case." Id. at 217. But Justice O'Connor pointed out in her concurrence, that the majority opinion "does

not foreclose the use of 'implied bias' in appropriate circumstances," even when the Phillips case was not one of those circumstances. Id. at 221. The Fifth circuit pointed out that Justice O'Connor's statement "is no more than the holding of the Court in Remmer II." Brooks II, 444 F.3d at 332. As the Brooks II Court further pointed out, the majority in Phillips neither addressed Remmer II, nor challenged Justice O'Connor's statement. Id.

Then, just two years later, in McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 104 S.Ct. 845 (1984), five justices endorsed Justice O'Connor's position in Phillips and Remmer II. Although the Court ultimately remanded the Greenwood case to allow the trial court to hold a hearing in the first instance, the five concurring justices all opined that the trial court may find "in exceptional circumstances, that the facts are such that bias is to be inferred." Id. at 556-57 (BLACKMUN, STEVENS, and O'CONNOR, J.J., concurring); see also id. at 558 (BRENNAN and MARSHALL, J.J., concurring).

The Second, Fifth, Seventh, Ninth and Tenth Circuits at times seem to have accepted the Sixth Amendment implied bias doctrine without qualification. See APPENDIX H (Slip Op. at 3 n. 10) (PRICE and HOLCOMB, J.J., dissenting) (listing cases). Indeed, the decision by a majority of the Texas Court of Criminal Appeals' judges in the discretionary review of Uranga's direct appeal, drew a most scathing dissent from Judges Price and Holcomb saying:

> Without fanfare, the Court today announces that there is no such thing as the Sixth Amendment doctrine of implied bias. The whold thing is apparently a figment of Justice O'Connor's imagination. I am here to attest that the implied bias doctrine does exist. I know it does; I have seen it.
>
> Notwithstanding the durability of the Sixth Amendment doctrine of implied bias, the Court today rejects it almost effortlessly, citing only the majority opinion in Smith v. Phillips for support.
>
> This Court's reliance on that majority opinion today to disown the Sixth Amendment doctrine of implied bias is, in my view, a grievous mistake.
>
> The Sixth Amendment implied bias doctrine is alive and well and ought to be applied on the facts of this case.

Uranga v. State, 330 S.W.3d 301, 308 (Tex. Crim. App. 2010); APPENDIX F at 9; AP-

PENDIX H (PRICE and HOLCOMB, J.J., dissenting). Judges Price and Holcomb's dissenting opinion so thoroughly sets forth Uranga's position that he presents today to the Supreme Court in this instant petition, that he hereby adopts it in its entirety, as permitted by leave of the Court, and inserts it here as if it had been pled.

But the First, Third, Fourth, Sixth and Eleventh Circuits have been unreliable and inconsistent in deciding whether the implied bias doctrine was clearly established federal law; and there has even been a multitude of intra and inter-circuit splits among all of the courts, state and federal, throughout the United States. In the Fifth Circuit for instance, in Andrews v. Collins, 21 F.3d 612 (5th Cir. 1994), the Court surveyed Supreme Court authority and declared: "The Supreme Court has never explicitly adopted or rejected the doctrine of implied bias." 21 F.3d at 620. That observation would foreclose any claim for relief under the Anti-terrorism and Effective Death Penalty Act ("AEDPA") predicated on implied bias,-- because it is only Supreme Court authority, and not Circuit authority -- that can form the basis of § 2254(d)(1)'s "clearly established" requirement. See Lopez v. Smith, ___ U.S. ___, 135 S.Ct. 1, 4 (2014) (per curiam) ("Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.'" (citation omitted)). By explaining that the Supreme Court has not spoken definitively, Andrews would foreclose a grant of habeas relief based on a claim of impled bias. Where the Fifth Circuit later determined that habeas relief is available in a case predicated on a state court's failure to apply the doctrine of implied bias, Brooks stands in conflict with Andrews.

The longstanding disagreement exemplified by Andrews and Brooks permeates decisions throughout the country. Shortly after the passage of the AEDPA, and the Supreme Court's Phillips decision, the Fifth Circuit declared that presumptions of juror bias are not appropriate. See United States v. Sylvester, 143

F.3d 923, 934 (5th Cir. 1998). The Court declared that "the Remmer presumption of prejudice cannot survive Phillips," and that a litigant therefore must show actual bias. Id. United States v. Smith agreed with that assessment. See 354 F.3d 390, 395 (5th Cir. 2003). There, the Fifth Circuit panel held that "it is no longer the case that any intrusion on the jury, no matter how slight, creates a rebuttable presumption of prejudice to the defendant." Id. It is this position that is held by a minority of the Circuits. See Parker v. Head, 244 F.3d 831, 839 n.6 (11th Cir. 2001) (collecting cases).

Brooks took the opposite view and held that not only can bias be inferred, but "the doctrine of implied bias is 'clearly established Federal law as determined by the Supreme Court.'" 444 F.3d at 330 (quoting 28 U.S.C. § 2254(d)(1)). And two years later, in Oliver v. Quarterman, the Fifth Circuit stated that bias may be implied "if prejudice is likely [caused by some] external influence." 541 F.3d 329, 341 (5th Cir. 2008).

The Fifth Circuit has issued two distinct strands of conflicting decisions just as has nearly every state and federal court throughout the land. On the one hand, Sylvester and Smith reject the viability of implied bias claims, and Andrews confirms that such claims cannot support habeas relief, because of the absence of clear Supreme Court authority. On the other hand, Brooks (supported by Oliver) takes the opposite view -- that being that "the doctrine of implied bias is 'clearly established Federal law as determined by the Supreme Court.'" 444 F.3d at 329.

In light of all of the conflicting approachas existing throughout all of the courts of the land, it is no wonder that, as an example, the Northern District of Texas has lamented the "disagreement ... within the Fifth Circuit" regarding applications of the implied bias doctrine. Ward v. Stephens, 3:10-CV-2101-N, 2014 WL 887440 (N.D. Tex. Mar. 6, 2014). The Ward court had observed that not only do "the circuit courts debate the vitality of the Remmer presumption,"

but "[t]he jurisprudence within this circuit is also mixed." Id. at *6 & *7 (citing cases). So when the Northern District of Texas was confronted with a habeas petition asserting implied bias, the court denied relief, concluding that where "the law is unsettled, the state court's decision [denying relief based on implied bias] cannot be an unreasonable application of federal law." Id. at *7. Given the total confusion among the state and federal courts of the land, and of the clean splits among the circuits, now is the time for the Supreme Court of the United States to resolve the "disagreements" that confounds thaose courts.

II. SHOULD DETERMINATIONS OF BIAS BE PREDICATED ON WHETHER OR NOT A CRIME COMMITTED BY A DEFENDANT AGAINST A VICTIM/JUROR WAS A DE MINIMIS LOSS OR INJURY?

When the partiality of the victim-juror is assessed without regard to his own assurances, the implied bias doctrine requires that the juror be excluded from the jury. The panel majority on rehearing in the instant case assessed the damages caused to the juror by Uranga as being "minimal," explaining that those damages could be "repaired for less than $500" by the juror himself. APPENDIX A at 10-11. But the amount of damages is not the critical point; it is the magnitude of the potential for the juror's emotional involvement in the outcome of a case that matters. See Brooks, 418 F.3d at 432-33; accord Solis v. Cockrell, 342 F.3d 392, 400 (5th cir. 2003).

Indeed, the "touchstone" of an implied bias inquiry is "whether the average person in the position of the juror would be prejudiced and feel substantial emotional involvement in the case." United States v. Mitchell, 690 F.3d 137, 146 (3rd Cir. 2012) (emphasis added). A juror is likely to have that improper emotional involvement where the "specific facts" of the juror's situation demonstrate "a close connection to the circumstances at hand." United States v. Scott, 854 F.2d 697, 699 (5th Cir. 1988) (quoting United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976)). In these "extreme situations," such as where "the juror was a witness or somehow involved in the criminal transaction ... the Sixth Amendment

right to an impartial jury should not allow a verdict to stand." Smith, 455 U.S. at 222.

The juror in Uranga's case had more than a "close connection" to the circumstances presented in the sentencing phase of Uranga's trial: he was "somehow involved" because he was the victim of one of Uranga's crimes. Id. As other circuits have recognized, jurors "who have been victims of the alleged crime" cannot serve on that defendant's jury, "even if they state that they could uphold the law faithfully." United States v. Torres, 128 F.3d 38, 41 (2nd Cir. 1997) (finding victims impliedly biased in the context of voir dire); see also United States v. Greer, 285 F.3d 158, 172 (2nd Cir. 2002) ("automatically presumed bias deals mainly with jurors who ... were victims of the alleged crime itself"). That is so because "the average person" in that juror's situation "would harbor prejudice, consciously or unconsciously," against the defendant. Mitchell, 690 F.3d at 142.

The presumption that a defendant's victims cannot sit in judgment on him, has deep historical roots. "Experience teaches that the victim of any criminal offense is rarely in sympathy with one charged with its perpetration; and it is quite certain that the former would in no case be competent to serve as a juror upon the trial of the latter. One whose property has been stolen will not be allowed to participate as a juror in the trial of the alleged thief." McElhannon v. Georgia, 26 S.E. 501, 504-05 (Ga. 1896). A defendant's victims have an "interest in the case," see id., and this "cause[ ] of challenge ... cannot be overruled, for jurors must be omni exceptione majors," United States v. Wood, 299 U.S. at 138 (quoting 3 William Blackstone, Commentaries 363). Accordingly, the prejudice resulting from the impanelment of a defendant's victims (or even a victim's relatives) has long mandated a new trial. See, e.g., McElhannon, 26 S.E. at 504-05 (defendant entitled to new trial where two jurors were relatives of plaintiff's stockholders); Wright v. Texas, 12 Tex. Ct. App. 163, 167-68 (Tex. Ct. App. 1882) (defendant entitled to new trial where two jurors were related to

victims "in cases involving to some extent at least proof of the same facts necessary to the conviction of the defendant"); Carr v. Alabama, 16 So. 150, 153-54 (Ala. 1894) (defendant entitled to new trial where juror sued the same defendant in another case on similar facts).

The juror in the case underlying this instant petition was not the victim of Uranga's crime of conviction. However, he was the victim of other conduct by Uranga that, as Judge Haynes pointed out, was "deemed relevant by the prosecution [for] sentencing [Uranga] to life!" APPENDIX A at 12-13 (HAYNES, C.J., dissenting). The average person in the juror's situation "would harbor prejudice against Uranga because Uranga's actions damaged the juror's own yard -- a place that was "physically and psychologically" linked to the juror's home, a place where "the intimate activity associated with the sanctity of a man's home and the privacies of life" occurs. California v. Ciraolo, 476 U.S. 207, 212-13 (1986). What is more, the juror watched that invasion occur on video, at the very same time that he was asked to evaluate an appropriate sentence for Uranga. The very purpose of the implied bias doctrine is to recognize in such circumstances that the victim-juror may dismiss any suggestion of bias even though bias exists. See Mitchell, 690 F.3d at 142; Torres, 128 F.3d at 41. Uranga received a sentence to prison for the rest of his life, from a jury that included someone who not only had a previous interaction with Uranga, but was presented with the question of how much punishment Uranga ought to receive in light of the previous harm he caused the juror! The placement on the jury of a juror with a direct connection to the case is highly unusual and precisely the type of "extreme" situation that draws into question the juror's ability to be impartial. Smith, 455 U.S. at 222. Indeed, if the Court does not presume the victim-juror was biased against Uranga -- despite the fact that the juror was not just "somehow involved" in one of the crimes at issue in Uranga's sentencing, but was the direct victim -- it is difficult to imagine how any juror could ever satisfy the

standard. See id.

Notably, courts have found implied bias in jurors who were significantly less "emotionally involved" in the proceedings than the victim-juror in Uranga's case. See Solis, 342 F.3d at 400. The quintessential example of implied bias, is a juror who is "emotionally involved in the case ... because the juror was a victim of a similar crime." Id. For instance, in Hunley v. Godinez, 975 F.2d 316, 320 (7th Cir. 1992) (cited with approval in Solis, 342 F.3d at 399 n. 42), the court implied bias to jurors who were burglarized during jury deliberations on a burglary case. Both the similarity of the jurors' experiences to the defendant's alleged crime and the timing of the jurors' experiences were key to the court's decision -- although "the jurors were initially accepted as being satisfactory,... the robberies during sequestration could easily affect their previously unbiased attitude." Id. at 320. This was true even though the jurors' losses were de minimis: "The burglar stole the foreman's $200 gold watch, and several hundred dollars in traveler's checks.... The burglar also took $10 from another juror and $24 from her roommate." Id. at 317 n. 2. Like the jurors in Hunley, Uranga's victim-juror discovered his personal connection to the case in the middle of the proceedings, when the discovery was likely to have a significant emotional impact. See id. at 320. Of course, in Hunley, unlike in Uranga's case, there was no question that someone other than the defendant perpetrated the crimes against the jurors. Yet, the Seventh Circuit held that the verdict had to be reversed due to implied bias. Id.

Courts have applied the implied bias doctrine to jurors with even more of an attenuated connection to the facts of the trial. In United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977), for instance, the court found that bank employees should not have been permitted to serve on the jury during a trial of defendants who had robbed a different branch of the same bank -- though the juros had never been victims of a bank robbery themselves -- because "[t]he potential for

substantial emotional involvement, adversely affecting impartiality, is evident when the prospective jurors work for the bank that has been robbed," and because bank employees have reason to fear a violent bank robbery. See, e.g., Dyer v. Calderon, 151 F.3d 970, 982 (9th Cir. 1998) (juror had not been "involved in the crime which was the subject of the case, nor did she have a personal relationship with any of the trial participants," but was impliedly biased because she concealed fact that her brother was murdered in a manner similar to the way the defendant was accused of murdering his victims); Scott, 854 F.2d at 699 (finding implied bias in juror whose brother investigated the defendant, where juror did not admit fact during voir dire); U.S. ex rel. De Vita v. McCorkle, 248 F.2d 1, 8 (3rd Cir. 1957) (juror who had previously been assaulted and robbed would be impliedly biased against defendants charged with similar crimes).

Furthermore, a juror's lesser connections to a defendant have given rise to findings of implied bias. For instance, in United States v. Harry Barfield Co., 359 F.2d 120, 123 (5th Cir. 1966), a civil plaintiff's elevator small talk with a juror, "inquiring about the [juror's] drugstore, and then letting the juror know to whom he was married," necessitated a new trial. Even though the juror testified that he "was not influenced, and it would no doubt be difficult to have a juror admit that he was influenced by such an approach ... and the juror here may not have been influenced," the risk that the personal connection forged in that elevator could have biased that juror was untenable. Id. See also Nell, 526 F.2d at 1230 (remanding case for consideration of bias where the juror knew the defendant and was a member of a rival union).

The implied bias standard set forth in Justice O'Connor's concurrence in Smith, and adopted by a majority of the circuit courts of appeals, requires only that "the average person in the position of the juror would be prejudiced and feel substantial emotional involvement in the case." Mitchell, 690 F.3d at 146; see also Solis, 342 F.3d at 399. If jurors who were victims of similar crimes

committed by someone other than the defendant, and even jurors involved in potentially prejudicial elevator smalltalk, could be sufficiently biasedto the extent that a new trial is required, certainly the victim-juror in Uranga's case -- himself a victim of the very defendant whose sentence he was to decide -- also meets the implied bias standard. The Fifth Circuit panel majority's findings to the contrary are clearly wrong.

A. THE FIFTH CIRCUIT PANEL'S APPLICATION OF A DE MINIMIS STANDARD CONFLICTS WITH RELEVANT DECISIONS OF THE SUPREME COURT.

The Fifth Circuit panel majority on rehearing acknowledged that Uranga had committed an offense previously against a person who had been selected to serve as a juror on Uranga's trial. See APPENDIX A at 10. The panel concluded that where the offense against the victim-juror was "a misdemeanor," and the damages to the victim-juror's property was "less than $500," they were de minimis and did "not rise to the level of the extreme situations wherein courts have previously imputed juror bias." Id. at 10-11. Judge Haynes dissented regarding the issue of implied juror bias, and in the dissenting opinion sufficiently reasoned that there should not be an application of a de minimis standard where a juror had been the victim in a prior offense committed by a defendant in which the juror was selected to serve in deciding the defendant's fate. Id. at 12-13. Judge Haynes concluded by stating

> The juror in this very case was a victim of this very defendant in a crime deemed relevant by the prosecution to sentencing this defendant to life. Pretty extreme, it seems to me. I would deny the petition for panel rehearing and stand with the original opinion. Because the majority determines otherwise, I respectfully dissent.

Id. at 13.

Out of this air, the majority panel has crafted a de minimis standard for making determinations on whether the facts of a case presented "extreme" situations sufficient to warrant a finding of implied juror bias. The de minimis concept in Uranga's case is a creature of spurious conception. The panel offers

no jurisprudential or analytical buttress for its application of the de minimis standard in implied juror bias cases, none whatsoever. It appears, instead, it was simply spawned parthenogenetically and slipped into the Fifth Circuit's encompassing storehouse of obiter dicta. In the past, a panel of the Fifth Circuit had acknowledged that a "de minimis exception" would "conflict[] with Supreme Court precedent" and that "the de minimis concept is contrary to Supreme Court precedent...." Teague v. Quarterman, 482 F.3d 769, 779, 780 (5th Cir. 2007). In Lewis v. Woods, the Fifth Circuit held that "[a] violation of constitutional rights is never de minimis, a phrase meaning so small or trifling that the law takes no count of it." 848 F.2d 649, 651 (5th Cir. 1988); see Carey v. Piphus, 435 U.S. 247, 254, 98 S.Ct. 1042 (1978).

The legal theory underlying this issue is analogous with Glover v. United States, 531 U.S. 198, 121 S.Ct. 696 (2001), in which the petitioner presented a claim of ineffective assistance of counsel at trial, which allegedly resulted in a sentence increase of anywhere between six and 21 months. See 531 U.S. at 202. The Supreme Court rejected the government's argument that a "minimal" amount of additional time on a sentence cannot constitute prejudice under Strickland v. Washington. Finding in favor of the petitioner, the Supreme Court said that "[its own] jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." Id. at 203. Thus, Glover was a sentencing case in which an alleged legal error resulted in a harsher sentence being imposed, thereby implicating the Sixth Amendment guarantee of effective assistance of counsel in a criminal proceeding.

Uranga presents a claim that during his sentencing, his fate was determined by a juror against whom he had previously committed an offense, a situation in which the facts, and a long line of case law, indicated that bias had to be imputed. The sentencing range the jurors were allowed to consider, was a term of 25 to 99 years, or life; thus, Glover applies here, as Uranga was given **LIFE**.

C O N C L U S I O N

The "implied juror bias" doctrine should be embraced by the Supreme Court as being the "Law of the Land." If the state and federal courts are allowed to follow the course that has been taken by the panel majority in this case, then it will only be a matter of time before voir dire of the prospective jurors is decided to be unnecessary, because it will make no difference if a defendant had previously committed an offense against one of the prospective jurors sometime in the past.

FOR THE REASONS SET FORTH HEREIN, Uranga respectfully prays that this Honorable Supreme Court of the United States will grant a writ of certiorari, and will request that the parties submit briefing on the issues herein presented.

Most Respectfully Submitted,

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