No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPII BEBO,
Petitioner

v.

SEAN MEDEIROS, ACTING SUPERINTENDENT,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATE COURT OF APPEALS FOR
THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether this Court should clarify its jurisprudence on the right to an impartial jury by addressing the question of whether it is an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d) to find that material that does not directly refer to the actual case under consideration categorically cannot constitute extraneous material entitling petitioner to a jury inquiry?

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The petitioner, Joseph Bebo, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case.

OPINION BELOW

The opinion of the panel of the United States Court of Appeals for the First Circuit, dated October 3, 2018, is appended hereto as Appendix A and is reported at *Bebo v. Medeiros*, 906 F.3d 129 (1st Cir. 2018).

JURISDICTION

The Court of Appeals issued judgment on October 3, 2018. No petition for rehearing was filed. This petition is being filed within ninety days of the First Circuit's opinion. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI.

> 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. XIV

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

28 U.S.C. § 2254

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

1. The State Court Trial

On March 5, 2009, petitioner Joseph Bebo was convicted of murder in the second degree following a jury trial in the Superior Court for Plymouth County, held in Brockton, Massachusetts. He is currently serving a life sentence as a result of this conviction.

The Commonwealth presented evidence at trial that Carl Schirmer, the victim, died from a stab wound to the chest sustained during a fight. J.A. 185, 208-214.[1] The fight occurred amidst a large altercation between two groups of people, one of which included petitioner and Raymond Muse, a major instigator of the fight who made repeated efforts to recruit petitioner into the conflict. J.A. 86, 35-38, 45, 64-74, 89-90, 100-101. Muse's group contained 8 people, the second group contained around 20.

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[1] Citation abbreviations are as follows: "Add." refers to the addendum to petitioner's opening brief in the First Circuit Court of Appeals, "J.A." to the joint appendix to the briefs in the First Circuit Court of Appeals, "D.E." to a United States District Court docket entry in this case, and "S.A." to the Supplemental Answer filed by the Respondent in the United States District Court, D.E. 16, and transmitted to the First Circuit Court of Appeals in a bound volume.

There were multiple physical confrontations during the fight, with rockthrowing, punching, and kicking. J.A. 33, 52-54, 58-63, 187-88, 190-191, 224. Some members of Muse's group were variously hit with a brick, stomped and kicked on the ground, J.A. 49-51, 86-93, stabbed in the leg, J.A. 48, and slammed on the ground, after which someone from the second group said "slice him." J.A. 19, 22, 43, 189, 204. Petitioner was seen with a knife in his hand at some point after he was seen backing away from the fight. J.A. 20-21, 34, 42. Someone yelled "he's got a knife" and around 4 people from the second group brandished knives. J.A. 44, 46-47.

Schirmer, the victim, had driven to the scene to help the second group in the fight. J.A. 29, 69-70. He eventually, after the fighting was already underway, parked in an area where petitioner, Muse and another member of Muse's group were standing. J.A. 30-31, 191-192, 227. Someone threw a beer bottle at petitioner. J.A. 227. Schirmer ran at petitioner, kicking and punching. J.A. 210-211, 231. Petitioner fought him. J.A. 102, 207, 210-211, 215-232. Within seconds, Schirmer yelled that he was stabbed. J.A. 214.

Muse's group fled. Surveillance video appeared to show Muse running with a knife, and petitioner with a cell phone. J.A. 138-143. Muse testified that at some point after the incident, Muse asked petitioner what happened and petitioner said he might have stabbed somebody and that the knife might have gone in. J.A. 103-104, 160-175.

In his defense, petitioner presented evidence and argued that the investigation's singular focus on him caused several missteps and enabled Muse, who was actually responsible, to escape prosecution. As evidence that Muse was the perpetrator, he pointed to, *inter alia,* Muse's temperament, the fact that Muse had a knife with him at the fight that he immediately disposed of, that he had a knife wound to his wrist, that he lied to the police multiple times, that he shaved off his hair and beard the day after the incident and threw away the clothes he had worn the day

of the fight. J.A. 78, 94-96, 105-154, 176-183, 239. Petitioner also highlighted government pressure on witnesses, including putting a 15-year old member of Muse's group in a district attorney's office room together with Muse after he had made a statement that Muse had admitted to the killing.

Petitioner noted failures in the investigation, such as not recovering the victim's bloody t-shirt and hoodie, nor a pile of bloody clothes at the scene of the fight. J.A. 178-183, 237-238, 242-251. Although a footprint casting was taken at the scene, no comparisons were made, and police did not ask for the clothing Muse wore despite the fact that he said that he had been stabbed in the wrist and bled from it. J.A. 27-28, 240-241.

In his closing, excerpts of which follow, the prosecutor offered extensive commentary on defense counsel's contentions:

MR. FLANAGAN:

. . .

> At the outset of the case, at the outset of my argument, let me just say this. I'm going to draw your attention to the evidence in this case, evidence that is before you for your consideration. But I cannot allow statements made in counsel's closing argument to go unaddressed. In the course of counsel's argument, and we will get into the details later, but there is what I would suggest is a defense strategy to distract you. Don't fall for it. Don't be fooled and don't be distracted ....It's your memory that holds. But I'm going to suggest to you that in the course of his closing argument, he made reference to numerous alleged statements of witnesses that were not stated, that are not admissible, that are not allowed to be considered because they are not reliable ....
>
> . . .
>
> But I want you to take note of the overt strategy, the argument, from counsel, experienced and talented counsel, Mr. Reddington. Don't get fooled or distracted from what the evidence shows ....
>
> . . .

J.A. 257-260.

> . . .
>
> Don't be distracted by classic strategy. Blame the state police. Talk about fingernail clippings? Or what the evidence indicates you can draw the reasonable inference. A useless footprint in an area where there were dozens of people running around by the defendant's own argument. There's two examples of attempts to get you to distrust the state police and the DA and the Brockton police. Really that's not what you should focus on. Focus on the evidence. Focus on what the eyewitnesses that were

> at the fight did. And, yes, do consider what the state police did and the Brockton police did and the investigation itself. It's fair game to consider it. But don't get fooled into buying the argument from the defense. Because the finger of blame is pointed over here, state police. Over here, the Brockton police. Over there, the State Police Crime Lab. Here, the DA's office. There at the Brockton kids on this side of the fight. There at Raymond Muse. There at the other kids from the Stoughton side of the fight. Everywhere else but where the evidence points and proves that this defendant was the man who used that knife and stood his ground and plunged it into the heart of Carl Schirmer, unarmed, at a fistfight.

J.A. 261-263.

> . . .
> And what do you hear, the statement from Mr. Muse? Mr. Muse, who also when he is interviewed by the police, he can be found. He is at his house. He leaves out Bebo's name. But what ultimately do you learn that Mr. Muse gives and testifies to at the Grand Jury? The statements of the defendant. I think I got him. I think I stabbed him. I felt it go through the skin. I think he's dead. Statements made by the defendant to Mr. Muse.

J.A. 264.

> . . . Don't get distracted. Don't get fooled with a classic strategy of point out or blame the police, blame the state police; blame the Brockton police, blame the DA's office, blame the Brockton kids, blame the Stoughton kids, blame Raymond Muse. Don't fall for that.
> . . .
> I suggest to you that when you look at the evidence, you don't allow yourselves to be distracted, don't fall for the blame game.

J.A. 265-266.

2. State Post-Trial Proceedings

The day after the jury verdict, a book entitled "Guilty," by Ann Coulter, was discovered in the jury room. The names of defense counsel, the prosecutor and the Judge in petitioner's case were written on a note inside the book. *Commonwealth v. Bebo*, No. 09-1975, 2013 Mass.App.Unpub. LEXIS 330 at *1 (Mass.App.Ct. March 21, 2013); J.A. 315.

The book's title word "Guilty" is prominently displayed in extremely large font white letters against a red background. J.A. 295. On an "About the Author" page of the book, Ann Coulter is described as a

> #1 *New York Times* bestselling author . . . [who is a] legal correspondent for *Human Events* . . .A graduate of Cornell University and University of Michigan Law School, she clerked for the Honorable Pasco Bowman II of the U.S. Court of Appeals for the Eighth Circuit, worked for the Senate Judiciary Committee, and served as a litigator with the Center for Individual Rights, a public-interest law firm dedicated to the defense of individual rights. . .

J.A. 313.

The book is subtitled "Liberal 'Victims' and Their Assault on America." J.A. 295. It advances the theses that liberals falsely claim to be victims while in fact they victimize others, that they make false claims on behalf of others whom they falsely consider to be victims (for example the poor, minorities, and women in abusive relationships), and that liberals and those for whom they advocate together participate in shunning responsibility for bad behavior. Integrated as illustrations of these themes are claims about criminal defense, criminal defense lawyers, and criminal defendants. The book comments on criminal defense lawyers:

> Liberals have nothing but admiration for criminal defense lawyers who lie remorselessly on behalf of child murderers, self-righteously informing us that it is "part of the process." Without these "Twinkie defense" champions, liberals tell us, our adversarial system of justice would collapse . . . It's one thing to vigorously defend a child molester . . .

Ann Coulter, *Guilty* 73-74 (2008); J.A. 308-309.

The book connects the worldviews of the "underclass," liberals, "derelicts," and murderers:

> The English doctor who writes under the penname "Theodore Dalrymple" says the conceptual framework of the underclass is to see themselves as the passive victims of circumstances, with no control over their own lives. This is a worldview unique to two groups-derelicts and liberals. Dalrymple reports that three murderers in the prison he serves used the exact same words to describe their crimes: "The knife went in." As Dalrymple says, "That the longhated victims were sought out, and the knives carried to the scene of the crimes, was as nothing compared with the willpower possessed by the inanimate knives themselves, which determined the unfortunate outcome." Murderers view their arrests for murder a matter of bad "luck."It's the same thing with battered women who act as if they could not possibly have foreseen the violent

> tendencies in their boyfriends. This, Dalrymple says, "serves to absolve them of all responsibility for whatever happens thereafter, allowing them to think of themselves as victims alone rather than the victims and accomplices they are."

Guilty 39-40; J.A. 304-305.

Defense counsel filed a Motion for Post-Verdict Inquiry of the Jury. *Bebo*, No. 09-1975, 2013 Mass.App.Unpub.LEXIS 330 at *1; S.A. 103-112. The trial judge held a non-evidentiary hearing and found that there was a showing that the book belonged to a juror and was brought by a juror. J.A. 283. He denied the Motion. J.A. 318-324. A consolidated appeal of the conviction and the denial of the Motion for Post-Verdict Inquiry of the Jury followed. S.A. 1-340. The Massachusetts Appeals Court affirmed the conviction and the denial of the Motion for Post-Verdict Inquiry of the Jury. It held first that the book did not constitute extraneous matter, as "it did not contain 'information, knowledge, or specific facts about one of the parties or the matter in litigation that did not come from the evidence at trial,'" and second, even if it did, petitioner did not show that the jury considered the book during deliberations. *Bebo*, 2013 Mass.App.Unpub.LEXIS 330 at *1, quoting *Commonwealth v. Greineder*, 458 Mass. 207, 246 (2010). Petitioner sought further appellate review from the Massachusetts Supreme Judicial Court, which was denied. *Commonwealth v. Bebo*, 465 Mass. 1102 (2013). J.A. 317.

3. Federal Court Proceedings

Petitioner filed a 28 U.S.C. § 2254 petition in the district court, claiming, *inter alia,* that his rights to an impartial jury and due process under the Sixth and Fourteenth Amendments to the United States Constitution were violated by the state court's denial of a post-verdict inquiry of the jury. D.E. 1, 04/08/2014. After counsel was appointed, petitioner filed a memorandum of law addressing the claim that his rights to an impartial jury and due process were violated by the state court's denial of a post-verdict inquiry of the jury, and requested an evidentiary hearing. D.E. 47,

07/17/2017. The district court heard oral argument and subsequently issued a Memorandum and Order denying the petition and the motion for evidentiary hearing. Add. 1-14. The court characterized the issue as "close," and remarked that ". . . under the prevailing caselaw in this circuit, this Court would have deemed the book in question 'extraneous material' and would have ordered a hearing to explore jury taint. All the circuits to consider such issues on direct review would have mandated the same." Add. 13. The court, however, ruled that there is room for disagreement about the breadth of the phrase "matter pending before the jury," and thus that the state court ruling was not contrary to or an unreasonable application of clearly established Federal law. Add. 13.

The district court granted a certificate of appealability under 28 U.S.C. § 2253(c) on the question of whether the book in question is "extraneous material" entitling petitioner to a hearing under "clearly established Federal law." Add. 13-14.

Petitioner filed an appeal in the First Circuit Court of Appeals. The First Circuit affirmed the district court's judgment, concluding that "in the absence of contrary Supreme Court guidance, a fairminded jurist could find," that the book Guilty, which "offers provocative commentary regarding defendants and defense lawyers and describes crimes bearing some similarity to the one at issue but that does not refer to the particular defendant or the particular case sub judice, was not 'about the matter pending before the jury,'" and that to apply *Remmer* to the facts of this case would be an extension of the clearly established Supreme Court rule. *Bebo v. Medeiros*, 906 F.3d at 138.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to review a ruling of the First Circuit Court of Appeals on an important federal question decided in conflict with this Court's precedents.

In affirming the district court's denial of petitioner's habeas petition, the First Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. Its construal of what counts as an unreasonable application of Supreme Court law concerning external influences that require juror inquiry conflicts with this Court's rulings on reasonableness review under § 2254 (d)(1) and on safeguarding the right to an impartial jury.

a. Reasonableness review under § 2254

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L.No. 104-132, 110 Stat. 1214, provides that where a state court adjudicated a claim on the merits, a petition based on the claim may only be granted where the state court adjudication:

> (1) . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

This standard for granting a petition under § 2254(d) requires that the state decision be assessed against Supreme Court law. A state court decision falls within § 2254(d)(1)'s "unreasonable application" clause when the state-court decision unreasonably applies Supreme Court law to the facts of a prisoner's case. *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

While the "more general the rule, the more leeway [state] courts have in reaching outcomes in case-by-case determinations," *Yarborough v. Alvarado*, 541 U.S. 652, 664

(2004), the fact that a rule "is stated in general terms does not mean the application was reasonable." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). *Panetti* outlined principles to guide assessment of an "unreasonable application" claim under § 2254(d)(1):

> . . . AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Carey v. Musladin*, 549 U.S. 70, 81, 127 S.Ct. 649, 656, 166 L.Ed. 2d 482 (2006)(Kennedy, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63, 76, 123 S.Ct. 1166, 155 L.Ed. 2d 144 (2003). The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. See, *e.g., Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (finding a state-court decision both contrary to and involving an unreasonable application of thc standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)).

Id. at 953.

A state court decision must be objectively unreasonable, not merely wrong or clearly erroneous, in order to be an unreasonable application of Supreme Court case law. *Virginia v. LeBlanc*, 137 S.Ct. 1726, 1728 (2017)(per curiam). A determination that a decision was not objectively unreasonable cannot, however, be made "on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case." *Williams*, 529 U.S. at 409-10. This would erroneously transform the determination into a subjective inquiry. *Id.* (noting as improper Fifth Circuit determination in which circuit court held state court's application of federal law not unreasonable because Fifth Circuit panel split 2-1 on underlying mixed constitutional question).

In *White v. Woodall*, 134 S.Ct. 1697, 1706 (2014) this Court reiterated that its clearly established precedents can be unreasonably applied in factual contexts different from those involved in the Court's previous rulings:

> This is not to say that § 2254(d)(1) requires an "identical fact pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S.Ct. 2842, 168 L.Ed.

> 2d 662 (2007). To the contrary, state courts must reasonably apply the rules "squarely established" by this Court's holdings to the facts of each case. *Knowles v. Mirzayance*, 556 U.S. 111, 122, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009). "[T]he difference between applying a rule and extending it is not always clear," but "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado*, 541 U.S. 652, 666, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004).

White, 134 S.Ct. at 1706.

The Court went on say that the critical point for the unreasonable application test is whether there could be no "fair-minded disagreement" concerning the precedent's application to such a new set of facts. *Id.* at 1706-07.

b. Safeguarding the right to an impartial jury

The clearly established Supreme Court law involved here concerns the protection of the right to an impartial jury. The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to a trial by an impartial jury. *See* U.S. Const. amend.VI; *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."(internal quotation marks omitted)); *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965). An impartial jury is one that arrives at its verdict "based upon the evidence developed at trial" and without external influences. *Irvin*, 366 U.S. at 722. This Court established more than a century ago that "the 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 and 150- 51(1892).

This Court has held that a defendant's right to an impartial jury is guaranteed by "[p]reservation of the opportunity to prove actual bias." *Dennis v. United States*, 339

U.S. 162, 171-172 (1950). Where allegations of improper jury contact were made and neither the court nor the defendant knew "what actually transpired, or whether the incidents that may have occurred were harmful or harmless," this Court ordered that the trial court "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Remmer v. United States*, 347 U.S. 227, 229-230 (1954); *Smith v. Phillips*, 455 U.S. 209, 216-217 (1982)(*Remmer* hearing is the proper protection of due process right to juror impartiality).

Determinations in *Remmer* hearings frequently turn upon juror testimony. *Id.* at 217 n.7. This Court has found a broad range of extraneous influences requiring an evidentiary hearing to determine the impact on jurors. *Remmer* said that extraneous influences encompassed a "private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury." *Id.* 347 U.S. at 229. In *Remmer*, the extraneous influence was an apparent bribe to a juror, followed by an FBI investigation of the matter involving the juror during trial proceedings; the apparent bribe was determined to have been a joke. *Smith v. Phillips* involved a job application submitted by a juror to the district attorney's office prosecuting the case on which the juror sat. In *Parker v. Gladden*, 385 U.S. 363 (1966), a bailiff said to the jurors about the defendant "oh that wicked fellow, he is guilty" and stated that if there was anything wrong with the trial, the Supreme Court would take care of it. In *Turner* this Court found that an external influence need not involve any communication to or from a juror about the case itself. There, principal witnesses for the government were deputy sheriffs who also were in charge of the jury and, as part of those duties, ate with them and drove them to and from the courthouse. Whether or not the sheriffs talked about the case, the Court found that, since

the credibility of the deputies was critical, the continual association between the jurors and deputies presented inherent prejudice. *Turner*, 379 U.S at 473. This Court has also said that extraneous influences may be introduced through reading material, such as newspaper articles that are not in evidence but are nevertheless considered by jurors in their deliberations. *Tanner*, 483 U.S. at 118 (1987).

c. The unreasonable application of this Court's law

Here, petitioner argued that the state court unreasonably applied clearly established federal law in failing to grant a request for juror inquiry. As described by the First Circuit, the material at issue was:

> . . . [A] book entitled Guilty, written by an author with a legal background . . . found in the jury room with a note containing the names of the attorneys and the judge involved in the petitioner's trial. And to make the matter even more dicey, the book contains commentary about defense lawyers lying and murderers disclaiming responsibility for stabbings they committed, using language similar to that attributed to petitioner by a witness at trial.

Bebo v. Medeiros, 906 F.3d at 136.

Petitioner contended that on these facts it was an unreasonable application of Supreme Court law to fail to require juror inquiry. Petitioner hypothesized that the state court's underlying reason for the failure, which was not clearly articulated, was that the material in question did not refer to the actual case under consideration, as opposed to refer to an issue involved in the case. He argued that a failure to require a *Remmer* inquiry on that ground is unreasonable under Supreme Court law.

Remmer articulated a juror inquiry requirement supported by this Court's precedent in *Mattox* v. *United States*, 146 U.S. 140, 149, 150-51 (1892), which characterizes extraneous influences as those that could "tend to disturb the exercise of deliberate and unbiased judgment." *Remmer*, 347 U.S. at 229. No reference to the actual case under consideration, as opposed to

reference to an issue in the case, is necessary for material to bias judgment. If courts were required to find such a reference, a court could be precluded from inquiring into a jury's consultation of a scientific article that was not admitted into evidence and that strongly criticized commonly used methods of DNA analysis that an expert at the trial testified to using. An interpretation of the *Remmer* requirement that would so clearly subvert the purpose of safeguarding the right to an impartial jury is unreasonable.

Petitioner further argued that there is evidence of the objective unreasonableness of understanding *Remmer* to require reference to the actual case under consideration. He noted that all twelve federal circuit courts of appeals have applied *Remmer* and counted material that does not specifically refer to the case at hand as extraneous and warranting inquiry, e.g., a bible, a dictionary, a textbook, or *Robert's Rules of Order*.

The First Circuit characterized the crux of the case as "whether fairminded jurists could disagree regarding the scope of the phrase 'about the matter pending before the jury.'" *Bebo*, 906 F.3d at 137. It noted that the dissent from this Court's denial of certiorari in *Joyner v. Barnes*, 135 S.Ct. 2643, 2646-47 (2015) commented that Supreme Court case law has not yet provided specific guidance on the scope of "'the matter pending before the jury'". *Bebo,* 906 F.3d at 137. It rejected petitioner's argument that evidence of the unreasonableness of the failure to apply *Remmer* in his case could be found in the fact that all of the federal circuits have applied *Remmer* to material that does not specifically refer to the case being adjudicated. The court described this argument as "'canvassing circuit decisions to determine whether a particular rule of law is so widely accepted among Federal Circuits that it would, if presented to [the Supreme] Court, be accepted as correct,'" an approach rejected by this Court in *Marshall v. Rogers,* 569 U.S. 58, 64 (2013). *Bebo,* 906 F.3d at 138.

Petitioner, however, was not proposing a rule to accept. Rather, he was offering an argument for the objective unreasonableness of the failure to find the book Guilty to be extraneous material requiring juror inquiry under this Court's existing law. Under the relevant section of § 2254(d)(1), a petitioner is required to show that an application of Supreme Court law is objectively unreasonable. Assuming the state court's reason for its ruling was that Guilty did not contain material that referred to the facts of petitioner's case, petitioner argued in effect that no federal court has adopted that as a requirement, and that the requirement is at odds with this Court's understanding of what is required of an impartial jury, as articulated in *Mattox* and referenced in *Remmer*. Unanimous agreement on a point can be some, albeit not determinative, evidence of its objective reasonableness. *Cf., e.g.* Robert Nozick, *Invariances: The Structure of the Objective World* (2001) at 90 ("Intersubjective agreement can be taken as evidence for objectivity."). Unanimous agreement in the circuits that a Supreme Court rule applies in a factual permutation that is different from the facts in the relevant Supreme Court cases can be some evidence of the unreasonableness of a failure to apply it in that factual permutation. Were it reasonable to either apply or not apply *Remmer* in that factual permutation, one would not expect unanimous agreement that it applies in such a factual permutation. Citing the unanimous agreement does not transform it into a proposed rule.

The First Circuit concluded that because *Remmer* did not define the scope of "the matter pending before the jury" and because Supreme Court cases finding extraneous influences have all involved communications or contacts relating to the specific case or parties at trial, a fairminded jurist could find that Guilty is not extraneous material requiring juror inquiry. This conclusion ignores this Court's admonitions that, under § 2254(d)(1), even a general standard may be applied in an unreasonable manner, and that § 2254(d)(1) does not require an identical

fact pattern before a legal rule must be applied. It further ignores the articulated purpose behind the *Remmer* requirement to safeguard the right to an impartial jury, i.e., a jury that "pass[es] 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 and 150-51 (1892).

The importance of this issue is manifest, and addressing it now has become more urgent with technological change. This Court has underscored the importance of safeguarding the right to an impartial jury, saying that "the failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Cases throughout the circuits catalog a vast array of potentially prejudicial materials consulted by jurors in the course of criminal trials. *See, e.g., United States v. Weiss*, 752 F.2d 777, 782-83 (2d Cir. 1985)(accounting textbooks); *United States v. Lloyd*, 269 F.3d 228, 237-244 (3rd Cir. 2001)(television show about computer virus); *United States v. Lawson*, 677 F.3d 629,639-651 (4th Cir. 2012)(Wikipedia definitions); *Oliver v. Quarterman*, 541 F.3d 329, 334-341 (5th Cir. 2008)(Bible); *United States v. Gillespie*, 61 F.3d 457, 459 (6th Cir. 1995)(dictionary);*United States v. Warner*, 498 F.3d 666, 678 (7th Cir. 2007)(article by American Judicature Society about substitution of jurors found by juror on internet); *United States v. Bassler*, 651 F.2d 600, 602 (8th Cir. 1981)(juror's notes on *Robert's Rules of Order* taken from a library book on jury duty); *United States v. Littlefield*, 752 F.2d 1429, 1431-32 (9th Cir. 1985)(article in *Time* magazine describing fraudulent tax shelters similar to defendants').

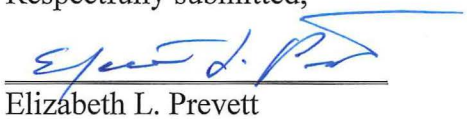
Use of the internet by Americans has increased dramatically over the years. In early 2000, half of all adults were online; by 2018, approximately 9 in 10 adults use the internet. *See Internet/Broadband Fact Sheet,* Pew Research Center, *available at: http://www.pewinternet.org/fact-sheet/internet-broadband/*

Increasing internet use provides more opportunity for jurors to access potentially prejudicial material relevant to an issue in the case but not mentioning the case itself. This in turn increases the importance of enforcing the safeguards of the right to an impartial jury by requiring juror inquiry when there are grounds to believe that those materials have been consulted.

CONCLUSION

This Court should vacate the judgment of the First Circuit Court of Appeals and clarify that it is an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d) to find that material that does not directly refer to the actual case under consideration cannot, categorically, constitute extraneous material entitling petitioner to a jury inquiry.

Respectfully submitted,



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