No. 18-7696

IN THE
# Supreme Court of the United States

TONY J. WALTON,

*Petitioner,*

v.

DAVID BALLARD, WARDEN

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The United States Court of Appeals**
**for the Fourth Circuit**

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


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## INTRODUCTION

Mr. Walton's petition demonstrated that there is a circuit split on the important and recurring due process question whether a trial court must question the jury in some fashion when there is a substantial risk to the jury's impartiality as revealed by concerns raised by the jury itself. Here, the jury expressed its inability to deliberate because a juror feared repercussions from the defendant's family, which the trial judge understood to mean that the juror "is scared as Hell, scared to death of the defendant's family and what's going to happen to her if she convicts him." Pet. 4. Yet the trial judge conducted no *voir dire* of the jury and did nothing in response, save for a general instruction on juror intimidation and impartiality.

Respondent's opposition is remarkable in that it largely ignores these undisputed facts and does not deny the importance of the question presented. Instead, Respondent primarily advances two purported vehicle problems. It curiously leads by urging that Mr. Walton's habeas petition in the district court was untimely under AEDPA, an argument it lost in the district court and then chose not to appeal. Respondent has waived this issue. In any event, it poses no obstacle to this Court's review, and the district court was plainly correct in ruling that Mr. Walton's state post-conviction motion was timely filed as it challenged his conviction on the basis that he is "innocent" of the crimes at issue. Respondent's second issue—that review should be denied because the court of appeals below denied a Certificate of Appealability ("COA")—fares no better. This Court routinely grants review in cases

where a COA has been denied, and the Petition establishes that Mr. Walton has made a substantial showing of the denial of a constitutional right.

Respondent's attempts to undermine the circuit split and argue the merits of the decisions below similarly fall flat. The undisputed fact of the jury's and trial judge's strong concerns about the safety of a juror provides the threshold showing requiring jury questioning. Indeed, federal courts of appeals are split 6-2 on the question presented, with courts in the First, Third, Sixth, Seventh, Ninth, and Tenth Circuits holding that a trial court must question the jury when it raises a substantial question of its impartiality, and with the Eleventh Circuit joining the Fourth Circuit below in holding that such questioning is not required. Indeed, the majority rule is compelled by this Court's precedents on jury impartiality. This Court's review is warranted.

## ARGUMENT

### I. Federal Appellate Courts Are Intractably Split Regarding Whether Courts Must Question Jurors When Presented with Substantial Concerns About Impartiality

1. Criminal defendants are constitutionally entitled to a trial by a fair and impartial jury. U.S. CONST., AMEND. VI. All agree on this foundational principle. *See, e.g., Dietz v. Bouldin*, 136 S. Ct. 1885, 1893 (2016) ("[T]he guarantee of an impartial jury [] is vital to the fair administration of justice.").

2. The circuit courts are divided, however, on what procedure this constitutional mandate requires when a court is presented with a substantial concern about juror bias, even though such issues arise frequently in trial courts around the

nation. At least six circuits—the First, Third, Sixth, Seventh, Ninth, and Tenth—have held that, in such situations, trial courts must meaningfully question the jury to ensure that it remains impartial. At least two circuits—the Fourth and Eleventh—have reached the opposite conclusion.

a. In *United States v. Bristol-Martir*, 570 F.3d 29, 35–36 (1st Cir. 2009), a juror conducted her own Internet research and presented it during deliberations. The trial court questioned the errant juror, the foreman, and a third juror who sat nearby in the deliberations. *Id.* at 36–38. It then "ruled that the errant juror's research and subsequent statements to the other jurors did not taint the jury." *Id.* at 38. The First Circuit held that the district court improperly failed to "inquire . . . whether jury members had been influenced by the errant juror's improper research and presentation." *Id.* at 43. Without such questioning, the court had "no way of knowing whether the errant juror's internet definitions unduly influenced a jury member's finding of guilt." *Id.* As such, the district court had "compromised the defendants' right to have a trial by an unbiased jury." *Id.* at 43–44.

Similarly, in *United States v. Resko*, 3 F.3d 684, 687 (3d Cir. 1993), during a break in the defendants' presentation of evidence, a juror informed a court officer that the jury "had been discussing the case during their recesses." The defendants filed motions for individualized *voir dire* of the jurors or a mistrial. *Id.* at 687–88. The court denied the motions, instead opting to present the entire jury with a questionnaire about whether they had participated in such discussions and whether they had formed an opinion about guilt. *Id.* at 688. The Third Circuit held that,

"because the district court failed to engage in any investigation beyond the cursory questionnaire," the court "simply ha[d] no way to know the nature of the jurors' discussions and whether these discussions in fact resulted in prejudice to the defendants." *Id.* at 690. Ultimately, the Third Circuit did not believe that the trial court "could have had enough information to make a reasoned determination that the defendants would suffer no prejudice" without "engag[ing] in further inquiry—such as individualized voir dire—upon which it could have determined whether the jurors had maintained open minds." *Id.* at 691.

Likewise, in *United States v. Blitch*, 622 F.3d 658, 600–02 (7th Cir. 2010), after the court declared a mistrial based on jurors' fears for their personal safety, the second jury impaneled expressed the same fear. This time, the trial court did not conduct individualized *voir dire*. *Id.* at 662–63. Instead, it opted to "bring[] in the entire venire at once" and "state that there had never been a problem with juror safety and then ask whether any person had a problem serving on the jury." *Id.* at 663. The Seventh Circuit refused to defer to the trial court's determination that the jury could remain impartial precisely because it had not conducted an individualized inquiry and thus had no basis to resolve the issues of bias, prejudice, and impartiality. *Id.* at 665–67.

Similarly, in *United States v. Simtob*, 485 F.3d 1058, 1060 (9th Cir. 2007), a juror expressed safety concerns because the defendant had been "eyeballing" him. The district court "ruled that the jury had been repeatedly admonished not to make up its mind about any issue" and "was absolutely satisfied that the jury had taken

those admonishments appropriately." *Id.* (internal quotation marks omitted). The Ninth Circuit held: "When a source presents the court with a colorable claim of juror bias, the court must make some inquiry of the juror . . . to determine whether the allegedly affected juror is incapable of performing the juror's functions impartially." *Id.* at 1064 (internal quotation marks omitted). Moreover, because the district court failed to "consider the possibility that the juror may have communicated his or her perception of a threat to other jurors," it "had no way of knowing whether any juror harbored lingering bias from the eye-balling incident." *Id.* at 1065; *see also United States v. Davis*, 177 F.3d 552 (6th Cir. 1999) (holding that a juror's mid-trial request to be excused because of fears for his safety and his revelation that he discussed those fears with fellow jurors should have prompted the trial court to conduct an inquiry into the possible effect of juror's remarks on other jurors).

The Tenth Circuit reached a similar conclusion in *United States v. Thompson*, 908 F.2d 648 (10th Cir. 1990). There, during deliberations, a newspaper published an article mentioning the defendant's withdrawn and excluded guilty plea. *Id.* at 649. Rather than asking about the article specifically, the district court asked generally "whether anything had occurred during the weekend that might affect the jurors' ability to be fair and impartial." *Id.* The Tenth Circuit held that, "[a]t a minimum[,] the court had a duty to ask whether the jurors had read the article concerning this case," noting that "the reason for the lack of specific evidence concerning the juror's connection with the newspaper article was the trial court's failure to question the jurors about their exposure." *Id.* at 650–52.

b. The Eleventh Circuit reached a contrary conclusion in *United States v. Bradley*, 644 F.3d 1213 (11th Cir. 2011). There, before the trial ended, the court learned that two jurors had stated that they would "make sure the defendants go to jail." *Id.* at 1278 (internal quotation marks and alterations omitted). The court did not question the two jurors, nor did it question the juror who overheard the comment. *Id.* Instead, it "decided to (1) instruct the jurors once again on the presumption of innocence and (2) direct them to refrain from coming to premature conclusion." *Id.* It then had the jurors individually confirm that they could abide by these instructions. *Id.* The Eleventh Circuit was willing to assume that "the jurors had merely been influenced . . . by the Government's evidence to that date." *Id.* at 1279. Accordingly, it held that the district court's failure to question the involved jurors was not an abuse of discretion. *Id.*

By denying Petitioner a certificate of appealability, the Fourth Circuit has effectively joined the Eleventh Circuit. The Fourth Circuit's ruling means that the trial court was not required to question the jurors about the potential bias that stemmed from the juror's fear and statements during deliberations.

3. As these cases demonstrate, Respondent is wrong about whether this case implicates a circuit split. *See* Opp. 24–26. The State's argument that the trial court's discretion is "at its broadest" with respect to what the juror may have shared during deliberations is equally misguided. *Id.* at 26. That discretion is "not unfettered." *Blitch*, 622 F.3d at 671. The trial court here understood that a juror feared for her life and had communicated that fear to the rest of the jury, leading it

to conclude it could not deliberate. Without any investigation into the scope of the potential bias, the trial court had no basis to determine whether the jurors could remain impartial.

4. Respondent also mistakenly relies upon *United States v. Benabe*, 654 F.3d 753 (7th Cir. 2011). Opp. at 24. There, the claim of impartiality was premised on the defendants' relative's post-verdict belief that she recognized a juror and had discussed the defendants with that juror, who had also been "a little frightened" upon seeing the defendants' family members in public. *Benabe*, 654 F.3d at 780. The juror's questionnaire, however, contradicted the relative's account, and the Seventh Circuit concluded that "[i]t was entirely within the trial court's discretion to conclude that [the relative] was mistaken" and "the contacts that [she] recounted did not happen." Id. at 781. Here, concerns of bias arose during deliberations and were not based on a second-hand account that the trial court found incorrect; indeed, the court believed the juror was "scared to death." This level of concern was far more likely to affect other jurors, an issue the trial court did not explore.

## II. The Courts Below Are Wrong: The Trial Court Needed to Question The Jurors to Assess the Potential Prejudice

1. The trial court had no basis to conclude that the fearful juror, or other jurors in the room, could remain impartial. As the First, Third, Seventh, Ninth, and Tenth Circuits have held, this failure deprived Mr. Walton of his right to a trial by an impartial jury. Importantly, that conclusion is consistent with this Court's precedent. *See, e.g.*, *Remmer v. United States*, 347 U.S. 227, 229–30 (1954) ("We do not know from this record . . . what actually transpired, or whether the incidents that

may have occurred were harmful or harmless. . . . The trial court . . . should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial . . . .").

2. The State's arguments to the contrary are meritless. *First*, the State does not argue that the Sixth Amendment rights discussed in these cases were not "clearly established." The trial court's failure here was *both* an abuse of discretion and an unreasonable application of clearly established federal law. Moreover, the State's case-by-case analysis is flawed. For example, although the Third Circuit reasoned that individualized questioning would not be required where there were "countervailing concerns" or "some basis for determining whether the defendants had been prejudiced," Opp. 21, neither was present here.

*Second*, the State agrees that courts must "ensure that jury members can remain impartial *when they have been exposed to extrinsic information that is potentially prejudicial*." *Id.* (citation omitted). That a juror's statements suggesting that she was "scared to death" of the defendant's family is both "potentially prejudicial" and "extrinsic" to the evidence presented in the case is beyond question.

*Third*, the State recommends deference to the trial courts' assessments because they generally concern "a host of factors impossible to capture fully in the record, such as inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Id.* at 22 (internal quotation marks omitted). But it oddly ignores that the trial court here did not assess any of these factors; it relied solely on a note. Without any further inquiry, "the judge c[ould] only guess as to the existence

or non-existence of prejudice." *Resko*, 3 F.3d at 694. The State's assessment of the juror's fear, Opp. 25, similarly falls short. There was no inquiry, and thus no basis for deference.

## III. This Case Is an Excellent Vehicle to Resolve the Question Presented

The question presented is squarely at issue here, and Respondent does not deny that Mr. Walton's petition in this Court is timely. Unable to meaningfully refute the circuit split on the question presented or the error of the courts below, Respondent primarily urges two meritless purported vehicle problems.

1. Respondent first urges that Mr. Walton's underlying petition was time-barred under AEDPA because his state post-conviction motion was supposedly itself untimely. Opp. 10–13. But Respondent lost this argument in the district court and failed to appeal it. *Walton v. Ballard*, No. 2:15-CV-11423, 2017 WL 1102595, at *5 (S.D. W. Va. Mar. 24, 2017), appeal dismissed, No. 17-6435, 2017 WL 4574482 (4th Cir. Apr. 14, 2017). It has therefore waived the argument, which should present no obstacle to this Court's review. *See Cutter v. Wilkinson*, 544 U.S. 709, 719 n.7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.").

Moreover, Respondent's timeliness argument is wrong, as the district court held. Respondent concedes that, if Mr. Walton's state post-conviction motion challenged his underlying conviction, it was timely under West Virginia's Rule 35(a). Opp. 12. However, his motion did not merely seek "to reduce a validly imposed

sentence." *Id.* Instead, Mr. Walton argued that his sentence was invalid and illegal because he was actually innocent. *See, e.g.*, *Walton v. Ballard*, No. 2:15-cv-11423, Dkt. No. 21-3 at 2 (urging that he had been punished for a crime he "did not commit"); *id.* at 3 (stating that he is "innocent of the crime [he was] charged with" and requesting that the charges be dropped). The state court's years-late, generic denial of pending motions does nothing to change this. Opp. 13. Thus, as the district court held, Petitioner's motion was "properly filed" and tolled AEDPA's limitations period.

2. Respondent also asserts that this case is a poor vehicle because the Fourth Circuit below denied a COA. But this Court routinely grants review in cases where a COA has been denied. *See, e.g., Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009) (certiorari granted, even though COA denied, and holding, after full briefing and argument, that a state court's grant of a right to file an out-of-time direct appeal resets the date for when a conviction becomes "final" under AEDPA); *Banks v. Dretke*, 540 U.S. 668, 703–05 (2004) (certiorari granted, even though COA denied, and holding that "jurists of reason could disagree" about the application of Federal Rule of Civil Procedure 15(b) to habeas proceedings); *Tennard v. Dretke*, 542 U.S. 274, 289 (2004) (certiorari granted, even though COA denied, and holding after full briefing and argument, that "the Fifth Circuit's 'uniquely severe permanent handicap' and 'nexus' tests are incorrect" and "that reasonable jurists would find debatable or wrong the District Court's disposition of Tennard's low-IQ-based Penry claim,"); *Miller-El v. Cockrell,* 537 U.S. 322, 338, 348 (2003) (holding, after "a preliminary . . . consideration of the three-step *Batson* framework," that appellate court should have issued a

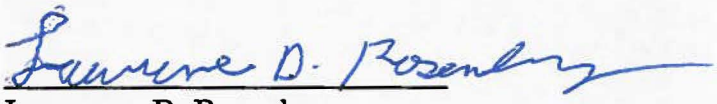
certificate of appealability); *Penry v. Johnson,* 532 U.S. 782, 800, 803–04 (2001) (reversing in part the Fifth Circuit's denial of a certificate of appealability and holding, after full briefing and argument, that the supplemental jury instruction at Penry's second trial "provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence.")

Moreover, Respondent's articulation of the certificate of appealability standard is wrong. "A COA may issue 'only if the applicant has made a substantial showing of the denial of a constitutional right.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Given the undisputed facts, Mr. Walton's petition easily satisfies that standard. However, the petition also satisfies Respondent's proffered "unreasonable application of, *clearly-established Federal law*" standard, Opp. 15, because the circuit conflict concerns the application of Supreme Court precedent. *See, e.g.*, *Bristol-Mártin*, 570 F.3d at 41 n.5 (discussing *Remmer*); *Resko*, 3 F.3d at 690 (discussing *Remmer* and several other Supreme Court cases); *Blitch*, 622 F.3d at 664 (discussing Supreme Court cases); *Simtob*, 485 F.3d at 1064 (discussing *Remmer*); *Thompson*, 908 F.2d 648, 652 (quoting a Tenth Circuit case citing *Remmer*); *Bradley*, 644 F.3d 1213, 1279 (distinguishing *Resko*, which relied on *Remmer*).

## CONCLUSION

This Court should grant the Petition.

Respectfully submitted,



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