

No. _____

In the
Supreme Court of the United States

Lee Alvin Vincent,

Petitioner,

v.

Brian Williams, et al.

Respondent.

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

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether a juror's love for an adverse party (co-defendant) constitutes actual or implied bias and thus violates the defendant's right to an impartial jury.

Whether section 2254(e)(1) forecloses relief to a petitioner who presented all his available evidence to the state court.

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lee Alvin Vincent respectfully prays that a writ of certiorari issue to review the memorandum opinion of the United States Court of Appeals for the Ninth Circuit. *See* Appendix B.

OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Ninth Circuit affirming the denial of Vincent's petition for a writ of habeas corpus, issued on May 2, 2019, is unpublished. *See* Appendix B.

JURISDICTION

The United States District Court for the District of Nevada had original jurisdiction over this case, pursuant to 28 U.S.C. § 2254. The district court granted a certificate of appealability. The Ninth Circuit affirmed the district court's decision on May 2, 2019. *See* Appendix B. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. *See* also Sup. Ct. R. 13(1).

STATEMENT OF THE CASE

During Vincent's trial, one of the jurors fell in love with his co-defendant, Ricky Vazquez. After sitting through the week-long joint trial, in which Vazquez repeatedly blamed Vincent for the offense, the juror convicted Vincent of first-degree murder. Vazquez was convicted of the lesser charge of second-degree murder. Three hours after the verdict came down, the juror tried to meet Vazquez in jail. She then continued a romantic correspondence with him for at least one year afterwards.

The juror's love for Vazquez, or according to the trial court, her "bizarre infatuation" for him, plainly deprived Vincent of his constitutional right to an

impartial jury that was willing and able to determine his guilt solely on the basis of the evidence at trial.

Vazquez blames Vincent at trial.

In the early morning of September 10, 2006, in Las Vegas, Nevada, Richard Morris got in a car with Lee Vincent, Ricky Vazquez, and Farin Estrada. Morris brought a concealed pistol with him, as did at least one of the other occupants of the car.

Around 7 o'clock that morning, two witnesses heard gunshots in their neighborhood. A car drove off; Morris's body lay in the road with six gunshot wounds. Morris died from his injuries.

A grand jury returned a single indictment against both Vincent and Vazquez on November 8, 2006. The indictment charged both defendants with conspiracy to commit murder and murder with use of a deadly weapon.

Before trial, Vincent moved to sever his joint trial with Vazquez. Vincent argued he "will have to endure the statements of Vazquez, implicating Vincent, without the ability to cross-examine Vazquez. Vazquez's statements may be crucial to the State's case." And he argued the potential for antagonistic defenses in this case warranted severance. The court denied the motion.

A four-day joint trial began on Monday, October 20, 2008. In opening, Vazquez's counsel argued, "What the evidence is going to show [is] that . . . Farin Estrada set this entire thing up with Mr. Lee, not my client."

After several witnesses testified, Vincent renewed his motion to sever again. Vincent's counsel noted Vazquez's counsel had elicited testimony from Farin Estrada to the effect "that this robbery was planned by her and [Vincent], that he said let's do it, she said okay. . . [Vazquez] was not involved." The court denied the renewed motion to sever.

In closing, Vazquez's counsel argued to the jury that Vincent and Estrada planned the robbery while Vazquez waited innocently in the car. He proposed, "If there's a conspiracy here, who's the conspiracy to rob with or between? . . . Lee Vincent and Farin Estrada." He argued that Vazquez "did not instigate this, didn't start this, wasn't a ringleader in this," and either Vincent or the decedent pulled a gun first, not Vazquez—the shooting caught Vazquez by surprise. Vazquez's counsel concluded that the jury should "apportion the liability. You don't punish the whole class because one kid is talking. Do not punish my client. He did not instigate this." Vincent's counsel agreed with Vazquez's discussion of the general lack of evidence in this case, but noted that, "[o]f course, there's some [of Vazquez's closing argument] that I disagree with."

A juror falls in love with Vazquez

At some point during trial—before the verdict—one of the jurors, Marnie Ramirez, became romantically and sexually enamored of Vazquez.¹ Later evidence

¹ The trial court noted: "All right. At least to some extent, Mr. Vazquez had the benefit of a bizarre infatuation by one of the jurors." The trial court also found,

showed that during jury deliberations, this juror was a holdout “who wanted to convict Vazquez of voluntary manslaughter, a lesser charge.” While she did not have her way, the jury did apportion more liability to Vincent and less to Vazquez, as requested by Vazquez’s counsel in closing.

The jury returned guilty verdicts against both defendants. On October 24, 2008, the jury found Vincent guilty of first degree murder with the use of a deadly weapon, and Vazquez guilty of second degree murder with the use of a deadly weapon. The transcript of proceedings indicates the jury was excused at 2:51 p.m. on Friday, October 24, 2008, and the verdict forms were filed in open court at 3:55 p.m.

At some point, whether during or after trial remains disputed, Juror Ramirez conducted independent research into codefendant Vazquez, with whom she was falling in love. She googled him and went to his MySpace page. After the verdict came down, the juror tried to visit Vazquez in the Clark County Detention Center three and a half hours after the verdict was announced. When she wasn’t able to get into the jail, Ramirez wrote a letter to Vazquez that same day using a false name. She wrote:

Hi Ricky! 10/24/08
So how are you? How’s your case going? I don’t know much about what happened and well I wouldn’t be able to help you anyway but I just want to show my support and sympathy. So my name is Jasmin so nice to meet you, I saw the profile on MySpace. And well if there’s anything you think I can help you with, let me know. I went down to the Detention Center today to visit you but was told that I had to go back next

“a juror had ‘disturbing feelings for Mr. Vazquez’ that ‘didn’t just kind of crop up following the verdict. So I think it was probably a progression as she watched the two defendants during trial.”

Wednesday, so I will be there to see you and so we can met [sic] each other. Hopefully you want to keep the letters going and you can keep updating me on how your whole situation is going. How do you feel? I want to help at least just by being friends, or just being here for you. And I think it sucks that I don't get to see you well I get to see you through a camera. What the hell is that? That just makes me hella angry! I wanted to be able to touch you and hug you. I guess not going to happen. Well Ricky write back please and once you see who I am you'll probably want to keep in touch. Wish you the best of luck!

Love, Jasmin

A week later, Juror Ramirez successfully visited Vazquez in jail. Ramirez and Vazquez continued to exchange letters thereafter. These letters show a long-term, sexually-charged relationship developed. Among other things, Ramirez sent Vazquez letters with the following statements:

- “I guess now the conversation changes a bit since you know who I am and I know about your case. I did see that your sentencing date is in December so at least I get to see you until then, but what about after? . . . Just because it would be nice if I could keep on seeing you. . . . I can support you in any way I can.”
- “Okay so probably now I might go into some personal stuff but just out of curiosity, what do you do about sex? Ha ha I know you don't have to answer if you don't want but personally I would go crazy, I guess I can be safe saying that sex is my addiction . . .”
- “I found your record online and well I'm good with finding information like that . . .”
- “I like how you look with glasses and a suit, haha, pretty decent.”
- “Ricky, I think I should stop writing now, two letters in one day is more than enough.”
- “The only good thing about prison would be that I will finally get to actually see you and be able to touch you and see where it all leads to.”

- “[Y]es I like drinking and I like sex, pretty cool to know you do too. . . . So yea sex addict, haha, and well I don’t know if it’s okay to talk dirty on letters or will I get in trouble for it? I’m pretty straight forward so when I feel the need for sex I just get it and I always get what I want! Ricky, I don’t think you’ll have to work hard to get me to fall, I fall for guys quite easily which I totally hate! I’m just weak like that and I’ll give you a ‘hint’ if you [r]eally want to get me, smile and I’m all yours!” (emphasis in original).
- “I like the sex a bit on the [r]ough side, the kinda hard sex that almost hurts, what a freak, huh? So I must tell you that I really enjoy giving oral more than I like getting it myself so that’s a plus for you. But I really don’t know how much we can actually do other than kiss. I have never had this kind of experience before and well you can tell me how these things work can you actually have some one [sic] go see you and would you be able to have sex with them?”
- “About the boyfriend, I don’t know if you want to know but I am married! Ouch, surprised much? . . . And about being a freak, maybe I can show you how much of a freak I am whenever I get to physically see you! Oh and I’ll take some pictures so you can help your imagination a little.”
- “Now I’m worried! So they took my letters? Why? I just hope I’m not in trouble or anything . . . I want to keep talking, writing and seeing you. But my husband is coming home on Sunday so I do want to ask you to stop writing anything sexual, though we can do that when I go see you.”

Vazquez also sent Juror Ramirez a letter. On November 5, 2008, he wrote he “can’t stop dreaming about” her and “I have so much love trapped in my heart and it’s all yours if you want it...I just can’t help myself, please write back and tell me how you feel okay!”

In the meantime, on November 3, 2008, Lee Vincent moved for a new trial based on the severance issue he raised multiple times before and during trial. He argued again that the defense strategies were antagonistic, as Vazquez had

“repeatedly emphasized through witnesses that [Vincent] was the one who arranged the meeting and was the one who knew the parties involved.” It does not appear on the record that Vincent or his counsel were yet aware of the contacts between Juror Ramirez and Vazquez.

Two days later, Vazquez moved for a new trial. The motion alleged a juror visited Vazquez at the conclusion of his trial and told Vazquez she had performed independent research on him during trial. Vazquez requested an evidentiary hearing.

In opposition to Vazquez’s motion for a new trial, the state conceded that Juror Marnie Ramirez used the alias “Jasmin Rosales” to send a letter to Vazquez on or about the day the verdict was returned. The state also conceded the following:

Several additional letters were sent to Vazquez at [the Clark County Detention Center] dated after October 24th. In these letters, [Ramirez], a married woman, states several things *inter alia*: professes her love for Vazquez; expresses a desire to maintain contact with Vazquez in the future; express a desire to have a sexual relationship with Vazquez; expresses a desire to be present at his sentencing date in December; and asks Vazquez to continue to call her on the telephone from jail.

The state attached several of the letters to the opposition.

On December 1, 2008, the court held an evidentiary hearing regarding Juror Ramirez. Ramirez testified. She admitted to visiting Vazquez after trial and visiting his MySpace page the same day. She denied accessing his MySpace page during the trial. She admitted to using the name Jasmin Rosales because she “didn’t want to use [her] real name.”

During sentencing, the state argued that juror Ramirez’s infatuation with Vazquez influenced her deliberations:

As to Mr. Vazquez, Your Honor, . . . he is the beneficiary of what -- obviously, this Court now has heard through an evidentiary hearing and from the verdict and the facts of this case, conduct by a juror, which is, frankly, outrageous, . . . and for the record, that same juror is in the courtroom today. I find her presence here, while not unlawful, offensive [Vazquez] has received the benefit of what clearly was a violation of a . . . juror’s oath.

The court agreed: “All right. At least to some extent, Mr. Vazquez had the benefit of a bizarre infatuation by one of the jurors. . . . To the extent that impacted the verdict, we don’t know.”

The court sentenced Vazquez to two consecutive sentences of life with the possibility of parole after ten years imprisonment and Vincent to two consecutive sentences of life with the possibility of parole after twenty years. The court entered Vincent’s judgment of conviction on January 22, 2009.

Vincent timely appealed to the Nevada Supreme Court. On appeal, Vincent argued the trial court should have granted the motion to sever and the motion for a new trial. Vincent argued that “antagonistic defenses warranted severance,” and—for the first time on appeal—he argued that a new trial should have been granted based on the “unusual . . . circumstance regarding a juror.”

The Nevada Supreme Court affirmed. Overlooking the fact that Vincent failed to raise the juror bias claim below, the court rejected the claim under state law, invoking the state’s palpable-abuse-of-discretion standard from *Domingues v. State*,

917 P.2d 1364, 1373 (Nev. 1996). On March 11, 2010, the Nevada Supreme Court issued remittitur.

On March 31, 2010, Vincent filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the District of Nevada.

Almost ten months later, on January 25, 2011, the district court appointed the Federal Public Defender as counsel. On February 28, 2011, Vincent filed a counseled first amended petition for a writ of habeas corpus in the United States District Court. Concurrently, Vincent filed a motion to stay pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to allow him to first exhaust claims in state court. *Vincent v. McDaniel, et al.*, Case No. 3:10-cv-00181-HDM-VPC, ECF No. 16 (D. Nev. July 15, 2011). The district court granted the motion and issued a stay.

Concurrently with his federal petition, on February 28, 2011, Vincent filed a timely state petition for a writ of habeas corpus. In relevant part, Vincent claimed the juror misconduct warranted a new trial because “the juror’s misconduct benefitted Vincent’s co-defendant but substantially prejudiced Vincent and denied him his right to a fair trial and due process under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.”

The state trial court set an evidentiary hearing. On the second day of the evidentiary hearing, on March 19, 2012, Juror Ramirez testified. She again admitted to trying to visit codefendant Vazquez the day the verdict was rendered, and then wrote him a letter on the same day. She claimed she visited Vazquez’s MySpace page on the night of October 24, 2008. She admitted she did a Google search for him and

saw there was a Review Journal article about him. She claimed she was “good” at independently researching online, such as when she found “the information on how to, like, send him letters or how to get in touch” or found his MySpace account.

She claimed she did not have feelings for Vazquez during the trial; instead, she claimed that immediately after the verdict was rendered in the mid-to-late afternoon of October 24, 2008, she went home, researched him on Google and MySpace, and at about 7 p.m., she tried to visit him in jail. The same evening, she was thinking about Vazquez and could not sleep, so she wrote him a letter.

She admitted once she spoke with Vazquez in the county jail, they continued to speak on the phone “maybe about once or twice a day.” She was planning to be in contact with him for an extended period of time and to have a long-term relationship with him.

Ramirez also testified that her contacts with Vazquez caused her problems at home and “it was a big mistake.” At first, her husband was in Mexico and did not know that she was exchanging letters with an inmate or that she attended Vazquez’s sentencing. When her husband found out about her contacts with Vazquez, he did not approve. They divorced.

Ramirez testified she never tried to contact Vazquez before the verdict, and nothing affected her ability to be impartial toward Vincent. But there were moments of untruthful testimony. For instance she indicated she never talked about the jury’s deliberations with Vazquez, but her letters to Vazquez prove otherwise. Also, she was not forthcoming about how many letters she wrote him. Asked whether she told

the truth in her testimony, she replied, “As far as I remember, yes.” Ramirez admitted Jasmin Rosales was an alias she created to avoid “the situation that I’m in now,” presumably referring to the fact that the state, defense, court, and media found out about her contacts with Vazquez and called her to testify.

After Ramirez’s testimony, the court noted, “[O]f the thousands of jurors that I’ve seen, this is the first time I’ve ever seen anything like this. . . . I think it’s troubling that someone would become infatuated with an individual that they’ve just convicted of . . . second-degree murder, but she was young, you know, maybe naïve.” The court correctly identified the relevant question for the purposes of the Sixth Amendment, which is whether this troubling infatuation with Vincent’s antagonistic codefendant caused her to have a bias against Vincent during trial or deliberations.

To this end, the state trial court found this infatuation must have developed during trial, not for the first time between when the verdict came down and when she tried to visit Vazquez in jail only a few hours later. The court found “I think that’s fair . . . that [these feelings] didn’t just kind of crop up following the verdict. So I think it was probably a progression as she watched the two defendants during the trial.” The trial court, however, concluded that these feelings did not adversely impact Vincent.

The trial court entered a written order denying Vincent’s state habeas corpus petition on April 26, 2012. The prosecutor drafted the order.

Vincent appealed. Among other claims, he presented the Nevada Supreme Court with his juror-bias claim which is currently before this court.

On July 23, 2013, the Nevada Supreme Court affirmed. Regarding the juror-bias claim, rather than address the merits as the state trial court did, the Nevada Supreme Court simply held, “These issues were considered and rejected on direct appeal. . . . The doctrine of law of the case prevents further litigation of these issues and ‘cannot be avoided by a more detailed and precisely focused argument.’ Therefore, the district court did not err in denying these claims.” The court issued remittitur on August 20, 2013.

On October 4, 2013, Vincent moved to reopen his federal case. On December 31, 2013, Vincent moved for leave to file a second amended petition for habeas corpus. The district court granted both motions.

The state answered and Vincent replied. On September 18, 2017, the district court denied the petition. The court granted a certificate of appealability for the juror bias claim. On October 3, 2017, Vincent timely appealed. The Ninth Circuit affirmed the denial of the petition on May 2, 2019. App. B.

REASONS FOR GRANTING THE PETITION

I. One of the twelve jurors in Vincent’s trial became sexually and romantically infatuated with Vincent’s codefendant during the trial. The codefendant’s theory of defense was to blame Vincent for the crime. Therefore, Vincent was not tried by an impartial jury.

It is clearly established that the Constitution “guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.” *Irwin v. Dowd*, 366 U.S. 717 at 722 (1961). The right to an impartial jury, which is also safeguarded by the Constitution’s provisions for due process and a fair trial, means “a jury capable and willing to decide the case solely on the evidence before it.” *McDonough Power*

Equipment Inc. v. Greenwood, 464 U.S. 548, 554 (1984), *citing Smith v. Phillips*, 455 U.S. 209, 217 (1982). Thus, the clearly established principles governing the right to an impartial jury make the bottom line of this case straightforward: if Juror Ramirez was biased against Vincent, a new trial is required. *See Irvin*, 366 U.S. at 722.

The real question in this case is whether the juror's obvious bias towards Vazquez affected the juror's consideration of the case against Vincent. It clearly did.

A. Juror Ramirez was biased towards Vazquez

The record is clear: Juror Ramirez developed a bizarre infatuation with Vincent's codefendant, Vazquez, during the trial, after *voir dire* and before rendering a verdict (the trial court found that a juror had "disturbing feelings for Mr. Vazquez" that "didn't just kind of crop up following the verdict. So I think it was probably a progression as she watched the two defendants during trial.")

Further, the record is clear that Ramirez's feelings for Vazquez involved the desire to form a long-term relationship with him. Not only do her letters to Vazquez show this to be the case, she expressly admitted it to be true. Therefore, beyond simply finding Vazquez attractive, Ramirez developed a vested interest in Vazquez's life—she wanted to be a part of it.

The record is clear Ramirez's feelings for Vazquez played a role in her deliberations in the case, at least to the benefit of Vazquez. Indeed, the state trial court found this to be true: "At least to some extent, Mr. Vazquez had the benefit of a bizarre infatuation by one of the jurors." Also, the state argued this was true and used this fact to its advantage during Vazquez's sentencing hearing (arguing Vazquez

was “the beneficiary of what—obviously, this Court has heard through an evidentiary hearing and from the verdict and the facts of this case, conduct by a juror, which is, frankly, outrageous [Vazquez] has received the benefit of what clearly was a violation of a . . . juror’s oath.”).

As the state correctly pointed out, the verdicts and the record in this case demonstrate that Ramirez’s feelings played a role in her deliberations. Just as Vazquez’s counsel requested in closing, the jury apportioned less liability to Vazquez and more to Vincent.

Further, Ramirez admitted to the Las Vegas Review Journal she was a holdout juror on Vazquez’s behalf: “Ramirez, married and a mother, said she was the hold-out on the jury who wanted to convict Vazquez of voluntary manslaughter, a lesser charge.” Ramirez’s letters to Vazquez show she wanted to help him however she could: “I can support you in any way I can.” Finally, the circumstances gave her motive to help him, given her interest in being a long-term part of his life, and her feelings likely clouded her judgment. Juror Ramirez was biased towards Vazquez.

B. Juror Ramirez’s bias towards Vazquez affected her consideration of the case against Vincent

The record clearly shows that Vazquez’s theory of defense was to blame Vincent to the exclusion of Vazquez, or at least to present Vazquez as significantly less culpable than Vincent. In opening, Vazquez’s counsel argued, “What the evidence is going to show [is] that . . . Farin Estrada set this entire thing up with Mr. Lee [Vincent], not my client.” During a break in the trial, Vazquez’s counsel

explained to the court that his defense theory was, in fact, that “the shots came from the driver, Mr. Vincent. . . . [My client, Vazquez] doesn’t know what’s going on because he doesn’t know there’s a robbery.”

Throughout trial, Vazquez’s counsel asked questions designed to support his defense theory. Vazquez first elicited testimony that a witness was “very upset” when Vincent arrived on his property the morning of the alleged murder. The witness “didn’t want him on my property,” he stated, due to some undisclosed incident that occurred with Vincent weeks prior. And Vazquez’s counsel asked Estrada, an occupant of the car during the shooting, “Do you recall . . . saying that you talked to Lee [Vincent] and Lee only about committing a robbery?” He asked her, “[Y]ou said the only person you talked to about a robbery was Mr. Lee Vincent, is that correct?”

Finally, Vazquez confirmed his anti-Vincent defense theory to the jury during closing. He argued Morris, the decedent, called Vincent for meth, repeating Vincent’s name. He reminded the jury about the testimony of a mysterious prior incident involving Vincent. He argued that due to this prior incident, a witness warned Morris not to get in the car with Vincent.

Further, Vazquez’s counsel argued to the jury that Vincent and Estrada planned the robbery while Vazquez waited innocently in the car. He proposed, “If there’s a conspiracy here, who’s the conspiracy to rob with or between? . . . Lee Vincent and Farin Estrada,” and “there was an agreement made for Vincent to rob someone. An agreement made for Vincent, not my client Ricky Vazquez,” and, “there was an agreement made for Vincent to rob someone, not Ricky.” He argued Vazquez “did not

instigate this, didn't start this, wasn't a ringleader in this," and that either Vincent or Morris pulled a gun first, not Vazquez. The shooting caught Vazquez by surprise.

In conclusion, Vazquez's counsel asked the jury to "apportion the liability. You don't punish the whole class because one kid is talking. Do not punish my client. He did not instigate this." Vincent's counsel agreed with Vazquez's discussion of the overall lack of evidence in this case, but noted that, "[o]f course, there's some [of Vazquez's closing argument] that I disagree with." Ultimately, if the jury was to accept Vazquez's defense theory, they needed to reject Vincent's.

When Ramirez developed her infatuation with Vazquez during trial, and developed a desire to have a long-term relationship with him, this rendered her partial towards Vazquez. And because Vazquez's defense was to apportion greater blame to Vincent, Ramirez's partiality toward Vazquez rendered her biased against Vincent. Such a bias is not based on the evidence presented at trial or the juror's logic, nor is she "indifferent" about the case or parties as the constitution requires. *See Irvin*, 366 U.S. at 722.

The touchstone of this inquiry under the clearly established principles governing the right to an impartial jury under Fifth, Sixth, and Fourteenth Amendment is simply whether the juror was biased against the defendant. For the reasons explained above, the record established that she was. It is impossible to reasonably separate Juror Ramirez's bias towards Vazquez from her bias against Vincent. If the juror's infatuation for Vazquez led her to accept his argument that he was less culpable, she would also have accepted Vazquez's repeated suggestion that

Vincent was more culpable. The juror’s own testimony reflects this bias. Just as she was infatuated with Vazquez, she testified that Vincent (who was accused of exactly the same crime) “scared” her. Simply put, Juror Ramirez deprived Vincent the right to an impartial jury because her bias to the favor of Vazquez, who presented a defense antagonistic to Vincent, pitted her against Vincent.

In *United States v. Wood*, this Court explored the various types of “cause” and “favor” challenges one might bring regarding juror bias. *See* 299 U.S. 123, 134–35 (1936). *Cf.* 28 U.S.C. § 1870. This Court distinguished challenges for actual malice against the defendant—which is not the basis of Vincent’s claim here—with challenges for a juror’s *favor* of an antagonistic party. *See id.* Either one, if substantiated, would violate the right to an impartial jury, “for jurors must be omni exceptione majores.” *Cf. id.* at 138 (quoting Blackstone’s Commentaries).

Although there is plenty of evidence here to conclude Juror Ramirez was *actually* biased, bias can also be implied or presumed. *See Smith v. Phillips*, 455 U.S. 209, 222 (O’Connor, J., concurring) (noting that “the opinion does not foreclose the use of ‘implied bias’ in appropriate circumstances, noting that jurors “may have an interest in concealing [their] own bias, particularly when the “charge of bias arises from juror misconduct,” and that some “extreme situations . . . would justify a finding of implied bias” in federal habeas despite contrary findings by a state court). Courts have found implied bias in situations much less unusual and extreme than this one. *See e.g. U.S. v. Eubanks*, 591 F.2d 513, 516-17 (9th Cir. 1979) (juror presumed biased in trial for heroin conspiracy because her sons were imprisoned for heroin-related

crimes); *Jackson v. United States*, 395 F.2d 615, 617-18 (D.C. Cir. 1968) (juror presumed biased when he was previously involved in “love triangle” similar to the involved in the trial); *United States ex rel De vita v. McCorkle*, 248 F.2d 1, 8 (3rd Cir. 1957) (juror presumed biased in robbery trial because he was a robbery victim).

There is good reason to believe than an unbiased jury would not convict Vincent of first-degree murder. The case came down to the credibility evaluations of several witness statements—a different jury could just as easily credit the evidence showing that Vincent was the less responsible party, and at least acquit him of first-degree murder.

II. Section 2254(e)(1) does not foreclose relief to a petitioner who presented all his available evidence to the state court.

In its affirmation of the denial of Vincent’s petition, the Ninth Circuit Court of Appeals noted: “we owe deference to the post-conviction court’s finding that the juror in question was not actually biased...Petitioner has not overcome the presumption of correctness because his argument rests entirely on the same evidence the state court found unpersuasive.” The court erred by adopting an erroneous interpretation of 28 U.S.C. § 2254(e)(1). In the circuit court’s view, Vincent could rebut the presumption of correctness only if he presented new evidence to the federal court that the state court didn’t consider; the circuit court held Vincent failed to rebut the presumption of correctness “because his argument rests entirely on the same evidence the state court found unpersuasive.” This is wrong.

A petitioner can rebut the presumption based on the evidence presented in

state court. In this case, the state court record establishes, clearly and convincingly, that the state court's factual determination was error. Vincent therefore rebutted the presumption of correctness. The Ninth Circuit's artificial requirement that Vincent present *new* evidence to rebut the presumption is erroneous, particularly given this Court's holding in *Cullen v. Pinholster*, 563 U.S. 170 (2011).

In *Pinholster*, this Court explained that Congress, in enacting AEDPA, intended for state prisoners to “channel [their] claims first to the state court” before requesting the federal judiciary to review it. *Id.* This means a petitioner should first fairly present to the state courts both the claim for relief and the evidence he has in support of the claim. Then, when a federal habeas court reviews whether the state court's decision is entitled to deference under § 2254(d)(1), the federal court must look only at the evidence presented to the state court, as opposed to new evidence presented for the first time in federal court. *See id.*

Under the Ninth Circuit's decision, however, a petitioner who diligently complies with the central holding of *Pinholster* would be unable to rebut the presumption of correctness under § 2254(e)(1), as such a petitioner would have already presented all his supporting evidence to the state courts. According to the circuit, when a petitioner's “argument rests entirely on the same evidence that the state court found unpersuasive,” the petitioner cannot rebut the presumption of correctness. Not so.

The circuit court's decision, therefore, means that Vincent would not be able to rebut the presumption of correctness in federal court even if the state court's view of

the evidence was unquestionably wrong because he diligently presented all his evidence to the state court first. Indeed, as Vincent explained above, the state-court record in this case overwhelmingly demonstrates the juror was biased in deliberations, and thus that the state court's factual decision to the contrary was incorrect. The Ninth Circuit's decision relies on an incorrect interpretation of § 2254(e)(1).

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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