No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SIR MARIO OWENS, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Attorney for Petitioner:

JONATHAN D. REPPUCCI
Reppucci Law Firm, P.C.
1544 Race St.
Denver, CO 80206
jiccupper@gmail.com
(303) 333-5166

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QUESTIONS PRESENTED

Not until postconviction proceedings did it come to light that one of the jurors who convicted Sir Mario Owens had a vast array of personal connections to people, places, and events related to the case, including an out-of-court encounter and hug with a prosecution witness in a visit to her son's home during trial, where her son advised her to get off the case because she was "too close" to it.

The questions presented are:

I. Whether the presumption of prejudice established in *Mattox* and *Remmer* continues to apply to cases involving juror exposure to extraneous information and outside influence when such exposure and influence is not discovered until postconviction proceedings, and what burdens and standards of proof apply in such situations?

II. Whether the federal doctrine of implied juror bias is the supreme law of the land and determined by an objective legal standard that does not depend on the juror's own assessment of his or her impartiality?

PARTIES TO THE PROCEEDING

Petitioner is Sir Mario Owens, an individual. Respondents are the People of the State of Colorado, as represented by Colorado's Attorney General. All parties appear in the case caption on the cover page.

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Petitioner Sir Mario Owens respectfully seeks a writ of certiorari to review or to reverse summarily the decision of the Colorado Court of Appeals denying Owens postconviction relief.

OPINIONS BELOW

The decision of the Colorado Court of Appeals ("CCA"), captioned *Owens v. People*, No. 17CA1182 (Colo. App. Oct. 7, 2021), denying Owens postconviction relief on his juror claims and other claims, is not published but is attached hereto as Appendix A. The postconviction court's decision, rendered on May 16, 2017, and captioned *People v. Owens*, Colo. Dist. No. 05CR2945, is not published but is attached as Appendix B.

JURISDICTION

The CCA issued its decision denying postconviction relief on Oct. 7, 2021. *See* Appendix ("Appx.") A. The Colorado Supreme Court denied certiorari on June 6, 2022 (No. 21SC832, *en banc*). *See* Appx. C. On September 1, 2022, Justice Gorsuch extended the time to file a petition for a writ of certiorari to and including October 6, 2022.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in part, that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury …."

Section 1 of the Fourteenth Amendment provides, in part, that: "No State shall … deprive any person of life, liberty, or property, without due process of law …."

STATEMENT OF THE CASE

This petition emanates from the denial of Owens' state court application for postconviction relief. Owens' grounds for certiorari stem from claims related to the presence on his jury of Juror 75, whose many connections to and entanglement with the case implicated Owens' fundamental rights to an impartial jury and a fair trial.

I. Trial

The State of Colorado prosecuted Owens for first-degree murder of Gregory Vann, and other lesser charges for the shootings of Javad Marshall-Fields and Elvin Bell, at Lowry Park on July 4, 2004. After two and a half days of deliberation, the jury – including Juror 75 – found Owens guilty on most counts, and he was sentenced to life without parole. The CCA affirmed his convictions on direct appeal. *People v. Owens*, No. 07CA0895 (Colo. App. 2012).

II. Postconviction Proceedings

Owens timely pursued his available state postconviction remedies. The postconviction court eventually conducted hearings on some, but not all, of the

issues he raised, and allowed testimony by some, but not all, of the witnesses he sought to present.

A. Overview

Postconviction proceedings revealed that Juror 75 never disclosed during trial that she: (1) knew and recognized witnesses testifying for the prosecution as her son's friends (even having contact with one witness at her son's apartment during trial); (2) knew or correctly suspected her son was at Lowry Park when the shootings occurred; (3) conversed with him during trial, when he told her he knew the people involved and urged her to get off the case because she was too close to it; (4) previously hosted murder victim Vann as a guest in her home; (5) was acquainted with the mother of Marshall-Fields, who was later murdered in a drive-by shooting on Dayton Street[1] near Juror 75's home (proximate to a bench showing Marshall-Fields' face and seeking information about his death); and (6) was in a relationship – and eventually after trial would marry – James Manuel, who Marshall-Fields knew as "Uncle Cornbread," a life-long friend of Marshall-Fields' biological uncles.[2] Postconviction, Owens argued that Juror 75's presence on the jury denied him a fair trial, an impartial jury, and due process.

The postconviction court denied relief under Colo. Crim. P. 35(c). *See* Appx. B. Owens appealed.

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[1] The Dayton Street case proceeded separately from this matter, and Owens and two others were later convicted of murdering Marshall-Fields. That appeal is now pending in the Colorado Supreme Court (No. 08SA402), where briefing is still in process.

[2] Juror 75's name is Stephanie Manuel, formerly Stephanie Griggs and, before that, Stephanie Ealy. *See* Appx. B, at 65.

On October 7, 2021, the CCA affirmed the postconviction court's denial of relief on all claims. *See* Appx. A. The Colorado Supreme Court denied certiorari on June 6, 2022 (No. 21SC832, *en banc*). *See* Appx. C.

B. Juror 75 Detail as Found/Adopted by Courts Below

Owens' Juror 75-related claims arise from an eye-popping constellation of established facts surrounding her connections to the case.

1. Juror 75's Conversation with Her Son About Being "Too Close" to the Case, After Encountering His Friend Who She Had Seen Testify as a Prosecution Witness

Among the prosecution's witnesses were Jamar Johnson and Jamar Dickey, who, unbeknownst to the trial court and parties, were close friends and gang associates with Juror 75's son Quincy.[3] All three had been at the crime scene. CF, p.4483 (prosecution concedes Quincy's presence). When Dickey testified against Owens at trial, on January 19, 2007, Juror 75 recognized him as one of Quincy's friends. 32.2 TR 3/26/15, p.30:6-22; SOPC.EX.D-1616. While testifying, Dickey likewise recognized Juror 75 as Quincy's mother. 32.2 TR 2/3/15, pp.154-56_(pdf.104-06) ("Probably cause I knew her.… I thought it was strange that out of all these people, this woman just happened to be on it [the jury].").[4]

After trial that day, Juror 75 went to Quincy's home. 32.2 TR 3/26/15, p.43:2-23; SOPC.EX.D-2399; TR 10/18/2016, pp.4-5; SOPC.EX.D-2141, pp.2-3. While

[3] The postconviction court referred to Quincy Ealy as "Q" and the CCA to him as "Q.E."

[4] Quincy testified that Dickey and Johnson were close friends of his between 2003-2007, and that they spent time together in Quincy's – *i.e.*, Juror 75's – home. 32.2 TR 3/27/15am, pp.68-69 (pdf.45-46).

there, she encountered Dickey, who said, "***Hi Mom[,] I saw you today***," and hugged her. 32.2 TR 3/26/15, p.43:2-23; TR 10/14/16, p.43:7-20.

Juror 75 then had a conversation with Quincy about her being too close to this case. She told him she was sitting as a juror, which he already knew from friends. 32.2 TR 3/27/15am, pp.82-84_(pdf.59-61). ***Quincy communicated with her about the matter pending before the jury and told her he had friends who were testifying, he knew "a lot of people that were involved in whatever had happened at the park and he had concerns," and warned her: "you need to let whoever you need to let know that you need to get off of this, that you're too close***." 32.2 TR 3/27/15am, pp.87-90_(pdf.64-67); 32.2 TR 3/26/15, p.33:1-11. Juror 75 never disclosed this conversation or her encounter with Dickey to the court.

Years after Owens' trial, in a prison phone call between Juror 75 and her son, they discussed Owens' trial and their conversation that occurred on the day she saw and hugged Dickey. During that call:

- Juror 75 affirmed Quincy's description "remember when you was doing jury duty on that case … and I told you I wanted you off it?"
- Juror 75 cautioned "well then if they say something about it, I wasn't allowed to talk about it until it was over, so why, me and you didn't discuss that."
- Juror 75 recalled that during trial "I know a lot of your friends, was hey mom, hey mom, hey mom."[5]

[5] Juror 75 consistently indicated that one or more *testifying witnesses* mouthed "Hi Mom" to her in the courtroom. 32.2 TR 3/26/15, pp.26-27, 85; SOPC-EXS.D-1619, D-2437, D-2430; TR 10/14/16, pp.49-50.

SOPC.EX.D-1619. Juror 75's contacts with Dickey and Quincy at Quincy's apartment during trial were just two components of her multi-faceted exposure to extraneous information and outside influence that made her unfit to decide Owens' case – and, under this Court's precedents, entitled Owens to a presumption of prejudice that the state courts never afforded him.

2. Facts Found by Postconviction Court and Adopted by CCA

Facts found by the postconviction court included:

> (1) While Juror 75 did not have a personal relationship with any witness, she recognized the faces of at least three. (2) Sometime after the Lowry Park shootings, Q told Juror 75 that there had been a shooting at Lowry Park. Knowing that many in their late teens and early twenties attended the event, and that Q did not tell her about the things he was involved in, she specifically looked for Q when the Lowry Park video was shown in court. (3) After she encountered Dickey at Q's apartment, Q told her that his homeboys were testifying and that if she had been seeing his friends testify, she needed to get herself excused from juror service. (4) Juror 75 was concerned for her son's safety and her own because she recognized faces of people whom she suspected might have gang involvement.[6] (5) She attempted to bring her recognition of faces to the attention of the court.

Appx. B, at 114 n.36. The CCA adopted these findings (Appx. A, ¶¶ 103, 141-142), adding:

- "She did not converse with Dickey at Q.E.'s apartment; Dickey said he had seen her in court and left immediately after her arrival."
- "The postconviction court found on conflicting evidence that this occurred on or after January 23, 2007, when Judge Spear brought Juror 75's connection with [Melissa] White to the attorneys' attention. However, Juror 75 testified that Dickey said, 'I saw you in court today,' and Dickey testified on January 19, 2007."

[6] The postconviction court found that "Juror 75's son Q was a member of a gang subculture…." Appx. B, at 81.

- "She told him [Quincy] that she had tried to get off the jury, but the court had told her that she was to stay."

Appx. A, ¶ 103 & n.15. The CCA also noted:

- "At postconviction hearings, Juror 75 testified that (1) during the trial she noticed a woman, whom she knew as Melissa White, sitting in the gallery; (2) when Marshall-Fields's mother testified at the trial, she recognized Ms. Fields as a person who had spoken at her church about the Dayton Street killings; (3) she recognized faces in the courtroom; and (4) she encountered one of the witnesses, Dickey, at Q.E.'s apartment during the trial."

- "The postconviction court concluded that Juror 75 had made a reasonable good faith effort to notify the trial court that she recognized White and others in the courtroom, but neither the trial court nor the attorneys understood the full extent of these matters because the court did not conduct an in camera interview as requested by the prosecution."

Appx. A, ¶¶ 102, 104.

The CCA "agree[d] with the postconviction court that Owens' offers of proof and testimony received tend to show that Juror 75 had a relationship with [James] Manuel that predated the trial and that Manuel had a relationship with the uncles," Appx. A, ¶ 120, but then failed to appreciate that Manuel had his *own* relationship with Marshall-Fields, who called Manuel "Uncle Cornbread." A biological relationship between the two was not necessary to have conveyed Marshall-Fields' plight to Juror 75 through Manuel, or for Manuel to have exerted outside influence upon her during the trial. Because that relationship existed at the time of trial, the CCA's characterization of Juror 75's bias being based on a "future relationship with a victim's uncles," Appx. A, ¶ 121, distorted the claim. Manuel's relationship with Juror 75 *at the time of trial* was close enough that he was *living with her* – and resulting friction between Manuel and her younger son Donovan

even drove Donovan out of the house, to go live with the family of his football coach. (Members of that family would have so testified, but the postconviction court did not permit their testimony.)

Additional facts found by the postconviction court but largely ignored by the CCA make the Juror 75 situation even more egregious. For example: "She had seen the Dayton Street murder scene, heard a news segment, seen a bus stop flyer about the murders, and heard Fields speak in her church." Appx. B, at 114. Remarkably, the CCA never mentioned the bus stop near Juror 75's building with the crime alert bearing a photograph of Marshall-Fields and his fiancé Vivian Wolfe. CF, p.5232; TR 10/14/16, p.54:6-19.[7]

3. Improper Limitations on Postconviction Proceedings Impugning Juror 75's Credibility

The postconviction court found Juror 75 "generally credible" by precluding evidence that would discredit her through showing her repeated dishonesty, not only at the time of Owens' trial, but at the time of her postconviction testimony. While postconviction proceedings were pending, significant new evidence came to light concerning Juror 75. CF, pp.4888-944, 4955-5080, 5182-397, 5458-92, 6198-204, 6271-431, 6454-526. But the court declined to re-open the hearing to allow Owens to present the newly discovered evidence, with the narrow exception of the

[7] The postconviction court found: "A poster was mounted on a bus bench in Juror 75's neighborhood seeking community assistance in finding those responsible for the Dayton Street murders. It bore a picture of Marshall-Fields and Wolfe. Although she did not use the bus, Juror 75 saw the poster on the bench." Appx. B, at 107.

single subject of Juror 75's familiarity with Marshall-Fields through his uncles, *but not including Manuel ("Uncle Cornbread")*. CF, pp.6100-06, 6532-34.

Among the factual topics on which the postconviction court refused to allow evidentiary hearing were:

- Testimony from Manuel and others about his relationships with Juror 75 and Marshall-Fields;
- Juror 75's involvement in a 2015-2016 insurance fraud scheme based on reporting stolen a car, which in actuality her son Donovan had delivered to Marshall-Fields' uncle. *See* SuppSE.22, SOPC.EXS.D-3054-3055, D-3061; CF, pp.4964-580; TR 4/17/17, pp.25-36, 121-27.
- Juror 75's 2015 felony deferred judgment for benefits theft ("provid[ing] false information to the unemployment office to conceal her employment and wages"), after which she disregarded an express judicial order to forego a Caribbean vacation because she had not paid restitution for the theft. *See* SOPC.EX.D-2444 (13CR1604); SuppSE.22, SOPC.EXS.D-3048-3050.
- Juror 75's 2016 resignation from the Jefferson Center for Mental Health after a Department of Local Affairs investigation revealed her submission of false information to obtain housing for her adult children through an assisted housing program. *See* SuppSE.22, SOPC.EXS.D-3062.
- Juror 75's listing as an endorsed witness in a 1992 triple-homicide prosecution in which Dwayne Chandler, her then common-law husband and father of her son Donovan, had been a suspect and then became the prosecution's chief witness. *See* SuppSE.22, SOPC.EXS.D-3010, D-3032-3035.

In addition, though not once mentioned by the CCA, Juror 75 deleted Facebook material that had been subpoenaed (concerning her relationship with Marshall-Fields' uncles), and on her last day of testimony, she testified only after having asserted her Fifth Amendment privilege and receiving immunity. *See* CF, pp. 6439-

48, 6528-29; SuppSE.22, SOPC.EX.D-3066; SuppSE.24, Appendices A&B thereto; TR 4/17/17, pp.25-36, 121-27.

REASONS FOR GRANTING THE PETITION

At the heart of this case lies a basic quandary. **Everybody agrees**, with the benefit of hindsight, that Juror 75 should not have served on the jury, given her many connections to the case and her exposure to extraneous information and outside influence beyond the evidence presented at trial. Given this consensus, why should the outcome be different solely because the information was not discovered or disclosed until after the trial on which she served?

Juror 75 herself conceded that she "should have been picked for a different jury or not picked at all." TR 10/14/16, p.52. **The postconviction court** recognized that "[t]his and similar cases present a troubling dilemma. When there is information that the attorneys would have found relevant in deciding whether to seek the replacement of a juror, it is regrettable that the attorneys did not have the information in order to present their positions to the trial court." Appx. B, at 66. **The CCA** agreed: "Like the postconviction court, we see this as a 'troubling dilemma' because had all of this information come to the attention of the attorneys and the court during the trial, an alternate may have been seated in Juror 75's place." Appx. A, ¶ 141. "Indeed, the trial judge so stated in his affidavit filed with the postconviction court." *Id.* n.27.

But because Juror 75 never made the appropriate disclosures,[8] Owens, counsel, and the court were deprived of the opportunity to learn the extent of her multi-faceted entanglement with the case. As the CCA recognized, "the information did not come out in a timely manner; and now through hindsight we have to decide how to address Owens's claims." Appx. A, ¶ 141. The problem is that in deciding how to address the claims, both the CCA and postconviction court stated incorrect rules of federal constitutional law in contravention of this Court's precedents, adopted or made conclusions that contradicted or ignored the court's own factual findings, and distorted Owens' claims in ways that both mangled the analysis and precluded development of facts essential to a proper analysis.

The right to an impartial jury is of paramount importance in our criminal justice system. Violation of that right through juror misconduct and/or improper juror exposure to extraneous information and/or outside influence is a recurring issue (and increasingly so as the internet and cell phones make more information more readily available to jurors). The precise contours of the law in this area are unsettled and divergent, even among this Court's own cases. This case presents an opportunity on an alarming set of juror facts – albeit whitewashed by the courts below – to potentially clarify some of the applicable standards in the areas of juror exposure to extraneous information/outside influence and implied juror bias.

I. The CCA improperly stated and applied the law and contravened this Court's precedents when it failed to even mention, much less apply, *Mattox* and *Remmer*.

[8] The CCA acknowledged that "this case involves numerous apparent nondisclosures." Appx. A ¶ 140.

The courts below failed to properly state the applicable law when they made *no mention whatsoever* of this Court's two fundamental, long-standing decisions in *Mattox v. U.S.*, 146 U.S. 140, (1892), and *Remmer v. U.S.*, 347 U.S. 227 (1954). *Mattox* "absolutely" forbids "external causes tending to disturb the [jury's] exercise of deliberate and unbiased judgment," including "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses…." *Mattox*, 146 U.S. at 149-50. Such communications "invalidate the verdict, at least until their harmlessness is made to appear." *Id.* at 150. And under *Remmer*, *any* unauthorized "private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." 347 U.S. at 229. "In sum, *Mattox* stands for the proposition that improper influences on jurors are sufficiently prejudicial to invalidate an otherwise-valid verdict, and *Remmer* advanced this notion by creating a presumption that improper influences on jurors are prejudicial and invalidate the verdict." Eva Kerr, *Prejudice, Procedure, and a Proper Presumption: Restoring the* Remmer *Presumption of Prejudice in Order to Protect Criminal Defendants' Sixth Amendment Rights*, 93 Iowa L. Rev. 1451, 1457 (2008).

The CCA's complete disregard of *Mattox* and *Remmer* constitutes an improper statement of clearly applicable constitutional law, which was not applied in this case. No presumption of prejudice was mentioned, much less overcome – contravening *Remmer*'s mandate that "the burden rests heavily upon the Government to establish … contact with the juror was harmless to the defendant."

347 U.S. at 229.

Instead, the state courts focused on Juror 75's own representations about her self-perceived lack of bias,[9] and framed the analysis as Owens' "fail[ure] to prove" her bias. Appx. B, at 114 ("This court finds that *Owens has failed to prove* that any extraneous information was introduced into the jury deliberation process and *has failed to prove* that Juror 75's verdict was influenced by extraneous information.") (emphasis added); Appx. A, ¶ 98 (emphasizing postconviction court's "conclu[sion] that Owens had failed to prove that 'any extraneous information was introduced into the jury deliberation process'"); *see also* Appx. B, at 103 ("*Owens has not shown* that he was deprived of a fair trial due to Juror 75's recognition of witnesses and courtroom observers, nor due to her concern for her son's safety and her own.") (emphasis added); Appx. A, ¶ 148 (quoting same). By ignoring this Court's precedents, the courts below applied incorrect legal standards and flipped the burden[s] of proof. *See Godoy v. Spearman*, 861 F.3d 956, 964 (9th Cir. 2017) ("[S]aying the presumption was rebutted because *Godoy's* evidence failed to prove actual prejudice is the equivalent of placing the entire burden of proof on Godoy. Under *Mattox* and *Remmer,* that was clearly wrong."); *Hall v. Zenk*, 692 F.3d 793, 805 (7th Cir. 2012) ("a presumption was due to Hall in his postverdict hearing, and the state court decision to the contrary was an abuse of discretion").

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[9] *See* Appx. B, at 64 ("This court does not find that the juror in question was deliberately dishonest about any material matter or that she engaged in any deliberate misconduct."). *But see Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) ("Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.") (O'Connor, J., concurring).

Here, far from applying the mandated presumption, the CCA's analysis did not even mention Juror 75's out-of-court encounter with Dickey or her conversation with Quincy about needing to get off the case because she was too close to it.[10] Her contacts with Dickey and Quincy are "absolutely" forbidden and presumptively prejudicial under *Mattox* and *Remmer*. And her contacts, knowledge, and communications went much further.[11]

II. A split among the federal circuits regarding the vitality, strength, and application of the *Remmer* presumption has percolated for decades and clarification by this Court is overdue.

In *Dietz v. Bouldin*, this Court cited *Mattox* and *Remmer* as precedents safeguarding from "various external influences that can taint a juror" "the guarantee of an impartial jury that is vital to the fair administration of justice." 579 U.S. 40, 48 (2016). So while there is no serious question that *Mattox* and *Remmer* remain the law of the land, there is considerable divergence and resulting confusion among the lower courts as to their implementation.

In the wake of *Smith v. Phillips*, 455 U.S. 209 (1982), and *U.S. v. Olano*, 507 U.S. 725 (1993), which arguably modified standards surrounding the *Remmer*

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[10] The CCA described the encounter with Dickey and the conversation with Quincy in its factual recitation (Appx. A, ¶¶ 102-103), but both are absent from its "Discussion" section.

[11] The CCA repeatedly referenced the straw man concept that Juror 75 never shared her exposure to extraneous information and outside influence with other jurors during trial (*see* Appx. A, ¶¶ 97-98, 122, 126), but Owens never claimed that Juror 75 "shared her knowledge with others." Appx. A, ¶ 122. She need not have done so for Owens to be granted relief – her experience *alone* was sufficient to taint the jury. *See Parker v. Gladden*, 385 U.S. 363, 366 (1966) (criminal defendants are "entitled to be tried by 12 … impartial and unprejudiced jurors"); *Fullwood v. Lee*, 290 F.3d 1225, 1227 (4th Cir. 2002) ("if even a single juror's impartiality is overcome by an improper extraneous influence, the accused has been deprived of the right to an impartial jury").

presumption of prejudice, lower courts across the nation have struggled to articulate coherent frameworks for analysis and have adopted varying approaches that have confused the jurisprudence, leading to disparate analyses and outcomes depending on jurisdiction. *See, e.g.,* Kerr, 93 Iowa L. Rev. at 1461 ("The circuit courts have struggled to reconcile *Smith* and *Olano* with *Remmer* and other Supreme Court cases that suggest prejudice is presumed when jurors are subjected to extraneous influences.").

The circuit split regarding application of *Remmer* has now existed for decades. *See, e.g., id.* at 1463-77 (articulating circuit split based on cases ranging from 1988-2007); *U.S. v. Scull*, 321 F.3d 1270, 1280 n.5 (10th Cir. 2013) ("this circuit and others have questioned the appropriate breadth of *Remmer*'s presumption of prejudice rule") (collecting cases dating back to 1990s in demonstrating circuit split); Anna H. Tison, *United States v. Lawson: Problems with Presumption in the Fourth Circuit*, 91 N.C. L. Rev. 2244, 2252-54 (2013) (same).

The inconsistency among jurisdictions has been the subject of frequent recent scholarship. *See, e.g.,* Andrew S. Rumschlag, *Iceberg Ahead: Why Courts Should Presume Bias in Cases of Extraneous Juror Contacts*, 72 Case W. Res. L. Rev. 463, 487 (2021) ("In sum, the patchwork solutions adopted by circuit and state courts provide inconsistent – and therefore constitutionally unacceptable – protections for defendants' Sixth Amendment right to an impartial jury."); Aja Pollack, *United States v. Loughry: Failing to "Follow" the Sixth Amendment Threat Posed by Juror Social Media Access*, 81 Md. L. Rev. 46, 50-55 (2022) (summarizing circuit split); B.

Samantha Helgason, *Opening Pandora's Jury Box*, 89 Fordham L. Rev. 231, 242-53 (2021) (summarizing "deepening split" among circuits "in how they perceive the presumption and allocate its burdens").

Helgason groups the approaches into three over-arching categories: (1) "*Remmer* circuits," which, per *Remmer*, "apply a burden-shifting framework to questions of jury taint" (Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits); (2) "*Phillips* circuits," which "conclude that *Phillips* removed the presumption and refrain from requiring the government to show harmlessness," (Fifth, Sixth, and D.C. Circuits); and (3) "*Olano* circuits," which "have construed the line of cases to narrow the presumption's applicability to a few types of cases" (First and Ninth Circuits). 89 Fordham L. Rev. at 242-53. Even within these three larger groupings, Helgason identifies nuanced differences in the approaches taken by the various courts of appeal. *Id.*

The level of confusion is such that the lines of fracture have evolved and/or there is disagreement even among how the split is characterized. Over a dozen years before Helgason, Kerr articulated the federal circuits' approaches as:

- "The [Eleventh] Circuit with No Articulated Standard;"
- "[Fourth and Seventh] Circuits Applying the *Remmer* Presumption of Prejudice with an Exception for Innocuous Interventions;"
- "[Eighth and Tenth] Circuits Applying the *Remmer* Presumption of Prejudice with an Exception for Federal Habeas Cases;"
- "[Second and Third] Circuits Applying a Variation of the Hypothetical-Average-Jury Test;"
- "[D.C. and Fifth] Circuits Presuming Prejudice in Egregious Circumstances or at the Discretion of the Court;" and

- "The Lone [Sixth] Circuit Disregarding the *Remmer* Presumption of Prejudice."

Kerr, 93 Iowa L. Rev. at 1463-77. *Cf.* Rumschlag, 72 Case W. Res. L. Rev. at 481 ("Eight federal circuits and twenty-eight states expressly maintain some form of *Remmer*'s presumption.").

The divergence has grown over a percolation period spanning decades, and has made application of this Court's precedents no less confusing for courts grappling with juror issues in criminal cases. Further, "[t]he unique procedural criteria inherent to habeas cases overlay the existing circuit split with even more confusion." Helgason, 89 Fordham L. Rev. at 254. The time is ripe for this Court to clarify the standards so that they can be more uniformly applied across jurisdictions in order to promote greater consistency in assessing claims by criminal defendants of violations of their Sixth Amendment rights to impartial juries.

Owens submits that the majority view – following the language of *Mattox* and *Remmer*, calling for a forceful presumption that places the burden upon the government to prove harmlessness – should apply, and the failure of the courts below even to mention *Mattox* or *Remmer* is worthy of this Court's attention. *See, e.g., Tarango v. McDaniel*, 837 F.3d 936, 948 (9th Cir. 2016) ("The *Mattox* Court categorically mandated that 'possibly prejudicial' external contacts 'invalidate the verdict, at least until their harmlessness is made to appear.'") (quoting *Mattox*, 146 U.S. at 150); *Stouffer v. Trammell*, 738 F.3d 1205, 1214 n.5 (10th Cir. 2013) ("Although circuit courts disagree about the contours of the *Remmer* presumption of prejudice, this circuit has continued to follow the presumption '[i]n the absence of

Supreme Court authority to the contrary.'"), quoting *Scull*, 321 F.3d at 1280 n.5, and citing *Teniente v. Wyoming Atty. Gen.*, 412 Fed.Appx. 96, 102-06 (10th Cir. 2011) ("providing an overview of the circuit split regarding the scope of the *Remmer* presumption"); *Hall*, 692 F.3d at 805 ("we are confident that despite some ambiguity regarding when the *Remmer* presumption should apply, all reasonable interpretations of *Remmer* and its progeny would lead to a presumption of prejudice in favor of Hall in his postverdict hearing").

Respectfully, the question has percolated long enough, and answers are necessary because, "[a]s technology advances, juries become more susceptible to outside influence, and the circuit split deepens. Consequently, defendants receive varying degrees of constitutional protection depending on where they stand trial." Helgason, 89 Fordham L. Rev. at 264. *See also* Pollack, 81 Md. L. Rev. at 58 ("Social media access by jurors presents an ongoing problem that courts have struggled to adequately address."); *cf. Dietz v. Bouldin*, 579 U.S. at 51 ("Prejudice can come through a whisper or a byte.").

Clarification by this Court would obviate continued litigation over the same nebulous issues that have been vexing the lower courts for too long now, creating ever deeper jurisprudential fissures.

III. The CCA had no basis to raise existential questions concerning the federal doctrine of implied juror bias and applied an incorrect standard in assessing Owens' claims of implied bias.

Although this Court has not issued a recent majority opinion regarding implied juror bias, the doctrine is firmly rooted in Justice O'Connor's concurring

opinion in *Smith v. Phillips*, 455 U.S. at 221-24, and in the concurring opinions of five justices in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556-58 (1984) (Justices Blackmun, Stevens, and O'Connor, concurring; and Justices Brennan and Marshall, concurring in the judgment) (citing Justice O'Connor's *Smith v. Phillips* concurrence and reaffirming that in exceptional circumstances juror bias can be inferred or implied as matter of law). The doctrine has been widely recognized and applied in the lower federal courts,[12] but the CCA nevertheless questioned its applicability in Colorado. *See* Appx. A, ¶ 114 ("it is unclear whether Colorado even recognizes implied bias outside those categories specified in [Colorado statute] section 16-10-103"); *id.*, ¶ 174 ("Neither the United States Supreme Court nor the Colorado Supreme Court has ever approved or applied this doctrine.") (Berger, J., concurring).

That the CCA questioned the applicability of the doctrine in Colorado is another indicator of its antipathy toward governing federal law providing constitutional protections to criminal defendants.

The doctrine of implied bias applies in "exceptional circumstances" where objective circumstances cast concrete doubt on the impartiality of a juror. *McDonough*, 464 U.S. at 556-57 (Blackmun, J., concurring); *Smith v. Phillips*, 455 U.S. at 222 (O'Connor, J., concurring) ("While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias.").

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[12] *See, e.g., Cunningham v. Shoop*, 23 F.4th 636, 661 (6th Cir. 2022); *Conaway v. Polk*, 453 F.3d 567, 586-88 (4th Cir. 2006); *Brooks v. Dretke*, 444 F.3d 328, 329-32 (5th Cir. 2006); *Dyer v. Calderon*, 151 F.3d 970, 981-85 (9th Cir. 1988;) *Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir. 1991).

Such circumstances include "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Fields v. Brown*, 503 F.3d 755, 770 (9th Cir. 2007). The standard for determining whether a juror would be impliedly biased is "essentially an objective one." *Id.* at 807; *U.S. v. Mitchell*, 690 F.3d 137, 142 (3d Cir. 2012) ("The test focuses on 'whether an average person in the position of the juror in controversy would be prejudiced.'"), quoting *U.S. v. Torres*, 128 F.3d 38, 45 (2d Cir. 1997). Accordingly, "[a] prospective juror's assessment of her own ability to remain impartial is irrelevant for purposes of the test." *Mitchell*, 690 F.3d at 143.[13]

Here, there seems little doubt that a typical juror in Juror 75's circumstances would be affected, given the long list of her connections to the case. At some point enough is enough; the facts in this case pass that point. No typical juror could have remained unaffected by the cornucopia of outside information and influence to which Juror 75 was exposed. The CCA's decision throwing shade upon the doctrine of implied bias must be rejected, and this Court should review its application on the merits here *de novo* as a question of law. *See Smith v. Phillips*, 455 U.S. at 222 n.*

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[13] The objective test is consistent with due process considerations requiring an "average judge" analysis in the judicial bias context. *Williams v. Pennsylvania*, 579 U.S. 1, 4 (2016) ("This Court's precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge 'is too high to be constitutionally tolerable.'"), quoting *Caperton v. A.T. Massey Coal Co.*, 566 U.S. 868, 872 (2009) ("judge *or decisionmaker*") (emphasis added); *Caperton*, at 883-84 ("[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards the Court has asked whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'").

("In those extraordinary situations involving implied bias, state-court proceedings resulting in a finding of 'no bias' are by definition inadequate to uncover the bias that the law conclusively presumes.") (O'Connor, J., concurring).

IV. This case is an ideal vehicle for this Court to clarify the standards applicable to recurring issues surrounding juror exposure to extraneous information and outside influence.

More than a century ago, this Court emphasized: "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). This case presents an ideal opportunity to test that axiom, given the many aspects of extraneous information and outside influence at play – where the juror:

- had an intimate relationship at the time of trial with one of the victim's *de facto* uncles; *and*
- had a child who was both at the crime scene and friends with testifying witnesses she believed to be involved in gang activities and violence; *and*
- encountered one such witness when at that child's home to talk about the case during trial; *and*
- received a warning from that child to get off the case because she was too close to it; *and*
- observed prosecution witnesses in the courtroom mouthing "hi mom" to her; *and*
- lived near the scene of a related crime that per the trial court's orders was supposed to be excluded from the trial; *and*
- recognized the mother of the victim (who was a surviving victim in this case but fatally shot in the related but excluded case) when she testified; *and*

- gave multiple false answers in juror questionnaire responses;[14] *and*
- deleted facebook content known to be responsive to an existing subpoena; *and*
- still, despite all that, disclosed only that she recognized a trial observer (not a witness) sitting in the gallery.

The acknowledgement in hindsight by the courts below that, had these facts been properly disclosed, the juror likely would not have served on the jury and deliberated, places the case in prime posture to evaluate and articulate the strength of and standards surrounding *Mattox* and *Remmer*'s presumption of prejudice, as well as the contours of the federal doctrine of implied juror bias.

This case is an excellent vehicle because most of the facts surrounding the juror are undisputed and show exposure she had to myriad information and relationships outside the courtroom, even if the postconviction court's hearing was inadequate for Owens to *fully* develop all the facts. The courts below artificially disentangled her many connections to the case and boxed them into distinct categories to be knocked down one at a time in a vacuum. This artificial boxing allowed the courts to completely ignore Juror 75's improper contact during trial with her son – who knew the victim and prosecution's critical witnesses – and a testifying witness, and this Court's precedents (*Mattox* and *Remmer*) establishing presumptions of prejudice arising from inappropriate extraneous contacts. The

[14] Though not argued as a basis for certiorari, this case would also present the Court with an opportunity to further examine and hone the standards applicable to the test of juror bias articulated in *McDonough*. There were a plethora of false responses in Juror 75's questionnaire, which if disclosed could have provided grounds for removal, but as to which the postconviction court did not permit adequate factual development by evidentiary hearing (for example, the fact that she had been endorsed as a witness in a triple-murder prosecution in which her former common-law husband became the state's chief witness).

total disregard of these seminal cases and the CCA's questioning of the federal constitutional doctrine of implied juror bias demonstrate clearly that the CCA improperly stated applicable rules of federal law and decided important federal questions in ways that conflict with this Court's governing decisions, thus making this case a worthy candidate for certiorari. *See* U.S. Sup. Ct. R. 10.

On remand in *Remmer*, this Court rejected the lower court's circumscribed interpretation of the issue and determined a new trial was necessary. *Remmer v. U.S.*, 350 U.S. 377, 380 (1954) (*Remmer II*) ("We will consider the evidence free from what we think are the unduly narrow limits of the question as viewed by the District Court."). This Court explained:

> He had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made.
>
> The unduly restrictive interpretation of the question by the District Court had the effect of diluting the force of all the other facts and circumstances in the case that may have influenced and disturbed Smith in the untrammeled exercise of his judgment as a juror. We hold that on a consideration of all the evidence uninfluenced by the District Court's narrow construction of the incident complained of, petitioner is entitled to a new trial.
>
> The Court of Appeals' judgment is vacated and the case is remanded to the District Court with directions to grant a new trial.

Id. at 382.

Owens humbly asks that the Court do the same here, where the courts below have likewise unduly narrowed the inquiry. *See also, e.g., Tarango*, 837 F.3d at 950 ("trial court improperly restricted the scope of the evidentiary hearing");

Cunningham v. Shoop, 23 F.4th 636, 654 (6th Cir. 2022) ("The district court's permitting defense counsel to question just three jurors and the magistrate judge's limiting the scope of Mikesell's deposition placed unconstitutional constraints on defense counsel."); *cf. Smith v. Phillips*, 455 U.S. at 222 ("in certain instances a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice") (O'Connor, J., concurring).

The facts here are so glaring that even if they do not warrant relief on a theory of implied bias, they are undoubtedly close to the edge – which can help the Court further refine the doctrine. Owens does not dispute that implied bias may be found only "in extremely rare circumstances" (Appx. A, ¶ 114); but respectfully submits that Juror 75's circumstances reach the requisite level of extreme rarity, and the state courts' conclusions to the contrary are no impediment to such a determination.

The potential avenues for relief discussed above represent points along a spectrum, where the *Mattox/Remmer* presumption is a rebuttable presumption based on a particular standard of proof this Court needs to clarify, and implied bias is an irrebuttable legal presumption based on a particular set of facts and a hypothetical objective juror standard. Neither presumption was properly considered below, because the state courts improperly stated and contravened applicable federal law. Juror 75's multitudinous connections to the case, her contacts with witnesses for the prosecution (including "hi moms") and her son

during trial, and her paucity of disclosures regarding the same provide fertile ground for this Court's clarification of principles across these intersecting doctrines, which would obviate recurring future litigation on issues that have splintered the jurisprudence and left criminal defendants, effectively, with different Sixth Amendment rights, based on where they are prosecuted.

CONCLUSION

For the foregoing reasons, Mr. Owens respectfully asks this Honorable Court to grant his petition for a writ of certiorari to review this case or, alternatively, to summarily reverse the CCA's denial of postconviction relief.

Respectfully submitted this 6th day of October 2022,

/s/ Jonathan Reppucci
JONATHAN D. REPPUCCI
Reppucci Law Firm, P.C.
1544 Race St.
Denver, CO 80206
jiccupper@gmail.com
(303) 333-5166

Attorney for Sir Mario Owens

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SIR MARIO OWENS, PETITIONER

vs.

STATE OF COLORADO, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

AFFIDAVIT OF SERVICE

JONATHAN D. REPPUCCI, a member of the bar of this Court, hereby attests that, pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari was served on counsel for Respondent by enclosing a copy of the same in an envelope, first-class postage prepaid and addressed to:

KATHARINE J. GILLESPIE & JILLIAN PRICE
COLRADO ATTORNEY GENERAL'S OFFICE
RALPH L. CARR COLORADO JUDICIAL CENTER
1300 BROADWAY, 9TH FLOOR
DENVER, CO 80203

and that the envelope was deposited with the United States Postal Service, Denver, Colorado 80206, on October 6, 2022, and further attests that all parties required to be served have been served.

/s/ Jonathan D. Reppucci

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JONATHAN D. REPPUCCI