Case No. 22-6821

In The Supreme Court Of The United States

JAMES MAMMONE III, Petitioner,

vs.

CHARLOTTE JENKINS, Respondent.

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

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Reply Brief For Petitioner

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REPLY BRIEF FOR PETITIONER

In his petition for writ of certiorari, James Mammone III demonstrated how pretrial publicity in his case triggered a presumption of prejudice that required a change of venue, and the trial court's failure to transfer venue therefore denied him a fair trial. He also showed how the state court's adjudication of this presumed-prejudice claim was contrary to, and an unreasonable application of, this Court's precedent in *Rideau* (among other cases). Namely, the state court applied factors that this Court has instructed courts not to consider and, even when considering the correct factors, applied them using improper bright-line rules.

The Warden's response to the petition is an exercise in misdirection. The Warden primarily focuses on the Antiterrorism and Effective Death Penalty Act ("AEDPA"), but Mr. Mammone already explained why AEDPA does not bar review of the questions presented. And the Warden's arguments on the questions presented simply rehash the state court's reasoning for denying Mr. Mammone's claim, even though Mr. Mammone has explained why that decision conflicts with this Court's precedent. In the end, nothing in the Warden's response counsels against this Court's review, which is necessary to correct an error of constitutional magnitude in this death-penalty case.

I. AEDPA Does Not Foreclose Review Of The Questions Presented.

The Warden's primary response to Mr. Mammone's petition is to invoke AEDPA. She contends that Mr. Mammone "all but concedes that he cannot satisfy AEDPA" because he "asks the Court to fault the Ohio Supreme Court for refusing to

extend *Rideau*," he "asks the Court to step in and resolve lower-court disagreement," and he "never challenges the Sixth Circuit's decision to credit the Ohio court's factual findings" pursuant to § 2254(e)(1). None of these contentions have merit.

A. The state court's decision is contrary to and an unreasonable application of this Court's precedent.

Take first the Warden's semantic argument that Mr. Mammone cannot satisfy 28 U.S.C. § 2254(d)(1) because he seeks to "extend" this Court's precedent rather than "apply" it. Opp'n at 12–15. Mr. Mammone's petition, however, was clear: Mr. Mammone need demonstrate that the Ohio Supreme Court's decision *either* is "contrary to" *or* "involved an unreasonable application of" this Court's precedent, 28 U.S.C. § 2254(d)(1)—and Mr. Mammone has demonstrated *both*.

As explained, the state court's decision here is "contrary to" this Court's precedent "because it applied factors that this Court has instructed courts not to consider" and "'confront[ed] a set of facts that are materially indistinguishable' from *Rideau* and 'nonetheless arrive[d] at a result different from [that] precedent.'" Pet. at 26. Thus, because the state court applied a legal standard that is directly contrary to the standard applied in *Rideau*, *see id.* at 14–18, no "extension" of *Rideau* is necessary.

Moreover, the state court "'unreasonably applie[d]' *Rideau* and *Skilling* 'to the facts of th[is] particular' case." *Id.* at 26. In arguing otherwise, the Warden emphasizes that the facts here are not identical to those in *Rideau*. But the Warden seems to forget that "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti v.*

Quarterman, 551 U.S. 930, 953 (2007). "Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" *Id.* That the facts are not identical to those in *Rideau* is therefore both unsurprising and inconsequential. In both cases, the community was saturated with prejudicial news coverage regarding the defendant and the crime, including the defendant's own confession. In fact, aspects of the confession here make it *more* prejudicial than in *Rideau*. Pet. at 20. At the very least, then, the state court unreasonably applied *Rideau* to the facts at hand.

The cases the Warden cites for her "extension" argument are inapposite. The petitioner in *White v. Woodall* argued that a Fifth Amendment rule applicable to the *guilt phase* of trial should be extended to the *penalty phase*, even though no prior precedent had applied that rule to the penalty phase and even though "the Fifth Amendment interests of the defendant are different" at the penalty phase. 572 U.S. 415, 421 (2014). Likewise, in *Brown v. Davenport*, the petitioner argued that a decision involving *pre-trial* questions to prospective jurors asking them to speculate how security measures might affect their *future* deliberations should be extended to a case involving *post-trial* questions to the actual jurors asking them how the security measures used at trial *actually affected* their deliberations. 142 S. Ct. 1510, 1530 (2022). No similar extension is required here. *Rideau* specifically instructs that both the source of the publicity and the voir dire transcript—two factors the state court considered in denying Mr. Mammone's claim—are irrelevant to the presumed-

prejudice analysis. *Rideau v. State of La.*, 373 U.S. 723, 726–27 (1963). Moreover, the facts in *Rideau* are "materially indistinguishable" from the facts here. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). So, the state court's decision was contrary to—and an unreasonable application of—federal law.

B. Lower court divergence does not foreclose relief.

Take next the Warden's argument that AEDPA forecloses relief because some lower courts disagree about whether a court may properly consider the source of the pretrial publicity. Opp'n at 1, 7, 15. It is true that two circuits (the Fourth Circuit in *Bakker* and the Sixth Circuit in this case) have refused to presume prejudice in part because the defendant initiated the publicity. Pet. at 15–16. Various other courts, by contrast, have adhered to *Rideau* in holding that the source of the publicity is irrelevant. *Id.*

The divergence on the issue, however, reveals only that the Fourth and Sixth Circuit decisions were contrary to (and/or unreasonably applied) *Rideau*. Pet. at 14–16. It does not foreclose relief under AEDPA. "Divergent approaches among the lower courts . . . is not dispositive, as judicial experience shows that even reasonable judges may sometimes reach unreasonable conclusions." *Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017); *see also Hall v. Zenk*, 692 F.3d 793, 799 (7th Cir. 2012) ("[A] split is not dispositive of the question" of whether a rule is clearly established for purposes of AEDPA). Indeed, in drafting § 2254(d), "it is most unlikely that Congress would deliberately impose such a requirement of unanimity on federal judges." *Williams*, 529 U.S. at 378. "[S]ometimes one or more circuits may simply

misinterpret or misapply existing law and create a disagreement with other circuits on an issue," in which case the Supreme Court can grant certiorari to "bring[] the erring circuit or circuits into line with" existing precedent. *Williamson v. Parke*, 963 F.2d 863, 867 (6th Cir. 1992). That is the necessary course here.

The Warden's cited decisions, again, have no bearing on this case. In those cases, a split arose because Supreme Court precedent had explicitly left the issue "unresolved," *White*, 572 U.S. at 422 & n.3, or had provided a "lack of guidance" to lower courts, *Carey v. Musladin*, 549 U.S. 70, 76–77 (2006). Not so here—*Rideau* explicitly states that the source of the publicity is "irrelevant" to the presumed-prejudice analysis. 373 U.S. at 726.

The Warden also attempts to find an "open" question in an irrelevant issue. Opp'n at 16. She states that "this Court has not yet resolved whether voir dire is available *to rebut*" a presumption of prejudice. *Id.* (emphasis added).[1] Here, however, the state court held that no presumption *arose* in the first instance. That is a different issue. And it is one that this Court *has* resolved; *Rideau* forbids courts from "examin[ing] a particularized transcript of the voir dire examination of the members of the jury" in deciding whether a presumption of prejudice arises. 373 U.S. at 727. The reason for this rule is also firmly grounded in precedent: where the community

[1] In *Coleman v. Kemp* (cited *id.*), the Eleventh Circuit merely suggested—in dicta—that rebuttal is permissible. 778 F.2d 1487, 1541 & n.25 (11th Cir. 1985) (granting habeas relief on claim of presumed prejudice).

was so pervasively exposed to prejudicial publicity, "the jurors' claims that they can be impartial should not be believed." *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991) (quoting *Patton v. Yount*, 467 U.S. 1025, 1031 (1984)); *see also* Pet. at 17–18. Accordingly, the Warden's attempt to characterize the questions presented as "open" issues is unconvincing.

C. Section 2254(e)(1) does not apply to the questions presented.

Finally, the Warden invokes 28 U.S.C. § 2254(e)(1) in arguing that this is a "poor case to evaluate the rules for showing presumed prejudice" because "Mammone never challenges the Sixth Circuit's decision to credit the Ohio court's factual findings about the juror's credibility and impartiality." Opp'n at 17. But, again, where prejudice is presumed, an evaluation of the *actual* jurors' professed impartiality is improper. Pet. at 16–17.

The Warden is similarly wrong that "granting Mammone relief would require this Court to contravene the state-court factual finding of no prejudice." Opp'n at 17. To the extent the Warden is referring to the state court's refusal to *presume* prejudice, that is a mixed question of law and fact, *Coleman v. Kemp*, 778 F.2d 1487, 1537 n.17 (11th Cir. 1985), that (again) does not depend on an assessment of the actual jurors' credibility. It therefore is not a "determination of a factual issue" under § 2254(e)(1). *See Finch v. Payne*, 983 F.3d 973, 979–80 (8th Cir. 2020) (explaining that "[s]o-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations" are not "factual issues" and thus "are not afforded the 'presumption of correctness' of 2254(e)(1)"). And here, the state court erred in its

application of the relevant *legal* principles. *See* Pet. at 10–26. Thus, Section 2254(e)(1) does not apply to the questions presented.

II. The Warden's Arguments On The Merits Of The Questions Presented Are Unconvincing.

The Warden fares no better when she addresses the merits of Mr. Mammone's questions presented, because she simply rehashes the state court's reasons for denying relief.

For example, the Warden emphasizes that Mr. Mammone, having sent his confession letter to the local newspaper, was the source of at least some of the pretrial publicity. Opp'n at 15. And the Warden suggests that, in *Rideau*, if the televised interrogation "had been Rideau's idea, the case might have come out another way." *Id.* at 15. Yet that is the *opposite* of what *Rideau* says. The Court there *first* remarked that "no one has suggested that it was Rideau's idea" to televise the interview. *Rideau*, 373 U.S. at 726. But it *then* immediately made clear that "the question of who originally initiated the idea of the televised interview is, *in any event*, a basically *irrelevant* detail" in the presumed-prejudice analysis. *Rideau*, 373 U.S. at 726 (emphases added). The Warden's argument therefore defies a plain reading of *Rideau*.

The Warden also reverts to the television-versus-print distinction applied by the lower courts. Mr. Mammone already explained why that bright-line rule has no basis in this Court's precedent. Pet. at 18–23. Nor does it make good sense, particularly given that Mr. Mammone's confession letter: is still available online; is more prejudicial than the confession in *Rideau*; and was itself covered by television

news outlets. *Id.* at 19–23. The Warden also ignores Mr. Mammone's argument that the lower courts failed to consider the local pre-trial publicity as a whole—beyond just his confession letter. *Id.* at 21–23.

Moreover, the cases (cited by the Warden) where the Court refused to presume prejudice differ drastically from Mr. Mammone's case. The publicity in those cases consisted of objective, factual reporting. *See Patton v. Yount*, 467 U.S. 1025, 1027–28, 1032–33 (1984) (publicity consisted of "purely factual articles" that "merely reported events without editorial comment"—for example, "extremely brief announcements of the trial dates and scheduling"); *Mu'Min*, 500 U.S. at 429 (unlike in *Irvin*, the publicity did *not* "contain[] numerous opinions as to [the defendant's] guilt" or "opinions about the appropriate punishment"; instead, most of the publicity "was aimed at the Department of Corrections and the criminal justice system in general"); *Murphy v. Fla.*, 421 U.S. 794, 801–02 & n.4 (1975) (news reports were "largely factual in nature"); *Dobbert v. Fla.*, 432 U.S. 282, 303 (1977) (defendant had "simply shown that the community was made well aware of the charges against him"). For example, in *Skilling*, "although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Skilling v. United States*, 561 U.S. 358, 382 (2010). Not so here. The news coverage in Mr. Mammone's case was littered with condemnatory and incendiary language, and his handwritten confession was posted (and remains posted) alongside countless (and vivid) demands for his execution. Pet. at 5–7, 21–23. Furthermore, in the cases cited by the Warden,

the news coverage had largely abated by the time of trial. *See, e.g.*, *Patton*, 467 U.S. at 1028, 1034–35 (between the defendant's first trial and his re-trial four years later "[p]ractically no publicity had been given to the case"); *Skilling*, 561 U.S. at 370 (explaining that "over [the] four years [that] elapsed between Enron's bankruptcy and Skilling's trial" "the decibel level of media attention [had] diminished"). Again, that is not the case here. Mr. Mammone's confession was first published online only four months before his trial, and the inflammatory news coverage persisted through trial. Pet. at 5–7, 21–23.

Finally, the Warden argues that Mr. Mammone "entirely fails to grapple with the confessions that the jury did hear during trial." Opp'n at 6–7, 17–18. Yet it is the Warden who fails to "grapple with" the relevant legal standards. A presumptively prejudiced jury is structural error that is *not* subject to the type of harmless-error analysis that the Warden invokes. Pet. at 12. In any event, the Warden ignores that the condemnatory and editorialized news coverage—not admitted in evidence at trial—was itself prejudicial. *Id.* at 6–7, 20–23. And she overlooks that the jury must be impartial not just as to guilt, but also with respect to imposing the death penalty. *Morgan*, 504 U.S. 719, 726-29 (1992); *see also Irvin v. Dowd*, 366 U.S. 717, 725 (1962) (jury not impartial where "curbstone opinions, *not only as to petitioner's guilt but even as to what punishment he should receive*, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations" (emphasis added)). The publicity in Mr. Mammone's case was uniquely prejudicial as to that issue. *See* Pet. at 6–7, 20–23.

In the end, none of the Warden's arguments counsel against this Court's review of Mr. Mammone's questions presented, and the petition for writ of certiorari should be granted.

Respectfully submitted,

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