

No. 25-6899

**IN THE SUPREME COURT OF THE UNITED
STATES**

OCTOBER TERM, 2025

TRACEY L. BROWN,

Petitioner-Appellant,

v.

**ATTORNEY GENERAL FOR THE STATE OF
NEVADA; RONALD OLIVER,**

Respondents-Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**REPLY TO OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

MARK D. EIBERT
Post Office Box 1126
Half Moon Bay, CA 94019-1126
Telephone: (650) 712-8380
Counsel of record for Petitioner
TRACEY L. BROWN

QUESTIONS PRESENTED

1. Did the Ninth Circuit Panel err in a federal habeas case where, following an *ex parte* contact during trial between multiple jurors and a key prosecution cooperating witness and her non-testifying friend one business day before the jury began deliberations, the friend vouched for the truthfulness of the cooperating prosecution witness and urged them to concentrate on certain prosecution evidence over other evidence, the Ninth Circuit Panel required the *defendant* to *prove prejudice* sufficient to grant a mistrial, rather than observing the *presumption of prejudice* and placing the burden on the *prosecution* to *rebut* that presumption and prove *lack of prejudice*, as required by the clearly established Supreme Court precedents of *Remmer v. United States*, 347 U.S. 227 (1954), *Mattox v. United States*, 146 U.S. 140 (1892), *Parker v. Gladden*, 385 U.S. 363 (1966) and their progeny?

2. Did the Ninth Circuit Panel err when it ruled in a federal habeas case that the Nevada Supreme Court's decision in *Meyer v. State*, 119 Nev. 554 (2003), which created the state court rule described above that eliminated the presumption of prejudice and shifted the burden of proof from the prosecution to the defense contrary to this Court's clearly established precedents, and which was used by the state court below to uphold the denial of two motions for a new trial, did not violate this Court's precedents in *Remmer I, supra*, *Mattox, supra*, *Parker, supra* and their progeny?

3. Are the issues set forth above important questions of federal law that have not been, but should be, settled by this Court?

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INTRODUCTION

The State's admits that the Ninth Circuit's new test for determining prejudice in the context of juror misconduct and placing the burden of proof on the defendant is "an imperfect, slightly awkward fit," and "not a perfect fit" with this Court's precedents—which presume prejudice in cases of third party communications with jurors and place the burden of proof on the prosecutor to prove lack of prejudice. Opp. at 13, 14.

The State also admitted expressly below, and again expressly in its Opposition, Opp. at 11, and by implication, Opp. at 16-17, that here is a *split of authority among the Circuits* regarding when prejudice is to be automatically presumed. Indeed, the state court, in creating its own new test, adopted the position of Circuits that took one such approach and declined to follow the other. Opp. at 17. *See Meyer v. State*, 119 Nev. 554, 564 & n. 24, 25 (2003) (citing the conflicting circuit cases). The State merely argues in its "Introduction" that its admission of a Circuit split below was made for a different purpose. Opp. at 1.

Moreover, the Opposition ignores facts that are critical to this Court's analysis and stresses irrelevant facts to obfuscate the real issues—which are discussed below.

FACTUAL ISSUES

The State completely ignores, indeed does not even acknowledge, the following facts that are critical to this Court's analysis:

1. That all four courts to hear this case found that juror misconduct *had*

occurred.

2. That the trial judge found that there was a deliberate attempt to influence the jury in the elevator. Pet. *Appendix E*.

These two facts make much of the State's arguments about the type and degree of the misconduct irrelevant to this Petition--except for the fact that the Circuits are split on this issue.

3. That the trial judge held that "the standard is a new trial must be granted unless it appears beyond a reasonable doubt that no prejudice has resulted." This put the burden of proof on the prosecution as required by this Court's precedents and none of the subsequent courts that heard this case and applied the opposite rule even bothered to explain why the trial court was wrong.

4. That in arguing that the presumption of prejudice was defeated in this case, Opp. at 1, the State fails to note that neither the state appellate court, nor the federal trial and appellate courts on habeas, ever adopted such a presumption, instead bypassing it to find that no presumption applied.

As for the facts the State *did* provide, they were deficient for these reasons:

First, the State begins by implying that Mr. Brown was identified by the victims of all seven robberies, citing a variety of things certain victims said about their robber. As noted at page 4 of the Petition, before Gallon testified the State had *zero* witnesses who were able to identify Mr. Brown as their robbers either in court or in the photo lineups in three of the seven robberies, and two additional victims who identified him in the photo lineups could not identify him as their partially

masked robber as he sat at the defense table. Some victims who identified Mr. Brown as their robber in the photo lineups could not identify him in court,¹ and two of the ones that did identify him in court had picked someone *other* than Mr. Brown in the photo lineups. One more victim could not decide which of two photos belonged to their robber. And in the end, even if Gallon's testimony was accepted, four and perhaps five of the robberies still had no witness who could identify Mr. Brown *in court* as their robber. Listing cherry-picked tidbits that various witnesses testified to have seen in *their* robberies, like the color of the robber's shirt (which was not identical in all the robberies), did not amount to identifying Mr. Brown as the robber in many of those cases. Gallon's credibility was critical to identifying Mr. Brown as the robber in many of the robberies of which he was convicted.²

Similarly, the State attempts to limit the prejudice from the elevator incident to just one juror, Juror No. 2. But as pointed out at pages 5-8 of the Petition, Juror No. 4 heard the witness' friend talk say "tell *them* [the jurors in the elevator] to look at the tapes, just look at the tapes. That says everything." And Juror No. 13 heard the friend talk about the case and what the prosecution witness said and thought it was done loudly and purposely. Moreover, testimony revealed that the jurors who

¹ The accuracy of the photo lineups were hotly contested at trial, with the defense arguing that the police used a six-year-old photo of Mr. Brown rather than his contemporaneous booking photo.

² The State notes that in relation to one video the victim got a brief glimpse of the robber's face when his mask (shirt) momentarily slipped and in another case the victim said she thought she saw him in the store at a separate time an hour before the robbery—which could have inadvertently and erroneously affected her later identification of him as the robber. Opp. at 3. The Petition erroneously states that none of the alleged victims ever saw the unmasked face of the person they later identified. Counsel apologizes for that error.

were in the elevator *all* discussed the incident, and that the jurors as a whole were shocked by it—although seven of the nine did not report it to the Judge, and the first one to do so waited until Monday (three days) instead of doing so while they were all still in the courthouse.³ Yet the State ignores two of the three jurors’ recollections of the elevator incident and concentrates on the jurors who only heard them talk about the witness’ hair or hat—which are irrelevant, unless you want to bury the significant jurors’ testimony.

The State also notes that the defense attorney did not accept the trial Judge’s offer to dismiss Juror No. 2 and one other juror—there were only two alternates—because the attorney insisted that *three* jurors were prejudiced and the trial Judge’s refusal to dismiss all three—and declare a mistrial—did not solve the prejudice issue. And the fact that the prosecutor admitted that Juror No. 2 should be dismissed and the trial court effectively admitted she was prejudiced by *sua sponte* offering to dismiss her proves that at a minimum, *one* tainted juror *did* serve on Mr. Brown’s jury—and as noted in the Petition, the law is clear that *even one* tainted juror denies a defendant due process. *See Parker v. Gladden*, 87 S. Ct. 468, 470-471 (1966); *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998 (en banc), *cert. denied*, 525 U.S. 1033 (1998); *Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1997); *Turner v. Louisiana*, 379 U.S. 466, 472 (1965).

And the State cites the conclusion that the State didn’t even need to call Gallon as a witness. This is contrary to the fact that without her testimony the

³ The eighth juror only reported it after the first one had done so.

prosecution had *zero* witnesses to identify Mr. Brown as the robber in three of the seven robberies, and witnesses to four or five robberies who could not identify him in court even accepting her testimony, and it does not explain why the prosecution *did* call her—and even gave her a plea deal likely to probation for her admitted participation in three allegedly armed robberies.

Petitioner and Respondent disagreed on some other facts as well in the briefs.

REASONS FOR GRANTING THE PETITION

The State first argues that the Ninth Circuit’s decision, while “imperfect and a little awkward,” and “not a perfect fit” with this Court’s precedents, it is “consistent” with them. It is wrong.

In *Remmer v. United States*, 347 U.S. 227 (1955) (*Remmer I*), this Court held that “[i]n a criminal case, *any* private communication, contact, *or* tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is...presumptively prejudicial...” *Id.* at 229 (emphasis added). While the presumption is not conclusive, the “burden rests heavily upon the Government” to establish that the contact was harmless to the defendant. *Id.* This Court cited *Mattox v. United States*, 146 U.S. 140 (1892) and *Wheaton v. United States*, 133 F.2d 522, 527 (8th Cir. 1943) in support.

In *Mattox*, during jury deliberations the bailiff made remarks about the defendant having killed other people before and how he would be tried again, and an unnamed person read a newspaper article about the case to the jurors in the jury room. This Court found those communications to the jury to be *jury tampering*,

reversed the judgment, and remanded the case for a new trial. *Mattox*, at 142-144.

In doing so, this Court held that

separation of the jury in such a way as to expose them to *tampering* may be reason for a new trial, *variously held as absolute, or prima facie, and subject to rebuttal by the prosecution*; or contingent on proof indicating that a tampering really took place.... Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."

Id. at 149-150 (emphasis added).

In *Parker v. Gladden*, 385 U.S. 363, 365 (1966), this Court reaffirmed the *Remmer I* and *Mattox* rule and dismissed the argument that since only two of the jurors had heard the prejudicial remarks the defendant's due process rights of confrontation, cross-examination and counsel was not violated.

These Supreme Court precedents are clear, unambiguous and have never been overruled. Respondent below admitted there was a Circuit split over when prejudice in this context should be *automatically* presumed—something that this Court's *Remmer/Mattox/Parker* line of cases appear to say "always." But in any event only *this* Court could carve out an exception and it is not an issue in this case because the existence of the misconduct and the fact that the witness and friend attempted to influence the jury are undisputed.

The State argues that *Smith v. Phillips*, 455 U.S. 209 (1982) effectively overruled the *Remmer I* line of case because it called for a hearing in that case to determine prejudice. But as discussed at pages 18-19 of the Petition, *Smith* involved a different kind of juror misconduct which courts uniformly distinguish from the

kind in this case. *Smith* did not involve any improper third-party contact, outside intrusion or attempt to sway the jury at all, but a totally independent act by a juror—in submitting an employment application to the D.A.’s office, apparently by mail, which arguably could have affected *his own* impartiality. In that situation the *Remmer* I presumption did not apply by its express terms, and this Court considered a hearing in which the defendant bore the burden of proving prejudice to be appropriate.

The State also argues that *United States v. Olano*, 507 U.S. 725 (1993) “acknowledged the need for a case-by-case examination of alleged facts” involving outside intrusions because “[t]here may be cases where an intrusion should be presumed prejudicial.” Opp. at 11. But as pointed out at page 19 of the Petition, there was no “outside intrusion.” The case involved alternate jurors attended jury deliberations under instructions to observe but not participate, was decided under Federal Rule of Criminal Procedure 24 not the Constitution, and was decided under the plain error standard of Rule 52(b) when the appellant waived the argument by pleading guilty and agreeing to the arrangement of the alternate jurors—thereby relieving the prosecution of any burden that may have existed. If this Court had intended *Olano* to overrule or even create a broad exception to *Remmer* *I/Mattox/Parker* it would have said so. Nor does the Ninth Circuit have the authority to do that.

More recently, *State v. Murdaugh*, ___ S.E.2d ___, 2026 WL 1322305 (May 13, 2026), which was decided after the Petition was filed, rejected the State’s

argument in this case. In *Murdaugh*, a court clerk, who was writing a book about the ongoing high-profile double murder trial, made comments to several jurors that implied the defendant's guilt. The South Carolina Supreme Court noted that although there is a split among the Circuits regarding whether the *Remmer* presumption survived this Court's *Smith* and *Olano* cases, it held that neither case expressly overruled *Remmer* and that both of those cases' outcomes were informed by their different procedural postures. *Murdaugh* at *6-*8 & n. 8 (citing and relying on multiple Fourth Circuit cases). The Court also held that it didn't matter that only a few of the jurors had overheard the prejudicial remarks. In doing so, the Court reversed a very high-profile double murder conviction by applying the Fourth Circuit's version of the *Remmer I/Mattox/Parker* rule. In addition to *Murdaugh*, the Ninth Circuit also held that the rulings of the *Remmer* line of cases are still good law—except when other Ninth Circuit cases say it is not. *Godoy v. Spearman*, 861 F.3d 956 (9th Cir. 2017).

Counsel is not arguing that *no ex parte* contact with jurors can *ever* be nonprejudicial. There *is* disagreement on that in the *lower court* cases that attempt to define an exception where the presumption of *Remmer et al.* might or might not apply. The cases cited by the Ninth Circuit in support of such an exception involved contacts such as “passing in the hall or crowded together in an elevator” *without speaking*, *Godoy v. Spearman*, 861 F.3d 956, 967 (9th Cir. 2017), and *United States v. Dutkel*, 192 F.3d 893, 895 cited cases such as *United States v. English*, 92 F.3d 909, 913-914 (9th Cir. 1996) (elevator encounter between juror and victims, again

without speaking); and *United States v. Madrid*, 842 F.2d, 1090, 1091 (9th Cir. 1988) (court clerk calming juror who had been sworn at by another juror)). Counsel is not arguing about whether there might be some “contacts” so meaningless as to be presumed harmless because (1) it simply is not an issue in this case, where the existence of the misconduct and the fact that the third party contact involved a deliberate attempt to influence the jury are undisputed and (2) only *this* Court can decide if such an exception existed even if it were relevant here.

The State next argues that the Ninth Circuit did not create a new test for analyzing juror misconduct, but that its opinion was “within the spectrum of juror misconduct,” whatever that means, albeit “imperfectly” and “awkwardly.” To be clear, it *is* a new test for analyzing juror misconduct involving improper third-party contact with jurors aiming to influence the jury’s verdict. The State does not cite one case with a test or analysis even remotely similar to what the Ninth Circuit did in this case.

The Panel essentially tries to *overrule* the *Remmer I/Mattox/ Parker* precedents with a focus solely on *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and goes through a tortured ride of other cases, taking a piece from here and a piece from there, to create a Frankenstein’s Monster of a decision. And in the process it holds that all “trial errors” are not subject to the *Remmer* presumption—creating a sweeping new exception to that presumption. This is not about the “integrity of the jury,” it is about presumptions of prejudice and the burden of proof.

Brecht provides a general standard of review for habeas cases. It is good law

in the proper context. But here, this Court has provided a *specific* standard for judging the prejudice of juror misconduct involving third party contacts attempting to influence the jury's verdict, *or* for jury tampering. A court doesn't even get to *Brecht* if it properly applies *Remmer I et al.* at the trial court level, which improperly denied two motions for a mistrial/new trial, nor can a trial court's violation of clearly established Supreme Court precedent be saved by an appellate court inventing new rules to avoid overturning invalid convictions. Nor can an invalid conviction be upheld by citing cases that have already been disapproved by the en banc court (*e.g. Dutkel, supra*) or by redefining common terms like "jury tampering"—which the cases uniformly say is either presumptively or conclusively presumed to be prejudicial. *Mattox*, 146 U.S. at 149-150; *Meyer*, 119 Nev. at 564.

As far as jury tampering is concerned, this Court has often said that legal terms should be interpreted consistently with their ordinary meaning. *See, e.g., Bondi v. VanDerStok*, 604 U.S. 458 (2025). As shown at pages 23-24 of the Petition, what happened in this case is exactly what the common and ordinary meaning of "jury tampering" is. It is also exactly what this Court described in both *Remmer I*, 347 U.S. at 229 and *Mattox*, 146 U.S. at 149-150. Moreover, *Remmer I* defines the situation calling for the presumption of prejudice as *either* "any private communication or contact *OR tampering*, directly or indirectly, with a jury during a trial about a matter pending before the jury." *Remmer I* at 229. Not only is the common and ordinary meaning of jury tampering exactly what happened in this case, it is also precisely what this Court held is either presumptively or conclusively

prejudicial. And even the Ninth Circuit held that jury tampering is an “egregious error” subject to the presumption of prejudice. The Panel simply failed to properly identify the activity in this case as jury tampering.^{4, 5}

The State next argues that the Nevada Supreme Court does not conflict with this Court’s binding precedents. But that court’s unexplained (and inexplicable) *Meyer* decision created a new test effectively eliminating the presumption of prejudice and placing the burden on the defendant to prove prejudice in this situation, contrary to this Court’s precedents. *See* the Petition at 28-33 for more detail which will not be repeated here. Moreover, the Nevada court recognized the split of authority among the federal Circuits on this issue, and Ninth Circuit law itself is divided and all over the place—much of it reaffirming the Circuit’s following of *Mattox*, *Remmer I* and *Parker*. *See* Petition at 34-36.⁶ Nor does the Panel’s

⁴ The State admits that the Panel erred in classifying “structural errors” as subject to merely a *rebuttable* presumption. Opp. at 13-14.

⁵ The State says that the *definition* of “jury tampering” was not raised up through the Opening Brief. That is because the issue of that term’s definition—which is only part of the *Remmer I* formula--was first raised by the State in its Answering Brief. The Reply Brief *replied* to that argument and after the Panel addressed it in the Opinion at issue here, raised it again in petitions for rehearing/rehearing en banc. The State also urges that if this Court finds that the Ninth Circuit Opinion is a complete outlier with a new test for analyzing juror misconduct involving third party communications, the Ninth Circuit should be allowed to correct it on its own. But (1) both the Panel and the En Banc Court had the chance to do so on rehearing and declined, and (2) given the multitude of issues how would they know what to correct without an Opinion based on full briefing and argument from this Court explaining it?

⁶ The State’s misunderstands the Petitioner’s argument when it interprets it as saying that Ninth Circuit case law is split on its interpretation of the *Meyer* opinion itself. The argument segued from the Ninth Circuit cases following the opposite of the new *Meyer* rule to intra-Circuit splits among the Ninth Circuit cases over the application of the presumption itself as expressed in both *Meyer* and the Ninth Circuit Panel’s decision. *See* Petition at 34-37.

reliance on *Von Tobel v. Benedetti*, 975 F.3d 849 (9th Cir. 2020) provide an excuse for their ruling. The erroneous state court decision in *Meyer* led the state court in this case to follow its own precedent, and *Von Tobel*'s decision not to correct it (and the Panel's decision to follow it) was, for the reasons discussed in the Petition, also erroneous. One error led to another, and only this Court can reassert its authority to fix it. Neither *Von Tobel* nor *Meyer* were ever appealed to this Court, allowing their erroneous conceptions of this Court's precedents to metastasize.

Finally, the State argues that *de novo* review would show that there was no prejudice because the jurors said that they would not be swayed by what had happened, that what happened in the elevator was obviously harmless (in the prosecutors' eyes), and that there was enough evidence to support the conviction even without Gallon's testimony.

As to the first argument, it ignores the case law cited at page 16 of the Petition that jurors can testify to the *facts* of the improper contacts but *not* to whether it influenced their verdict. *See Mattox*, 146 U.S. at 147-149 (discussing this rule and citing cases). The Nevada Supreme Court reached the same conclusion, explaining that jurors can testify as to the extent of their exposure to the improper contact, but cannot and should not opine on the subjective effects of any extrinsic evidence of misconduct on the jurors because it is an *objective* test to determine whether the average, hypothetical juror would be influenced by the juror misconduct, making juror statements on the actual effect of the misconduct on their deliberations inadmissible. *Meyer*, 119 Nev. at 566-567.

In the recent high-profile case of *State v. Murdaugh, supra*, the South Carolina Supreme Court also ruled that jurors can testify as to the external communications made to them but *not* as to whether they influenced their verdict. *Murdaugh*, at *9-*10. The Court based this ruling on South Carolina Rule of Evidence 606(b), which it noted was substantially the same as Federal Rule of Evidence 606(b) and cited federal cases in its analysis. *Id.* Nevada’s evidentiary rule, N.R.R. 50.065, is also substantially the same as the Federal and South Carolina rules. The *Murdaugh* court therefore rejected a lower court’s conclusion, based on juror affidavits and testimony that they were not influenced in their verdicts by a court clerk (who was writing a book on the high-profile trial) indicating she thought the defendant was guilty.

In other words, the trial court should not have based its decision on whether the jurors *said* that they would not be influenced by what happened in the elevator but should have only used what they said *happened* to determine whether “the average, hypothetical juror” would be influenced. Here, an extremely questionable prosecution witness, cooperating against her allegedly cheating boyfriend in exchange for probation for her role in the same robberies, gave hostile and contradictory (indeed false) testimony about her own plea deal. And immediately after her testimony her friend told an elevator full of jurors that the witness had told the truth and that they should consider certain specific *prosecution* evidence as dispositive in a *deliberate attempt* to influence the jury. Under any objective test, a hypothetical average juror would have been influenced.

As to the second argument, the facts and trial court rulings outlined in the Petition and above demonstrate not only that it could have affected the jury's verdict, but that Juror No. 2--who the prosecutor said should have been discharged and the trial court impliedly agreed by *sua sponte* offering to dismiss her--*actually sat* on the jury that convicted Mr. Brown. That establishes a due process violation in any event.

As to the third argument, again as described more thoroughly in the Petition, Gallon's extremely hostile and uncooperative testimony against the boyfriend she said cheated on her in exchange for possible probation for her own role in the robberies, and her refusal to admit the benefits she would get by her testimony until her plea agreement was shoved in front of her, made her testimony more than just suspect. Her friend had reason to worry and try immediately after her testimony⁷ to vouch for her truthfulness and direct the jury's attention away from her testimony and the evidence that favored the defense—including all the victims who could not identify Mr. Brown as their robber and the fact that the photo lineup used a six year old photo of Mr. Brown--to the videos, which they thought favored the prosecution. And the State never answered the question of why the prosecutor felt he had to call her at all, so much so that they offered her such a generous cooperation deal. Counsel submits that they did that because without her testimony, multiple victims were unable to identify Mr. Brown as their robber, and others made contradictory identifications between the time of the photo lineups and

⁷ The State glosses over the fact that Gallon was the *last* witness to testify in the trial, and no further evidence was introduced after that.

their trial testimony. And perhaps that is why the prosecutor, in the hearing questioning jurors about the elevator incident, chose not to call either Gallon (their own witness) or her friend (who Gallon obviously knew) to testify, making the hearing woefully incomplete and inadequate.

In any event, the courts below, and this Court now, need not get to the stage of assessing the sufficiency of the evidence. If the presumption required by this Court's rulings was not followed, and the burden of proof also required by this Court was reversed from the prosecution to the defense, the trial court erred by refusing to grant the two motions for a mistrial/new trial and the appellate courts that followed erred by not overturning the verdict on that basis.

CONCLUSION

The case law on juror misconduct involving outside influences is a mess. There are questions on which the circuits are split between themselves, within their own case law, and with state courts, that only this Court can resolve. The *Murdaugh* case, which was still in the national news on the day this Reply is being filed, illustrates why this Court should, once and for all, explain what its rulings in *Remmer I*, *Mattox* and *Parker* mean and how they should be applied.

For the foregoing reasons, petitioner Tracey L. Brown respectfully requests that this petition for writ of certiorari be granted.

Dated: June 19, 2026

Respectfully submitted,

/s/ Mark D. Eibert

MARK D. EIBERT

Counsel for Petitioner TRACEY L. BROWN