

No. 1010915

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM THOMAS BAUBERGER,

Petitioner,

v.

GRADY J. HAYNES, SUPT., OF
WARREN CORRECTIONAL INST.,

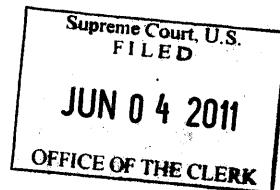
Respondent.

On Petition for Writ of Certiorari
From The United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 6, 2011

Question Presented

Did the North Carolina Court unreasonably apply established precedent of the United States Supreme Court where it ruled that the action of a juror looking up in a dictionary the words essential to the decisive jury instruction is an “internal” matter that merely affects how the juror feels or facilitates an examination of what the juror already thinks or believes, or is such action by a juror an “external” matter that (1) is extraneous prejudicial information that was not admitted into evidence but nevertheless bears on a fact at issue in the case, or (2) is an outside influence upon the partiality of the jury; and did such ruling have a substantial and injurious effect on the Petitioner?

Parties to the Proceeding

The parties to the proceeding are those named in the caption above.

Corporate Disclosure Statement

Petitioner represents that the following listed persons and entities as described in Supreme Court Rule 12.6 have an interest in the outcome of this case. These representations are made so that the Justices of this Court may evaluate possible disqualification or recusal.

Judge, United States District Court, Middle District of North Carolina	Hon. Thomas Schroeder
Magistrate Judge, United States District Court, Middle District of North Carolina	Hon. Wallace Dixon
Petitioner	William Thomas Bauberger
Respondent	Grady J. Haynes, Superintendent of Warren Correctional Institute
Attorney for Petitioner, Petition for Writ of Certiorari	M. Michael Mowla
Attorney for Respondent	Clarence Deforge, Special Deputy Attorney General
Attorney for Respondent	N.C. Department of Justice
Postconviction Counsel for Petitioner Before United States District Court, Middle District of North Carolina	Kearns Davis Brooks Pierce McLendon Humphrey & Leonard
Postconviction Counsel for Petitioner Before United States District Court, Middle District of North Carolina and United States Court of Appeals for the 4 th Circuit	David L. Neal
United States Court of Appeals for the 4 th Circuit (Dissenting Opinion)	Hon. J. Harvie Wilkinson
United States Court of Appeals for the 4 th Circuit	Hon. Damon J. Keith
United States Court of Appeals for the 4 th Circuit	Hon. Diana G. Motz
Trial Counsel for Petitioner (Withdrew prior to trial)	James Quander
Trial Counsel for Petitioner	Don Tisdale
Trial Counsel for Petitioner	David Freeman

Assistant District Attorney	Vincent Rabil
N.C. Superior Court Trial Judge	John O. Craig, III
Appellate Counsel for Petitioner N.C. State Proceedings	Kathy L. Vandenberg
North Carolina Court of Appeals Judge	Hon. Rick Elmore
North Carolina Court of Appeals Judge	Hon. Ann Marie Calabria
North Carolina Court of Appeals Judge	Hon. Martha Geer
Appellate Counsel for North Carolina	Roy Cooper
Appellate Counsel for North Carolina	Patricia A. Duffy
Appellate Counsel for North Carolina	Isaac T. Avery, III.
North Carolina Supreme Court	Hon. I. Beverly Lake, Jr.
North Carolina Supreme Court	Hon. Edward T. Brady
North Carolina Supreme Court	Hon. Sarah Parker
North Carolina Supreme Court	Hon. Robert Edmunds, Jr.
North Carolina Supreme Court	Hon. Mark Martin
North Carolina Supreme Court	Hon. Patricia Timmons-Goodson

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PETITION FOR WRIT OF CERTIORARI

Petitioner **WILLIAM THOMAS BAUBERGER** respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Opinions Below

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit are found at Bauberger v. Haynes, 632 F.3d 100 (4th Cir. 2011) (App. A). The opinion and judgment of the district court for the Middle District of North Carolina is found at Bauberger v. Haynes, 702 F.Supp.2d 588 (M.D. N.C. 2010) (App. G).

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were entered on February 11, 2011. (App. A). A petition for rehearing was filed by Petitioner on February 25, 2011. (App. B). The mandate was stayed on the same date. (App. C). Petitioner's Petition for Rehearing and Rehearing En Banc were denied on March 11, 2011. (App. 9). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Relevant Statutory Provision

The relevant federal statute at issue in this case is 28 U.S.C. § 2254(d)(1). (App. E).

Statement of the Case

Petitioner **WILLIAM THOMAS BAUBERGER** is serving a sentence of 189 to 236 months imprisonment in North Carolina for second-degree murder. (App. H, p. 143-148). His conviction arose from a traffic accident on February 3, 2002 in which Petitioner was driving while intoxicated. (App. H, p. 135, 143-148). He was tried before a jury in August 2003. (App. H, p. 112, 143-148).

During deliberations, the jury asked the trial court several questions about “malice,” an element of second-degree murder that was in dispute. (App. H, 137-138; App. F & G); Bauberger v. Haynes, 666 F.Supp.2d 558 (M.D. N.C. 2008). After the jury reported a deadlock, the trial court gave the jury an Allen charge. Soon thereafter, the jury returned verdicts of guilty for second-degree murder and assault with a deadly weapon inflicting serious injury. (App. H, p. 139-140; App. F & G).

Petitioner’s trial defense rested on the legal distinction between malice and culpable negligence. A finding of malice meant second degree murder, while a finding of culpable negligence meant involuntary manslaughter. N.C. Gen. Stat. § 14-17 (2001); N.C. Gen. Stat. § 14-18 (1997). In North Carolina, “malice” is that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse or justification. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922), overruled on other grounds, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Tilley, 18 N.C. App. 300, 196 S.E.2d 816 (1973); State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979); State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983); State v. Hamilton, 77 N.C. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1986).

The implications of whether Petitioner acted with “malice” on February 3, 2002 are enormous. See State v. Watson, 338 N.C. 168, 449 S.E.2d 694 (1994), overruled on other grounds; See also State v. Richardson, 341 N.C. 585, 461 S.E.2d 724 (1995). In North Carolina, murder in the second degree is a class B2 felony. N.C. Gen. Stat. § 14-17 (2001). In 2002, for a person of Petitioner’s prior record level, murder in the second degree was punishable by a presumptive range of 151 to 236 months in prison, excluding aggravating and mitigating factors, neither of which was found in this case. N.C. Gen. Stat. § 15A-1340.17(c), (e) (1997); (See

Judgment of Conviction, App. H p. 143-148). Involuntary manslaughter, on the other hand, is a class F felony in North Carolina. N.C. Gen. Stat. § 14-18 (1997). Had Petitioner been convicted of involuntary manslaughter, he would have been punished under a presumptive range of 15-23 months in prison. N.C. Gen. Stat. § 15A-340.17(c)-(d) (1997). As becomes apparent when the ranges are compared, the finding of malice increased Petitioner's sentencing exposure by more than an order of magnitude.

During the trial, the trial judge instructed the jurors on the meaning of "malice," the element of second-degree murder Petitioner disputes, as follows:

"Malice is a necessary element which distinguishes second degree murder from manslaughter. Malice arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief."

Bauberger v. Haynes, 632 F.3d at 105 (App. A). Shortly after beginning its deliberations, the jury requested a copy of the elements of second-degree murder and manslaughter. Id. at 105 (App. A); (App. H, 137-138). In response, the judge reread the instructions to the jurors and asked them to return to deliberations. Id. at 105 (App. A). The jury's foreperson then obtained a dictionary and read some of its definitions to the other jurors. Id. at 105 (App. A). Though he the jury foreperson did not read the definition for "malice" itself to the jury, he read them the definitions for "recklessly" and "wantonly," both of which were in the jury charge. Id. at 105 (App. A). The dictionary used by the jury foreperson defined "recklessly" as "lack of due caution" and the "wantonly" as "arrogant recklessness of justice or the feelings of others." Id. at 106 (App. A). Two hours later the jury informed the judge that they had resolved one count but were split seven to five on the other. Id. at 106 (App. A). The judge instructed them to do their best to "reconcile [their] differences . . . without the surrender of conscientious convictions." Within one hour the jury stood at ten to two, and then two hours later the jury convicted

Petitioner of second-degree murder and assault with a deadly weapon inflicting serious injury. Id. at 106 (App. A); (App. H, 139-140). In addition, the jurors looked up the other definitions in the dictionary such as “manifest,” “utterly,” “fully, totally,” and “regard.” Id. at 106 (App. A). Another juror looked up “malice” in a dictionary at his home but claimed that he did not copy it down. Id. at 106 (App. A).

Therefore, despite having the definitions they needed in the jury charge, the jurors struggled with the issue of “malice.” Id. at 106 (App. A); (App. H, p. 137-138; App. F). At one point, the jury asked the court for a “copy of the law” (i.e., copy of the statute) about the elements of murder in the second degree, and also specifically a copy of the final element of the statute. Bauberger v. Haynes, 632 F.3d at 105 (App. A); (App. H, p. 137-138).

The District Court concluded that the dictionary definitions could have allowed the jury to convict on a lesser standard than required under North Carolina law. (App. G). The United States Magistrate Judge also found that the dictionary definitions of “reckless” and “wanton” set a lower standard than that required under the trial court's instructions. (App. F). Based on the dictionary definitions, the District Court found that at least one juror could have concluded that it was permissible to find “malice based on a standard of carelessness, which is less than the... standard to which the State is to be held.” (App. F). The District Court further found that the holding of the North Carolina Court of Appeals that the Sixth Amendment to the United States Constitution does not protect an accused with regard to “legal terminology” is *not* the law. (App. F). After thorough review of the record, the Magistrate Judge concluded that under clearly established Supreme Court law, “the mere fact that an influence is ‘legal terminology’ does not immunize it from the Sixth Amendment.” (App. F). Reviewing the record for harmless error, the Magistrate Judge found that the jury misconduct had a substantial and injurious effect or

influence in determining the jury's verdict. (App. F). The District Court further found that Petitioner "has the right to be tried according to the trial judge's instructions, rather than based on a dictionary definition that arguably lowered the standard of culpability for finding malice." (App. F).

The District Judge reviewed the record and the Magistrate's Recommendation *de novo*. (App. G). The District Judge independently concluded that the writ of habeas corpus should issue, as resort to a dictionary is an extrinsic influence because it contains definitions of legal terms that were not presented during the trial, imparted by the trial judge in the jury instructions, or based upon the common knowledge, belief, or impression of the jurors. Bauberger v. Haynes, 702 F.Supp.2d 588 (M.D. N.C. 2010); (App. G). The District Judge also found that the determination by the North Carolina Court of Appeals was an objectively unreasonable application of the U.S. Supreme Court's clearly established law. Id., (App. G). Further, the District Judge found that "Improper prejudice regarding a single juror is sufficient grounds to grant a habeas petition. Id., (App. G).

Here, all twelve jurors were exposed to the extraneous information....such broad exposure creates a high likelihood that one juror may have been influenced by the dictionary definitions such that the standard in the judge's malice instruction was lessened. Id., (App. G). Thus, the District Court concluded "the facts in the record are at least evenly balanced so as to cause grave doubt as to the harmlessness of the jurors' misconduct." Id., (App. G). As the District Judge and Magistrate Judge recognized, Petitioner's future hung on the meaning of those words. He heard the court's definitions, his counsel argued the court's definitions, and the court's definitions are the law. But Petitioner had no opportunity to confront the dictionary definitions, and his counsel had no opportunity to argue their meaning to the jury. (App. F & G).

Reasons for Granting the Writ

I. Reason for Granting the Writ

The North Carolina Court unreasonably applied established precedent of the United States Supreme Court where it ruled that the action of a juror looking up in a dictionary the words essential to the decisive jury instruction is an “internal” matter that merely affects how the juror feels or facilitates an examination of what the juror already thinks or believes, and such action by a juror is an “external” matter that (1) is extraneous prejudicial information that was not admitted into evidence but nevertheless bears on a fact at issue in the case, and (2) is an outside influence upon the partiality of the jury, and such ruling had a substantial and injurious effect on the Petitioner.

II. Standards for “contrary to clearly established federal law.”

The question when considering a petitioner’s petition for writ of habeas corpus is whether the state court’s decision was contrary to, or involved an unreasonable application of clearly established federal law. See 28 U.S.C. § 2254(d)(1). “Clearly established federal law” under § 2254(d)(1) refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court rendered its decision. Bell v. Cone, 535 U.S. 685, 698 (2002); Williams v. Taylor, 529 U.S. 362, 405, 413 (2000). The petitioner must raise at least one issue as to which the petitioner makes a substantial showing of the denial of a federal right. Barefoot v. Estelle, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983). A substantial issue may also exist when the result sought on appeal is not squarely foreclosed by statute, rule, or authoritative court decision, lacks any factual basis in the record. Autry v. Estelle, 464 U.S. 1301, 1302, 104 S. Ct. 24, 78 L. Ed. 2d 7 (1983) (because of potential conflict between circuits, it could not be said that issue lacked substance).

III. Standards for “harm.”

Even if the state court proceedings violated clearly established law, the court may not grant a defendant’s petition for relief if the error was harmless. Jones v. Polk, 401 F.3d 257, 265 (4th Cir. 2005). The habeas petitioner is entitled to relief if a habeas court is “in grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury’s verdict.” O’Neal v. McAninch, 513 U.S. 432, 436 (1995) (internal quotation marks and citation omitted). “[G]rave doubt exists when, in the relevant circumstances, the question is so evenly balanced that the reviewing court finds itself in virtual equipoise on the harmless issue.” Barbe v. McBride, 521 F.3d 443, 461 (4th Cir. 2008) (internal quotation marks and citations omitted).

IV. The Trial Court unreasonably applied established Supreme Court precedent.

To determine whether North Carolina unreasonably applied established Supreme Court precedent, this Court must conclude with fair assurance that not a single juror’s decision was swayed by resort to the extrinsic influence of the juror summoning a dictionary for definitions to words found in the jury charge. See Parker v. Gladden, 385 U.S. 363, 366 (1966) (“A defendant is ‘entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors.’”); Fullwood v. Lee, 290 F.3d 663, 678 (4th Cir. 2002) (“[I]f 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.”); Lawson v. Borg, 60 F.3d 608, 613 (9th Cir. 1995) (noting that if even one juror was improperly influenced the verdict must be reversed).

As the dissent in Bauberger v. Haynes wrote, “The Sixth Amendment provides, in relevant part, that ‘the accused shall enjoy the right to a . . . trial[] by an impartial jury . . . [and to] be confronted with the witnesses against him.’” Bauberger v. Haynes, 632 F.3d at 110 (App.

A); U.S. Const. Amend. VI. The Sixth Amendment further guarantees a defendant in a criminal prosecution the right to a jury trial on the issue of guilt or innocence unless the prosecution is for a petty offense. U.S. Const. Amend. VI; Duncan v. Louisiana, 391 U.S. 145 (1968) (applicability of Sixth Amendment right to jury trial in state court.) The same laws that guarantee the right to a jury trial also require that the jury be impartial. U.S. Const. Amend. VI; Irvin v. Dowd, 366 U.S. 717, 722 (1961). Jurors are considered to be impartial if they can lay aside any impression or opinion and render a verdict based on the evidence presented in court. U.S. Const. Amend. VI; Irvin v. Dowd, 366 U.S. at 722. This right prohibits “any private communication, contact, or tampering directly or indirectly, with a juror during trial about the matter pending before the jury.” Remmer v. United States, 347 U.S. 227, 229 (1954). It is improper to employ a procedure at trial that undermines the impartiality of the jury. See Turner v. Louisiana, 379 U.S. 466 (1965) (Actual harm need not be shown). A procedure is improper when it had an actual effect on the jury’s impartiality or is such a practice that it must be presumed to have affected the jury’s impartiality. Turner v. Louisiana, 379 U.S. at 470-471.

All influences outside the record on a juror’s decisions are not necessarily prohibited, as while external influences on a jury’s deliberations are prohibited, internal ones are permissible. Robinson v. Polk, 438 F.3d 350, 362 (4th Cir. 2006). Under established Supreme Court case law, an influence is external if it (1) is extraneous prejudicial information, which is information that was not admitted into evidence but nevertheless bears on a fact at issue in the case; or (2) is an outside influence upon the partiality of the jury, such as private communication, contact, or tampering . . . with a juror. Id. at 363. Examples of internal influences include alcohol or drugs taken by a juror, Turner v. Louisiana, 379 U.S. at 466, or Bible readings which a juror relies

upon for the purpose of “examining his or her own conscience from within,” Robinson v. Polk, 438 F.3d at 363-364.

Under this Court’s precedents, when a jury relies on a source outside of its own knowledge or beliefs to determine what relevant law to apply, and such evidence or law is not presented at trial or by the trial judge as part of the court’s instructions, the jury has been subject to an “external influence” in violation of the Sixth Amendment to the United States Constitution. Rogers v. United States, 422 U.S. 35 (1975) (finding violation of the Sixth Amendment where the court, without consulting the defendant, provided further instruction to the jury which the jury then relied on in convicting the defendant).

In Tanner v. United States, 483 U.S. 107, 117-118 (1987), this Court noted the distinction between “external” influences, such as a juror reading a newspaper or hearing prejudicial statements from others, and “internal” influences. In Parker v. Gladden, 385 U.S. at 364-366, this Court found that a bailiff’s statement to jurors that the defendant was a “wicked fellow” and “guilty” constituted an “outside influence” that violated the defendant’s Sixth Amendment right to fair trial and confrontation because, as this Court held, “the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant’s right of confrontation, of cross-examination, and of counsel.” Then in Turner v. Louisiana, 379 U.S. at 473, this Court found a violation of the defendant’s Sixth Amendment rights because two deputies who testified against him were assigned to guard the jury, and ultimately fraternized with the jury. In Remmer v. United States, 347 U.S. at 229, this Court ruled that “private communication, contact, or tampering” with the jury is presumptively prejudicial. And finally, as early as the 19th Century, this Court in Mattox v. United States, 146

U.S. 140, 149 (1892), held “in capital cases . . . the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment.”

A review of other federal circuits shows support for the position of Petitioner and the position of the dissent below. For instance, Petitioner asks that this court consider the facts and the ruling of the 11th Circuit Court of Appeals in United States v. Martinez, 14 F.3d 543 (11th Cir. 1994). In Martinez, evidence was presented that the jury used a dictionary to look up the definitions of “deliberate,” “predicate,” “subpredicate,” and “deliberation.” Id. at 548. In fact, one juror made an enlarged photocopy of a page from the dictionary of the word “deliberate,” and then used the photocopy to inform other jurors “what we were supposed to be doing in order to reach a decision.” Id. at 548. The 11th Circuit found that the defendant met his initial burden of showing that extrinsic evidence invaded the jury’s deliberations because, among other reasons, the jury used a dictionary to define terms arising during deliberations, including words with technical meanings. Id. at 550. Relying upon United States v. Perkins, 748 F.2d 1519, 1533 (11th Cir. 1984), United States v. Caporale, 806 F.2d 1487, 1503 (11th Cir. 1996), and Remmer v. United States, 347 U.S. at 229, the 11th Circuit held that because the defendant proves extrinsic contact, the burden shifts to the government to demonstrate that the consideration of the evidence was harmless. U.S. v. Martinez, 14 F.3d at 550. The 11th Circuit further found that standing alone, the jury’s use of the dictionary would not warrant a new trial, but in light of the circumstances, including the jury’s willingness to disregard the district court’s instructions, the jury’s use of the dictionary “further taints its deliberations.” Id. at 551.

Petitioner also points out that in Martinez, the words that were looked up by the jury did not go to the heart of the statute allegedly violated by Martinez to the degree that the word “malice” goes to the heart of the statute under which Petitioner stands convicted before this

Court. In U.S. v. Martinez, the defendant was convicted of Counts I, II, III, IV, VI, and VII of an indictment. Id. at 546. Counts III through VIII of the indictment were brought under the Hobbs Act, 18 U.S.C. § 1951, a U.S. federal law that prohibits actual or attempted robbery or extortion affecting interstate or foreign commerce. 18 U.S.C. § 1951. The Hobbs Act covers two distinct forms of extortionate activity: extortion by fear (i.e., traditional robbery), and extortion under color of law, which occurs generally where a government official uses his position to obtain payment from a victim. 18 U.S.C. § 1951(b)(2). The Hobbs Act makes it a crime if a person “...in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section...” 18 U.S.C. § 1951(a). As it applied to Martinez, “extortion” is defined by the Hobbs Act as the “obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” 18 U.S.C. § 1951(b)(2).

Count I of the indictment alleged a conspiracy under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), which provides for extended criminal penalties for acts performed as part of an ongoing criminal organization, in violation of 18 U.S.C. § 1962(d), and Count II alleged a RICO violation under 18 U.S.C. § 1962(c). 18 U.S.C. § 1962(d) simply provides that one cannot conspire to violate any provision of 18 U.S.C. §§ 1962(a), (b), and (c). 18 U.S.C. § 1962(a) provides as follows:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of (18 U.S.C. § 2) to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect,

interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

18 U.S.C. § 1962(a). Finally, 18 U.S.C. §§ 1962(b) & (c) provide as follows:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. §§ 1962(b) & (c). Again, “deliberate,” “predicate,” “subpredicate,” and “deliberation” are not found in any of the statutory provisions of RICO.

As this Court will note, the words looked up by the jury in U.S. v. Martinez, “deliberate,” “predicate,” “subpredicate,” and “deliberation” are not found in the statutory language of the Hobbs Act as it applied in Counts III through VIII of the indictment against Mr. Martinez. Nor are they found in the RICO statute, 18 U.S.C. § 1962. Even so, the 11th Circuit found reversible error and fault with the conduct of the jury in Martinez even though the words looked up in the dictionary by the jury did not go to the heart of the Hobbs Act or RICO or were even found in the statutory language of the Hobbs Act or RICO.

To further support Petitioner's claim in this petition and to contrast Petitioner's circumstances from a case in which the court found the use of a dictionary not prejudicial, consider a case from the D.C. Circuit, United States v. Williams-Davis, 90 F.3d 490 (D.C. Cir. 1996). Here, two jurors admitted that during deliberations, the forewoman looked up the word

“enterprise” in a dictionary and read out the definition to persuade jurors to convict. Id. at 508. The district trial court found this use of a dictionary to be not prejudicial because the term “enterprise” was legally significant only for counts on which the jury *acquitted* the defendants. The Court in United States v. Williams-Davis concluded that the “word word looked up had no legal relevance to the findings necessary for the charges on which the jury convicted.” Id. at 508.

Compare and contrasting United States v. Williams-Davis to the case before this Court, the looking up of the word “malice” in a dictionary and using this definition was prejudicial to Petitioner because “malice” is essential to the count on which the jury convicted Petitioner. Contrary to the holding in United States v. Williams-Davis, the word looked up in this case (malice) has direct legal relevance to the findings necessary for the charges on which the jury convicted Petitioner.

In a civil rights case from the 10th Circuit that further illustrates the issue of a jury using dictionary definitions of terms being crucial to a case, Mayhue v. St. Francis Hosp., Inc., 969 F.2d 919 (10th Cir. 1992), a deadlocked jury used a dictionary to determine the definitions of the terms “discriminate” and “prejudice” during their deliberations. Id. at 921. At issue in Mayhue was the following statutory language: “*It shall be an unlawful employment practice for an employer...to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...*” Id. at 920. The 10th Circuit further affirmed the District Court’s ruling that prejudice was inferred from the timing of the verdict as a formerly deadlocked jury was able to reach a verdict less than three hours after the foreperson read the dictionary definitions, despite having been plagued by

“irreconcilable differences” the night before. Id. at 926. Thus, in Mayhue, the Court found fault with the jury using dictionary definitions that are found in the statutory language and that go to the heart of the case, just as “malice” goes to the heart of the statute under which Petitioner stands convicted before this Court. Further, the Mayhue court set forth a five-part test that will be discussed in detail below.

In the 4th Circuit, Courts have found that the reliance of a jury on a dictionary in defining the applicable legal principles violates the Sixth Amendment. See United States v. Duncan, 598 F.2d 839 (4th Cir. 1979). For instance, in McNeill v. Polk, 476 F.3d 206 (4th Cir. 2007), two of three judges on the panel found a juror had relied on an improper external influence by consulting dictionary for the definition of “mitigate.”

Finally, the 9th Circuit Court of Appeals has ruled on this issue as well. In Marino v. Vasquez, 812 F.2d 499 (9th Cir. 1987), the Court ruled that the “unauthorized reference to dictionary definitions constitutes reversible error which the State must prove harmless beyond a reasonable doubt.” Id. at 505. Marino v. Vasquez involves certain facts that are similar to those in Petitioner’s case. In Marino v. Vasquez, the defendant was convicted of murder in the second degree. Id. at 501. One of the jurors informed the trial court that prior to the final ballot, the jury discussion had centered on whether the defendant Marino harbored malice towards the victim, and the juror felt that at that time, the prosecution had not proven malice as defined in the court’s instructions in the jury charge. Id. at 502. Another juror provided a dictionary definition of malice, handwritten on a piece of paper, which defined malice in a manner that was different from that set forth in the court’s instructions to the jury. Id. at 502-503. In its holding, the 9th Circuit held that “unauthorized reference to dictionary definitions constitutes reversible error which the State must prove harmless beyond a reasonable doubt.” Id. at 505, citing United

States v. Kupau, 781 F.2d 740, 744 (9th Cir.), cert. denied, 479 U.S. 823, 107 S. Ct. 93, 93 L. Ed. 2d 45 (1986). The 9th Circuit further found without merit the State's argument that the juror's use of a dictionary to define malice actually increased the burden on the prosecution, and could not therefore result in prejudice to the petitioner. Id. at 505. The 9th Circuit surmised that a "juror using the dictionary definition could have convicted (defendant) if he found ill-will alone, without applying the remaining elements of the legal definition of malice...as set forth in the instructions to the jury." Id. at 505.

In this case, the dissent below wrote correctly that, unlike ingesting alcohol or drugs or reading a Bible to settle one's conscience, looking up legal terms to apply in the decision-making process is not merely an "internal" matter that merely affects how one feels or facilitates an examination of what one already thinks or believes. Bauberger v. Haynes, 632 F.3d at 111 (App. A). On the contrary, the jury in Petitioner's case, in considering the dictionary's definition of the word "malice," was consulting an external source, the dictionary, specifically because they found their internal knowledge to be insufficient. Id. at 111 (App. A). See also Robinson v. Polk, 438 F.3d at 364 (external influences impart pressure or knowledge on "a juror apart from the juror himself, the reading of Bible passages invites the listener to examine his or her own conscience from within."). As the dissent below wrote, had the jury possessed the knowledge within itself, it would not have found it necessary to consult the dictionary in the first place. Bauberger v. Haynes, 632 F.3d at 111 (App. A).

Further, as the dissent below noted, unlike reading the Bible or ingesting alcohol or drugs, consulting the dictionary to determine the applicable legal principle was not merely incidental to the issues before the jury, but was directly relevant as the jury looked up words it was instructed to apply. Robinson v. Polk, 438 F.3d at 363; Bauberger v. Haynes, 632 F.3d at

111 (App. A). This is a reasonable conclusion in this case because, as the dissent below notes, “any doubt concerning the correctness of this conclusion is all but vitiated in a situation such as this where the defendant has conceded all but one legal element and the jury acquired information about this one legal element at issue.” Bauberger v. Haynes, 632 F.3d at 111-112 (App. A).

And as the dissent below correctly points out, the cases cited by the State are “clearly distinguishable” because in none of these cases did the jury rely on an influence to resolve a legal question or factual dispute relevant to the case before it. Bauberger v. Haynes, 632 F.3d at 112 (App. A); citing Wolfe v. Johnson, 565 F.3d 140 (4th Cir. 2009) (finding no error where juror brought pictures of his son into jury room and another juror spoke with his wife); Robinson v. Polk, 438 F.3d at 364 (finding no clearly established law prohibiting a juror from relying on Bible not to garner any external fact or legal principle but merely to reflect on his own conscience); Lynch v. Polk, 204 F. App’x. 167 (4th Cir. 2006). The State’s reliance on the aforementioned cases “suffers from the flawed assumption that merely because the influence of some materials may not violate the Sixth Amendment, the consideration of any and all external material does not violate the Sixth Amendment.” Bauberger v. Haynes, 632 F.3d at 112 (App. A).

And as the dissent below also notes, beyond citing these cases, none of which are on point in this case, the State provides no explanation as to why it believes that a dictionary used to define the element at the center of trial constitutes a permissible internal influence as opposed to an impermissible external influence. Bauberger v. Haynes, 632 F.3d at 112 (App. A). Instead, the State claims that no case has specifically found that a jury’s use of a dictionary to define the specific legal terms at issue in this case violates the Sixth Amendment. Id. at 112 (App. A).

The relevant legal principle in this case is not whether a Supreme Court precedent is directly on point such that a case has specifically found that a jury's use of a dictionary to define the specific legal terms at issue in this case violates the Sixth Amendment, but whether a relevant Supreme Court precedent "provides a 'governing legal principle' and articulates specific considerations for lower courts to follow when applying the relevant precedent." Quinn v. Hayes, 234 F.3d 837, 844 (4th Cir. 2000) (citing Williams v. Taylor, 529 U.S. 362, 413 (2000)); Panetti v. Quarterman, 551 U.S. 930, 953 (2007) ("That the standard is stated in general terms does not mean the application was reasonable. [The statute] does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'"); Lockyer v. Andrade, 538 U.S. 63, 76 (2003) ("Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced."). See 28 U.S.C. § 2254(d)(1).

The conclusions set forth by Petitioner in this case are strengthened by the decisions of the Courts of the various Circuits that have found that the reliance of a jury on a dictionary in defining the applicable legal principles violates the Sixth Amendment. Thus, without necessarily deciding that the jury's conduct violated the Sixth Amendment, no such assumptions are necessary. Under Supreme Court's jurisprudence, such conduct by the jury is unconstitutional.

V. Petitioner was harmed under Brecht's "Substantial and Injurious Effect" Standard.

Not only was the action by the jury in using a dictionary definition unconstitutional, the conduct was prejudicial to Petitioner. Turning back to Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d 919 (10th Cir. 1992), the 10th Circuit set out a five-part test to use when determining whether a trial court's error is prejudicial:

- (1) The importance of the word or phrase being defined to the resolution of the case;

- (2) The extent to which the dictionary definition differs from the jury instructions or from the proper legal definition;
- (3) The extent to which the jury discussed and emphasized the definition;
- (4) The strength of the evidence and whether the jury had difficulty reaching a verdict prior to introduction of the dictionary definition; and
- (5) Any other factors that relate to a determination of prejudice.

Id. at 924. This test was subsequently adopted by the majority of the judges of a panel of the 4th Circuit Court of Appeals. McNeill v. Polk, 476 F.3d at 229.

There is no dispute between Petitioner and the State that the words the jurors looked up in the dictionary were very important in this case. See Bauberger v. Haynes, 632 F.3d at 114 (App. A). Petitioner conceded every other element of the offense other than whether he had acted with malice, which is the very word the jury sought help to define from the external source, the dictionary. Id. at 114 (App. A).

The parties disagree on part two of the Mayhue test, which is the extent to which the definitions provided in the dictionary for the words “recklessly” and “wantonly” differ from the legal definitions. See Bauberger v. Haynes, 632 F.3d at 114 (App. A). The dictionary defined “recklessly” as “lack of due caution.” Id. at 106, 114. The dictionary defined “wantonly” as an “arrogant recklessness of justice or the feelings of others.” Id. at 106, 114. Bauberger argues that the jury's use of these definitions effectively lowered the standard for malice to something more equivalent to negligence. The State argues, and the majority agreed, that the standard imposed by those terms was virtually identical the legal definition under North Carolina law. Id. at 114.

The judge's instruction to the jury on malice provided that “malice arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as

to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.” Id. at 105 (App. A). The trial judge contrasted this standard with the more lenient one applicable to involuntary manslaughter, with which Petitioner was also charged. Id. at 114 (App. A). On the other hand, to be guilty of involuntary manslaughter, the defendant must have acted with “culpable negligence,” which was defined by the trial court to require “either (1) a ‘willful, wanton, or intentional’ violation of law governing the operation of a motor vehicle, or (2) an ‘inadvertent or unintentional violation of the law’ that is ‘accompanied by recklessness of probable consequences of a dangerous nature when tested by the rule of reasonable foresight amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety of others.’” Id. at 114 (App. A). The trial court also instructed the jury on the meaning of “reckless” in the context of reckless driving, which required that the jury find that Petitioner “acted carelessly and heedlessly in willful or wanton disregard of the rights or safety of others.” Id. at 114 (App. A).

In this case, the definition of “malice” and consequently Petitioner’s due process rights hinged on the effect of the dictionary definitions of two of the words used by the trial court to define malice: “recklessly” and “wantonly.” The foreman read to the rest of the jury the dictionary definition of “recklessly” as “lack of due caution” and “wantonly” as “arrogant recklessness of justice or the feelings of others.” These dictionary definitions could have allowed the jury to convict on a lesser standard than required under North Carolina law, as North Carolina courts have clearly stated that malice for murder requires a “high degree of recklessness.” Further, the dictionary definition of “reckless,” which is “lack of due caution,” sets a lower standard than that set by the legal standard. See State v. Rich, 351 N.C. 386, 393-395; 527 S.E.2d 299, 303 (2000).

Further, North Carolina courts have defined “wantonly” with respect to criminal statutes as an action by a defendant that “...connotes intentional wrongdoing. . . . Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others.” State v. Williams, 284 N.C. 67, 72-73, 199 S.E.2d 409, 412 (1973); State v. Davis, 86 N.C. App. 25, 30, 356 S.E.2d 607, 610 (1987). In addition, “willful” and “wanton” have substantially the same meaning when used in reference to the requisite state of mind for a violation of a criminal statute. See State v. Davis, 356 S.E.2d at 610. “Willful” as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of the law. Id. at 610. These definitions clearly set a standard that is much higher than the dictionary definition used by the jury for “wanton” as the “arrogant recklessness of justice or the feelings of others.” (App. G). For an individual to have acted with malice, he must not only have committed the act intentionally, but also acted in willful or wanton disregard of the risk his actions posed, which means that he must have been aware of the risk his actions entailed and disregarded them nonetheless. The dictionary definition of reckless (lack of due caution) requires no such awareness.

As a result, it is clear that under North Carolina law, a person may act without due caution, but not necessarily in willful or wanton disregard of the rights or safety of others. When carefully reviewing the dictionary’s definition of recklessness, because it does not require that the disregard for others be willful or wanton, such definition amounts to the legal standard for negligence. Not every act which is in arrogant disregard of others will necessarily involve a conscious and intentional disregard of others.

When considering whether at least one juror objectively could have considered the dictionary terms to permit a finding of malice based on a standard of carelessness, which is less than the wantonness and recklessness standard that is defined by the statute, one must conclude that the differences in the dictionary and legal definitions are substantial and meaningful and that there should be “grave doubt that at least one juror reasonably could have read the instruction to adopt an impermissible lower standard.” This matches the findings of the district court and the dissent below. Bauberger v. Haynes, 702 F.Supp.2d at 594; 632 F.3d at 110; (App. G).

Further, in considering the remaining factors for determining harmless error from Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d at 924, Petitioner asks this Court to consider that all twelve jurors were exposed to the external information of the dictionary definition of the definitions of “malice.” And such exposure to the prohibited external dictionary definition created a great likelihood that one juror may have been influenced by the dictionary definitions such that the standard in the judge’s malice instruction was lessened.

In addition, the State that has the burden of proof on harmless error pursuant to Brecht v. Abrahamson, 507 U.S. 619 (1993); See Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); (App. G). In its oral argument before the District Court, the State made a concession that it has the burden of proof, and the District Court took note of the State’s admission in a footnote of its Memorandum Opinion and Order. (App. G). Thus, the state is bound by such a concession at oral argument. See Fowler v. Rhode Island, 345 U.S. 67, 69 (1952) (concession made at oral argument by the state of Rhode Island was fatal to its case).

Next, the constitutional error that occurred in this case “substantially influenced the jury’s decision. See Brecht v. Abrahamson, 507 U.S. at 654; See O’Neal v. McAninch, 513 U.S. 432, 436-437 (1995). “If the record is so evenly balanced that it is extremely difficult to say the

judge is in grave doubt as to the harmlessness, the petitioner must win.” O’Neal v. McAninch, Id. at 437, 442. Under this test, Petitioner is entitled to the writ of habeas corpus and reversal of his conviction in this case.

There is strong reason to believe that the jury placed significant emphasis on the terms for which they garnered definitions if one considers the number of jurors exposed to the potentially prejudicial information, at what point in their deliberations they received the prejudicial material, and the length of time they considered it. See Fitzgerald v. Greene, 150 F.3d 357, 366 (4th Cir. 1998) (noting that a potentially biased member’s impact was minimal as jury rejected her sentencing suggestion and they had made their decision before she made potentially prejudicial statements). Although it is true that several members of the jury requested further instruction from the judge on the definition of malice, because it was the foreman who obtained the dictionary early in the jury’s deliberative process and shared it is likely that other jurors may have attached additional weight to the external information from the dictionary. See Mayhue v. St. Francis Hosp., Inc., 969 F.2d at 925.

Therefore, even if this Court determines that after considering all the Mayhue factors the question of whether the jury’s consideration of the dictionary was prejudicial is a close question, because the jury considered external information directly relevant to the sole disputed legal issue, and the substantial difference between the terms as defined in the dictionary and as they are defined by North Carolina Courts, this Court’s conclusion should be to make a finding of prejudice. Even if this Court considers that there may have been substantial evidence of malice, Petitioner respectfully asks this Court to consider that the foreman felt it necessary to go to the library, other members of the jury likewise felt it necessary to request additional information regarding “malice,” and only after an Allen charge and multiple votes did the jury reach its

conclusion. Bauberger v. Haynes, 632 F.3d at 116 (App. A). Further, in order to obtain a new trial, Petitioner need not prove that the result was a proximate result of the impropriety, but merely that the evidence available is in even balance pointing to whether his trial may have been affected. As a result, Petitioner has shown that he raised “grave doubt” as to whether the jury’s decision was in fact untainted. See O’Neal v. McAninch, 513 U.S. at 436.

Conclusion

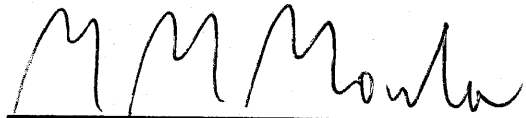
To allow jurors to go outside of the record and obtain definitions central to the statute at hand to determine guilt or innocence creates the proverbial “slippery slope,” or as the dissent below noted, a “Pandora’s box” of unconstitutional behavior. Such action by a jury is unfair to both a defendant and the State, as no longer can either party rely on the basic assumption that the jury will consider only the evidence before it and the definitions in the jury charge that both parties were able to argue upon, possibly agree upon, and object to on the record. As Petitioner has made clear in this case, the definition of “malice” is most central to the statute for which he currently stands convicted, and is not a collateral definition that may have helped a juror internalize his or her thoughts about the case. All relevant caselaw found by Petitioner in the various Circuit Courts of Appeals support Petitioner’s assertions. This Supreme Court should thus grant his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit so that this important constitutional issue can be resolved by this Court.

Prayer

WHEREFORE, PREMISES CONSIDERED, Petitioner **WILLIAM THOMAS BAUBERGER** respectfully prays that this Court grant his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. Petitioner Appellant additionally prays for such other and further relief to which he may be entitled, at law and in equity.

Respectfully submitted,

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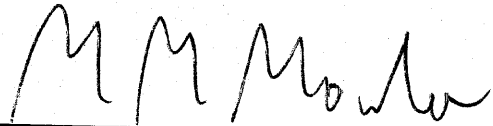


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Certificate of Service

I, M. Michael Mowla, a member of the Bar of the Supreme Court of the United States, hereby certify that on this the 6th day of June 2011, in compliance with Rule 29.3, Rule 29.4(a), and Rule 29.5 of the Rules of the Supreme Court of the United States, I have served copies of the forgoing Petition for Writ of Certiorari, the Appendix, and the Motion For Leave to Proceed In Forma Pauperis on the party below by depositing the document with the United States Postal Service First Class Mail, addressed as follows:

Clarence Deforge
N.C. Department of Justice
9001 Mail Service Center
Raleigh, NC 27699



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