No. 17-7504

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM EUGENE THOMPSON **PETITIONER**

v.

PHILLIP PARKER, WARDEN **RESPONDENT**

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

RESPONDENT'S BRIEF IN OPPOSITION

****CAPITAL CASE****

Respectfully Submitted,

ANDY BESHEAR
Attorney General of Kentucky

JASON BRADLEY MOORE*
Assistant Attorney General
Attorney General's Office
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601
(502)696-5342
Counsel for Respondent

**Counsel of Record*

QUESTION PRESENTED

Are a defendant's due process and impartial jury rights violated when jurors discuss an unrelated matter one juror had learned of through normal life experience during penalty deliberations?

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TABLE OF AUTHORITIES

Cases

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OPINIONS BELOW

Citations to the official and unofficial reports of the opinions below are adequately set forth in the certiorari petition, as well as in the appendix thereto.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are adequately set forth in the certiorari petition.

STATEMENT OF THE CASE

Petitioner, William Eugene Thompson, freely and candidly admits that he murdered Fred Cash, his prison supervisor in May of 1986. Thompson was twice sentenced to death for this brutal and senseless act of violence. The Kentucky Supreme Court reversed his first conviction and sentence due to the erroneous denial of five challenges for cause to members of the venire, and remanded his case for retrial. *Thompson v. Commonwealth*, 862 S.W.2d 871, 872 (Ky. 1993); Pet. Appx. E1-E8.

Prior to his retrial, Thompson pleaded guilty to the murder. He then was sentenced to death following a jury sentencing trial. *Thompson v. Commonwealth*, 56 S.W.3d 406, 407 (Ky. 2001). On direct appeal from his guilty plea and death sentence, Thompson raised a number of issues including the question of whether he was competent to plead guilty. *Id.* at 407. Because the trial court had not held an evidentiary hearing to determine Thompson's competency, the Kentucky Supreme Court remanded for a retrospective competency hearing and "abate[d] consideration of the remaining issues on appeal." *Id.*

After conducting the retrospective competency hearing, the trial court found that Thompson was competent at the time he entered he guilty plea. The case then returned to the Kentucky Supreme Court which unanimously affirmed the trial court's competency determination and rejected Thompson's other twenty-eight allegations of error. *Thompson v. Commonwealth*, 174 S.W.3d 22 (Ky. 2004). In its opinion, the Kentucky Supreme Court described the underlying facts as follows:

> At the time of this crime, [Thompson] was serving a life sentence for murder. He was transferred to the Western Kentucky Farm Center, a minimum security prison facility that includes an inmate-operated dairy farm. During the early morning hours of May 9, 1986, [Thompson] and his supervisor, Fred Cash, reported to work at the dairy barn. According to [Thompson], he became enraged outside a calf barn while he and Mr. Cash were attempting to start some equipment. [Thompson] admits striking Mr. Cash once to the head with a hammer. Little is known about exactly what transpired thereafter, as [Thompson] claims to have "blacked out." However, the evidence reveals that Mr. Cash's skull was crushed by numerous blows to the head with a hammer and his body was dragged into a calf's stall. According to [Thompson], upon realizing what he had done, he removed Mr. Cash's pocketknife, keys and wallet, and left the Farm Center in the prison dairy truck. [Thompson] fled to the nearby town of Princeton, where he purchased a ticket and boarded a bus bound for Madisonville. The authorities apprehended [Thompson] in Madisonville.

Id. at 31; Pet. Appx. F2. This Court denied Thompson's petition for writ of certiorari on June 27, 2005. *Thompson v. Kentucky*, 545 U.S. 1142 (2005).

Thompson filed a post-conviction motion pursuant to Kentucky Rule of Criminal Procedure (RCr) 11.42 collaterally attacking his judgment and sentence in the trial court on May 18, 2006. The trial court denied the RCr 11.42 motion without an evidentiary hearing on May 15, 2009, and the Kentucky Supreme Court unanimously affirmed in an unpublished opinion rendered October 21, 2010. *Thompson v. Commonwealth*, 2010 WL 4156756 (Ky. Oct. 21, 2010); Pet. Appx. G1-G4.

Thompson then filed a federal habeas corpus petition in the Western District of Kentucky on March 1, 2011, and filed an amended petition on July 12, 2011, asserting seven grounds for relief. The district court held an evidentiary hearing

related to Thompson's claim that extrajudicial evidence was in the jury room during deliberations at which Thompson called one witness, jury foreperson Roger Dowdy. In its memorandum opinion and order denying Thompson's petition, the district court set forth Dowdy's testimony as follows:

> When Thompson's counsel asked whether there was any discussion of another criminal case that was going on at the time of the trial, Dowdy testified:
>
> > It was brought up probably after two or three votes or whatever that about the case in Florida was brought up at that time where a man has been paroled from prison and moved from California to Florida and committed murder again within a short period of time. It wasn't even—I don't know how long. I don't remember the details of it, but I just remember it was brought up and that was it.
>
> Hr'g Tr. at 4. When asked by Thompson's counsel who brought up the Singleton case, Dowdy responded, "I don't—I don't have a clue. Fourteen years, I don't—[.]" Id. He stated that it was one of the other jurors. Id. When asked if there was a discussion about it, Dowdy testified as follows:
>
> > I don't—I don't have a clue right now. It may have been. It may have been. I just know that—I know that it was probably a 9–to–3 or 8–to–4 ... vote at that time, and there was three holdouts or whatever to the end until the last vote. And it was probably brought up sometime during that period.
>
> Id. at 5. Thompson's counsel asked him if it was brought up among all the jurors, and Dowdy replied, "Well, I—don't know—yeah, all the jurors heard it because we was all in the room." Id. About the Singleton case, he stated, "It was a man that was paroled after 20–something years in California and come to—moved to Florida and killed his neighbor after a short period, what I can remember of it." Id.
>
> Respondent's counsel asked Dowdy if the Singleton case was the only topic that was discussed by the jury, and Dowdy stated, "Oh, we discussed a lot. We brought out the evidence several times. It

wasn't just—it wasn't just this piece here. I mean, we brought out all—we had the box of evidence in there." Id. at 8. Further, he stated, "We sat in there for 10, 12 hours. I don't—or better." Id. at 9.

When Thompson's counsel asked Dowdy again about who brought up the story, he testified that he did not bring up the Singleton case himself. Id. at 9. When asked again if it was one of the other jurors who brought up the subject, he stated:

> Yes, I would think it was. I don't—like I said, I don't know whether it was one of them women that was having trouble making up their minds or—some of them wouldn't vote. I mean some of them said they didn't know for a long time and then—but I don't have a clue whether it was one of them or one of the other jurors.

Id. at 9–10.

The Court questioned Dowdy as follows:

> The Court: Were there any newspaper articles or anything like that brought into the room?
>
> Dowdy: I don't think there was in there, no. There wasn't—
>
> The Court: Just someone mentioned—
>
> Dowdy: Just somebody mentioned that it was—because it was prominent probably at that time. I don't know. It may have been. It was probably prominent at that time.
>
> The Court: And only one juror brought it up?
>
> Dowdy: I guess they—I don't know whether one of them brought it up ...
>
> The Court: You don't remember. You don't remember what was said.
>
> Dowdy:—remember for sure whether it was said that way or—

> The Court: Did more than one juror bring up the article that they'd read?
>
> Dowdy: No.

Id. at 10–11.

> Thompson's counsel asked whether there was a discussion, and Dowdy testified, "There may have been a discussion about it at that time. Like I said, we ate two meals in there, and we was there for 12 hours locked in there." Id. at 11. Dowdy also stated, "It may—it should have—it probably was at one end of the table or another. At the other end of the table, there was several down there talking about it. Or may have been over a meal. I don't—right now, I don't know when. It may have been while we was eating." Id. at 13.

Thompson v. Parker, 2012 WL 6201203 at *8-9 (W.D.Ky Dec. 10, 2012); Pet. Appx. B6-B7.

The district court denied Thompson habeas relief in an opinion and order entered on December 10, 2012. *Id*. In the order, the district court granted a certificate of appealability ("COA") on Thompson's claim the mitigating circumstance instruction improperly implied such had to be found unanimously. Pet. Appx. B26. Thompson filed a motion pursuant to Fed. R. Civ. P. 59 which the district court denied in part and granted in part on July 22, 2013. *Thompson v. Parker*, 2013 WL 3816705 (W.D.Ky. July 22, 2013); Pet. Appx. C1-C7. In particular, the district court granted Thompson's motion to expand the COA to include Thompson's claim challenging Kentucky's proportionality review of his sentence. Pet. Appx. C1.

Thompson then appealed to the United States Court of Appeals for the Sixth Circuit, and that court expanded the COA to include his claim regarding the jury's alleged consideration of extraneous evidence during deliberations. The Sixth Circuit

then rendered a unanimous opinion affirming the district court's denial of Thompson's habeas corpus petition on August 14, 2017. *Thompson v. Parker*, 867 F.3d 641 (6th Cir. 2017); Pet. Appx. A1-A8. Thompson's petition for panel and en banc rehearing was denied on October 18, 2017. Pet. App. D1. Thompson filed this petition for writ of certiorari on January 16, 2018.

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT DECISION THE JURY DID NOT IMPROPERLY CONSIDER EXTRANEOUS EVIDENCE DURING DELIBERATIONS WAS CORRECT AND NOT IN CONFLICT WITH ANY DECISIONS OF THIS COURT OR OTHER COURTS

In his petition, Thompson seeks this Court's review of only his claim the jury improperly considered extraneous evidence during deliberations in violation of his rights to an impartial jury and to confront witnesses. He correctly notes this issue was decided by the district court and the Sixth Circuit *de novo* because it was not adjudicated on the merits by the Kentucky courts. However, the resolution of this case by the Sixth Circuit does not warrant this Court's review as the determination involves a fact-specific issue. Further, the Sixth Circuit's rejection of this issue does not conflict with a decision of another United States court of appeals or address an "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10.

In this matter, the Sixth Circuit properly concluded the jurors' discussion of the Singleton case during deliberations was not an improper consideration of

extraneous evidence in violation of Thompson's constitutional rights. As the Sixth Circuit correctly noted "impartiality and indifference do not require ignorance" on the part of jurors. 867 F.3d at 647. Rather, jurors "must take into account rather than ignore what general knowledge they have gained from their life experiences." *Id.*

Applying these principles, the Sixth Circuit correctly concluded the discussion of the unrelated Florida case by the jurors in this matter was "fair game for discussion" and not extraneous evidence where the evidence did not relate to Thompson's case directly and did not involve anything physically being brought into the jury room. This conclusion is supported the cases Thompson cites in his petition to this Court.

In *Marquez v. City of Albuquerque*, 399 F.3d 1216, 1223 (10th Cir. 2005), the Tenth Circuit concluded a juror's "personal experience with training police dogs" which was shared with other jurors during deliberations was not extraneous evidence in a 42 U.S.C. § 1983 case claiming the plaintiff's apprehension by a police dog constituted excessive force. In *Brooks v. Zahn*, 826 P.2d 1171, 1178 (Ariz. Ct. App. 1991), the Arizona Court of Appeals rejected a claim that a juror's comments "regarding antibiotics, surgery, post-operative healing and her husband's bone infection" was not extraneous evidence where the comments were based upon the juror's knowledge and past experience as a registered nurse. In *Marr v. Shores*, 495 A.2d 1202, 1205 (Me. 1985), the Supreme Judicial Court of Maine held a juror's discussion of his personal knowledge concerning one of the plaintiff's health insurance during deliberations was not extraneous evidence.

The holdings of these cases are also consistent with the hypothetical set forth by the Sixth Circuit which Thompson takes such issue with in his petition. In its opinion, the Sixth Circuit noted that if it held "the jurors' general knowledge about recidivism, even if it includes recollections of unrelated news coverage of other crimes" constituted extraneous evidence, the decision "would have curious (and undesirable) implications." *Thompson*, 867 F.3d at 648. To demonstrate such implications, the Court rhetorically asked:

> What if, for example, a juror were an actuary who had general knowledge of the life expectancy of someone similarly situated to the defendant: would that juror's discussion of the defendant's odds of reoffending be "extraneous evidence" and thus violate the defendant's constitutional rights? Or, what if the jurors in this case, instead of discussing a news story, had discussed a story that had been related in a novel? Would all general knowledge gleaned from reading books be considered "extraneous evidence"? Or only from reading nonfiction books?

Id.

Thompson takes great issue with the Sixth Circuit "presupposing the answers were obvious," Pet., at p. 6, and "fail[ing] to perceive the difficult implications of the question[s] it presents." Pet., at p. 12. In fact, the questions proposed by the Sixth Circuit fall perfectly in line with the cases cited above finding a juror's experience, be it from their profession or their general life, is not "extraneous evidence." The actuary in the Sixth Circuit's opinion is no different from the police dog trainer the Tenth Circuit considered in *Marquez*, or the registered nurse considered in *Brooks*, be it from their profession or their general life, by the Arizona Court of Appeals.

Plainly, the Sixth Circuit's decision in this matter does not conflict with any of the cases Thompson relies upon in his petition. To the contrary, it is entirely consistent with those decisions. The decision is this matter also conforms with this Court's general definition of "extraneous" as "deriv[ing] from a source 'external' to the jury." *Warger v. Shauers*, 135 S.Ct. 521, 529 (2014) citing *Tanner v. United States*, 483 U.S. 107, 117 (1987). " 'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room." *Id.* The Sixth Circuit's decision accords with this general definition by finding the discussion of the Florida case involved an "internal" matter.

Thompson's reliance upon *Waldorf v. Shuta*, 3 F.3d 705 (3rd Cir. 1993), as somehow conflicting with the Sixth Circuit's decision in this case is likewise unpersuasive. In *Waldorf*, the plaintiff was rendered "quadriplegic as a result of a motor vehicle accident which occurred in the Borough of Kenilworth." *Id.* at 706. The case was bifurcated between damages and liability, with the issues of damages tried first. *Id.* at 707. After the trial on damages, the Borough stipulated liability. *Id.*

"At the trial's outset, the district court carefully and explicitly instructed the jury to avoid news stories containing other accidents." *Id.* Despite these instructions, the jury was exposed to a news story concerning a jury verdict in another case, in which "a jury, that day, had awarded $30 million to a New York City high school student…, who was rendered Quadriplegic as a result of a shooting which occurred at school." *Id.* A TV news story and *New York Post* article "placed before the jury the

very same type of information [evidence regarding the capabilities of other quadriplegics] the district court had excluded as inadmissible." *Id.* Additionally, the *Post* article "was physically present in the jury room just prior to the commencement of jury deliberations. The article was read by at least one of the jurors and shown to another. In addition to their review of the article, the article was the subject of 'comment' by yet another juror. The juror who "made comment" admitted that "other ears were listening." *Id*. at 711.

Thus, while Thompson is correct that the news information in *Waldorf* concerned a different, but similar case, than that being considered by the jury, he ignores the fact the external information was in the jury room during its deliberations. Under the Sixth Circuit's analysis in the case at bar, *Waldorf* would reach the same result as was reached by the Third Circuit therein, i.e. remand for a new trial.

Nothing about the Sixth Circuit's rejection of Thompson's claim the jury was improperly exposed to extraneous evidence during their deliberations warrants this Court's review. The Sixth Circuit's decision in no way conflicts with the decision of another United States court of appeal or state court of last resort. To the contrary, the Sixth Circuit's rejection of Thompson's claim a juror's knowledge of the facts of an unrelated case from his general life experience constitutes an "external" matter is completely consistent with this Court's general definition of "external" and "internal" matters as articulated in *Warger*, *supra*. Review by this Court should be denied.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **DENIED.**

Respectfully Submitted,

ANDY BESHEAR
Attorney General of Kentucky

s/Jason Bradley Moore
JASON BRADLEY MOORE
Assistant Attorney General
(Counsel of Record)
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, Kentucky 40601-8204
(502) 696-5342

Counsel for Respondent