

NO. \_\_\_\_\_

---

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

---

**OCTOBER TERM 2018**

---

**KEVIN MARQUETTE BELLINGER, Petitioner,**

**v.**

**UNITED STATES OF AMERICA, Respondent**

---

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

---

KRISTEN M. LEDDY  
Assistant Federal Public Defender  
Office of the Federal Public Defender  
For the Northern District of West Virginia  
651 Foxcroft Avenue, Suite 202  
Martinsburg, West Virginia 25401  
(304) 260-9421  
*Counsel for Kevin Bellinger*

## **I. QUESTION PRESENTED**

Whether there was sufficient evidence presented to the jury in Bellinger's case to convict Bellinger of murder as alleged in Counts One and Two, where the Government failed to prove malice aforethought?

## II. TABLE OF CONTENTS

I.	QUESTION PRESENTED FOR REVIEW.....	1
II.	TABLE OF CONTENTS. ....	2
III.	TABLE OF AUTHORITIES.....	3
IV.	OPINIONS BELOW.....	4
V.	JURISDICTION.....	5
VI.	CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. ....	6
VII.	STATEMENT OF THE CASE.....	7-11
VIII	REASON FOR GRANTING THE WRIT.....	12-17
	A.    The writ should be granted to determine whether the government presented sufficient evidence of murder supportive of the two verdicts in Bellinger’s case given that the Government failed to prove malice aforethought.	
IX.	CONCLUSION.....	18
APPENDIX A - APPEALS COURT OPINION, NO. 17-4773		

### III. TABLE OF AUTHORITIES

#### Supreme Court Cases

<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979).....	12
<i>Scales v. United States</i> , 367 U.S. 203 (1961).....	12

#### Statutes

18 U.S.C. § 2. ....	8
18 U.S.C. § 1111. ....	8
18 U.S.C. § 1118. ....	8
18 U.S.C. § 3742. ....	8
28 U.S.C. § 1254. ....	5
28 U.S.C. § 1291. ....	8

#### **IV. OPINIONS BELOW**

The unpublished per curiam opinion by the United States Court of Appeals for the Fourth Circuit in case, *United States v. Kevin Marquette Bellinger*, No. 17-4773, is attached to this Petition as Appendix A.

## **V. JURISDICTION**

This Petition seeks review of an unpublished per curiam opinion of the United States Court of Appeals for the Fourth Circuit entered on August 10, 2018. No petition for rehearing or rehearing *en banc* was filed. This Petition is filed within 90 days of the opinion affirming the decision of the appellate court. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

## **VI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case requires interpretation and application of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, that requires that no person be made to suffer the onus of a criminal conviction except upon sufficient proof, defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

## **VII. STATEMENT OF THE CASE**

### **A. Federal Jurisdiction.**

Based upon one incident at a federal penitentiary in the Northern District of West Virginia, Bellinger was charged with second degree murder and with the unlawful killing of another inmate while Bellinger was serving a life sentence. Because these charges constituted offenses against the United States, the District Court had original jurisdiction pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

### **B. Procedural History.**

On October 2, 2012, Patrick Franklin Andrews and Kevin Marquette Bellinger were named in a two-count Indictment. Count One charged that on October 7, 2007, in Preston County, West Virginia, Messrs. Andrews and Bellinger, while confined in a federal correctional institution, namely, the United States Penitentiary at Hazelton, and while each was under a sentence for a term of life imprisonment, aided and abetted by each other, did unlawfully kill Jesse Harris with malice aforethought, which killing is a murder as defined in 18 U.S.C. § 1111(a), in violation of 18 U.S.C. §§ 2 and 1118. Count Two charged that on October 7, 2007, in Preston County, West Virginia, Messrs. Andrews and Bellinger, at the United States Penitentiary at Hazelton, within the special maritime and territorial jurisdiction of the United States, aided and abetted by each other, did unlawfully kill Jesse Harris with malice aforethought, in violation of 18 U.S.C. §§ 1111(a), 1111(b), 2, and 7(3).



On October 23, 2012, Bellinger made his initial appearance in the United States Magistrate Court in Clarksburg, West Virginia. Given that Bellinger was then in the custody of the United States Bureau of Prisons, the issue of release was not addressed.

On June 9, 2014, Bellinger appeared for trial by jury in the United States District Court at Clarksburg. On June 16, 2014, a jury convicted Bellinger of both counts against him, and the District Court sentenced him to concurrent terms of life imprisonment on each count. Furthermore, Bellinger's federal court convictions and sentence were imposed so that they would run consecutive to his term of imprisonment imposed on August 9, 2002, in Superior Court, Washington, D.C., at Case No. 2000FEL006204. Bellinger filed a Notice of Appeal on October 16, 2014. On June 13, 2016, the United States Court of Appeals for the Fourth Circuit vacated Bellinger's convictions and remanded the case back to the District Court for further proceedings. *See United States v. Bellinger*, 652 Fed.Appx. 143 (4<sup>th</sup> Cir. 2016) (No. 14-4786), "*Bellinger 1.*"

On August 7, 2017, Bellinger appeared for his retrial. On August 9, 2017, a jury found Bellinger guilty on both counts. J.A. 903-05.<sup>1</sup> Bellinger filed a Motion for Judgment of Acquittal, or in the Alternative, a Motion for a New Trial under Fed. R. Crim. P. 33. J.A. 913-27. The District Court denied the Motion on December 8, 2017. J.A. 932-39. On December 11, 2017, Bellinger was sentenced to life imprisonment on

---

<sup>1</sup> "J.A." refers to the parties' joint appendix filed in connection with Bellinger's appeal to the United States Court of Appeals for the Fourth Circuit at 17-4773.

each count, to run concurrent. J.A. 906-12. Bellinger filed a Notice of Appeal with the Fourth Circuit, and in his brief argued that the evidence at trial was insufficient to support the jury's verdicts. J.A. 940-42. The Fourth Circuit affirmed in an unpublished per curiam opinion, filed on August 10, 2018. Bellinger now petitions the United States Supreme Court to review his convictions and life sentence.

### **C. Statement of Facts.**

Bellinger's state of mind became the central issue at trial. Bellinger claimed he never intended to kill Jesse Harris. Rather, a sudden quarrel occurred between Harris and Patrick Andrews. Bellinger acted to save Andrews and involved himself in the fight in a heat of passion. J.A. 426-29. For its part, the Government maintained that Bellinger acted with malice aforethought and was, therefore, guilty of murder.

Before the fight, numerous inmates at USP Hazelton were walking to their cells down the prison's various corridors, all identified by color, after the conclusion of recreation time. J.A. 111-113. Although Andrew's cell was located on the Red Corridor of the prison, Andrews walked toward the Blue Corridor, then stopped near the intersection of the Yellow Corridor and Blue Corridor. J.A. 127-32. This area is referred to as the Y-3 Grill. Also, at the same time, Harris was walking to the Blue Corridor, where his cell was located. J.A. 130-31. When Harris reached the intersection, he stopped too. J.A. 902. Harris and Andrews had a discussion, which was not captured by the prison because there is no audio component to the surveillance system. J.A. 902. Bellinger arrived shortly thereafter, passing Harris.

After Bellinger reached the intersection of the Yellow and Blue Corridors,

Andrews walked toward Harris and so did Bellinger. J.A. 460. As Andrews moved toward Harris, Harris hit Andrews, the two men began to fight, and then Bellinger joined the fight. J.A. 166, 173, 182, 328, 421. During the fight, Harris was stabbed multiple times in the head, neck, chest and back. J.A. 249-250. Bellinger was stabbed on his hand. J.A. 208-210, 473, 902. After about ten seconds, Andrews disengaged, walked away, apparently disposing of items in a trash can where a homemade knife and a bloody shirt were later discovered, and walked to his cell. J.A. 121-129, 902. Meanwhile, Harris and Bellinger continued to fight for about 15 seconds until Bellinger got away and ran around the area. J.A. 171-172. Bellinger was apprehended near the location of the fight within another minute. J.A. 164, 179.

Harris remained standing after the fight, at the location of the fight, but after a few minutes, when the prison's medical staff members arrived, Harris was found laying on the ground and unresponsive. J.A. 195-196. Harris was then transported by ambulance to a local hospital. J.A. 204-205. Despite surgical intervention, Harris died within two hours of the fight. J.A. 248-252.

The defense called Gerry Osborne to testify that on the day of the fight, he heard Harris yelling and acting aggressively towards Andrews. J.A. 275. Osborne recounted what he had heard and seen, testifying that "[Harris] said we can do this right here. We can do this right here. You know what I'm saying. He was like gesturing towards [Andrews] and I was doing my best to get out of the situation. He was like I will slam this knife in you." J.A. 280.

Patrick Andrews testified that on the day of the fight, Harris came up to

Andrews's housing unit and demanded money. When they met up later on the recreation yard, Harris again demanded money from Andrews. Harris brandished a homemade weapon (i.e., a shank) and Andrews pulled out his own shank. Other inmates broke up this fight. Harris then challenged Andrews to a knife fight in Harris's cell. J.A. 316-23.

Shortly thereafter, back inside the facility, Andrews determined not to go to Harris's cell. Harris threatened Andrews with a knife. The fight ensued and Andrews stabbed Harris. J.A. 326-28. Andrews testified that he wanted to take sole responsibility for what he did. He said Harris was his friend and he caused him to do something he did not want to do. He believed that he caused Harris's death. J.A. 389.

Bellinger testified in his defense that Harris was very angry. When Bellinger arrived at the Y-3 grill, Bellinger saw that Harris was grabbing himself in such a way as to indicate he had a weapon. He heard Harris tell Andrews that he was "going to put steel" in him. Bellinger feared for Andrews; he believed Harris was going to kill Andrews. Bellinger entered the fray, in shock and in a state of fear. Bellinger had reason to fear Harris since he had seen Harris stab someone else in the past. J.A. 389, 426-31.

On August 9, 2017, after a three day trial, the jury returned guilty verdicts on both counts against Bellinger. J.A. 903-905. On December 12, 2017, the district court sentenced Bellinger to a life term of imprisonment on each count of conviction, running concurrently to one another. J.A. 907. Bellinger filed a timely notice of appeal on December 13, 2017. J.A. 940.

### **C. Appeal Before United States Court of Appeals for the Fourth Circuit.**

On appeal, Bellinger argued that there was insufficient evidence to convict him of the killing of Jesse Harris. First, he argued the Government failed to prove, through the evidence presented, that he acted with malice aforethought. Second, Bellinger argued that the Government failed to prove the absence of the heat of passion.

The Fourth Circuit affirmed Bellinger's convictions. In a short opinion, it held that "[a]t bottom, Bellinger's arguments are based on the implicit premise that the jury should have accepted as true the testimony of Bellinger and his former codefendant regarding the events leading up to, and their states of mind during, their fatal altercation with the decedent." The Fourth Circuit found that, viewing the evidence in the light most favorable to the Government, the evidence presented at trial was adequate to disprove Bellinger's arguments and support the jury's findings. Appendix A, at p. 3.

## **VIII. REASONS FOR GRANTING THE WRIT**

**The writ should be granted to determine whether Bellinger's due process rights were violated when he was convicted of murder without sufficient proof of malice aforethought.**

### **A. Standard of Review.**

There are instances where the Supreme Court will review general sufficiency of the evidence to support a criminal conviction, despite that, ordinarily, that is a function which begins and ends with the Court of Appeals. *See Scales v. United States*, 367 U.S. 203 (1961) (wherein the Supreme Court reviewed the sufficiency of evidence presented to support the conviction for violation of membership clause of the

Smith Act, to ensure that substantive constitutional standards were not thwarted, and to provide guidance to lower courts in an area bordering closely upon constitutionally protected rights).

The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citing *Johnson v. Louisiana*, 406 U.S. 356, 360-61 (1972)).

**B. There was insufficient evidence to convict Bellinger of murder.**

At trial, where Bellinger faced two counts of murder, the Government failed to prove “malice aforethought.” Malice aforethought is an essential element of Counts One and Two. According to the jury instructions, to kill with malice aforethought meant “either to kill another person deliberately and intentionally, or to act willfully with the awareness that one’s conduct creates a serious risk of death or serious bodily harm.” J.A. 526-27. Viewed in the light most favorable to the Government, the incident at USP Hazelton was a sudden quarrel gone awry, not a murder.

The Government failed to present any direct evidence of malice aforethought. Rather, the Government relied upon certain circumstances to prove malice aforethought. Yet, each of the circumstances raised and suggested by the Government’s evidence and arguments were equally subject to an interpretation that suggested a lack of malice aforethought and favoring Bellinger’s innocence.

**PLAN.** The Government argued that Bellinger and Andrews had a plan to attack Harris, a point the evidence did not support. There was no plan. Had there

been evidence of a plan, the Government would have sought a charge for First Degree Murder. There was no testimony elicited from any witness about a plan. There was no statement from either Bellinger or Andrews admitting at trial to a plan. Their movements were not necessarily coordinated prior to the altercation. The video evidence showed that Andrews fought with Harris and then Bellinger joined the fight. J.A. 902. Neither the testimony nor the video clips showed evidence of a plan.

On the other hand, Bellinger testified that Harris told Andrews that he was going to “put steel” in him. Bellinger was shocked and acted in a state of fear. He was so overtaken by this fear for Andrews’s safety that he did not even realize when Andrews left the fight. J.A. 428-29, 432-33. Bellinger testified, “I wasn’t even thinking. I couldn’t think. It was just so much just going on at that time my brain couldn’t register what was happening till after everything was over with and I was apprehended and in the Special Housing Unit. The only thing that kept playing in my mind is that, you know, Harris . . . threatened to kill Andrews and Andrews and Harris got into -- I couldn’t -- I just couldn’t understand how two -- two of my friends, you know, why they got into it like that.” J.A. 434. Bellinger’s behavior was supportive of a state of panic and confusion, not a plan. Indeed, Bellinger specifically testified that there was no plan. J.A. 460-61.

**LOCATION.** The Government argued that the location of the fight indicated an intentional killing. Bellinger and Andrews lived in housing units on the Red Corridor. Harris lived in the Blue Corridor. The Government suggested Bellinger and Andrews were out of place when they fought with Harris. In addition, there were

correctional officers in the Yellow Corridor, but not in the immediate area of the Y-3 Grill. So, the Government considered this to be a blind spot where Bellinger and Andrews knew they could safely get away with an intentional killing with malice aforethought. J.A. 543-544.

The Government's point about the location is not persuasive. There are multiple cameras in the Yellow Corridor, near the Y-3 Grill, and in the Blue Corridor. These cameras obviously could and did capture the fight, from multiple angles. No inmate would choose to involve himself in an unlawful killing at that location. On the other hand, the cells, for example, have no cameras. J.A. 144-45. There are multiple blind spots in the outdoor recreation yard as well. J.A. 145. Had the fight occurred in either of those location, the Government's point would be well taken. As the evidence was, the location of the fight in no way incriminated Bellinger.

**INITIATION.** The Government argued that Bellinger and Andrews were the aggressors. J.A. 543. The evidence in the light most favorable to the Government indicated that Harris was the aggressor, demanding money from Andrews with a weapon on the outdoor recreation yard and threatening to stab Andrews near the Y-3 Grill. J.A. 321-323, 327-328. The video clearly showed Harris approaching Andrews, making threatening gestures and grabbing his pocket, where one would have a weapon concealed. J.A. 902.

**WEAPONS.** The Government claimed that Bellinger and Andrews had weapons while Harris did not. J.A. 543. This circumstance, in the Government's view, suggested malice aforethought. This position remains highly speculative. The



more likely reality is that the prison staff did not recover the weapon Harris possessed in the Yellow Corridor. Osborne, Andrews, and Bellinger all testified Harris possessed and attempted to use a weapon. J.A. 276-80, 322, 324-327, and 426.

**RUTHLESSNESS.** The Government argued that Bellinger and Andrews fought with Harris in a ruthless manner, suggesting an intentional killing with malice aforethought. J.A. 543. Harris was ruthless, too. The point, however, is that all killings can be classified as ruthless. Yet, not all killings involve malice aforethought.

**HEAT OF PASSION.** Finally, the Government failed to meet its burden to prove malice aforethought in another way. That is, the Government failed to prove the absence of heat of passion. Again, according to the District Court's instructions to the jury, "[i]n order to show that the defendant acted with malice aforethought, the government must prove the absence of heat of passion beyond a reasonable doubt. Heat of passion may be provoked by fear, rage or terror. The provocation . . . must be such as might arouse a reasonable person, in the defendant's position, to kill someone." J.A. 527-528.

The Government did not present a scintilla of evidence to disprove heat of passion. The evidence showed that Bellinger had no prior knowledge of a dispute between Andrews and Harris. Bellinger did not know that Harris had threatened Andrews on the recreation yard with a weapon. Bellinger became shocked and extraordinarily upset when he encountered Harris in the Yellow Corridor making threats to stab Andrews. Bellinger knew that Harris had a violent past. Bellinger knew that Harris carried a weapon in the prison. Bellinger knew that Harris had a

tendency to make good on violent threats. Since Andrews was like a brother to him, Bellinger lost control of himself, involving himself in the fight between Harris and Andrews, in order to save Andrews and because Bellinger was in fear and very upset with Harris.

The Government did little to contradict this evidence, which illustrated a lack of malice aforethought. The Government did not disprove that Harris made multiple threats to Andrews, by brandishing a weapon on the rec yard, and through verbal threats to stab and aggressive gestures in the Yellow Corridor near the Y-3 Grill. The Government did not disprove that Bellinger had a very close relationship with Andrews, who was like a brother. The Government did not present testimony or other evidence to effectively refute that Bellinger became wildly upset and fearful when he encountered Harris threatening to stab Andrews.

In sum, the trial involved a death of an inmate at U.S.P. Hazelton. The Government proved the fight, Bellinger's involvement, and the death of Harris. Yet, Bellinger's actual guilt or innocence came down to Bellinger's state of mind. The Government was incapable of proving that this was not a heat of passion killing and, in the end, failed to prove malice aforethought.

## **IX. CONCLUSION**

For these reasons, Bellinger asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted,

**KEVIN MARQUETTE BELLINGER**

---

**KRISTEN M. LEDDY**  
**ASSISTANT FEDERAL PUBLIC DEFENDER**  
Office of the Federal Public Defender  
for the Northern District of West Virginia  
650 Foxcroft Avenue, Suite 202  
Martinsburg, WV 25401  
(304) 260-9421  
*Counsel for Kevin Bellinger*

DATED: November 8, 2018.