UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOSEPH A. BEBO, Petitioner,	)	
v.	)	Civil Action No. 14-11872
SEAN MEDEIROS, Respondent.	)	

MEMORANDUM AND ORDER

November 13, 2017

Saris, C.J.

INTRODUCTION

Petitioner Joseph A. Bebo objects to the Report and Recommendation issued by the Magistrate Judge on August 31, 2017 (Docket No. 55). The Magistrate Judge recommended that Bebo's motion for an evidentiary hearing and underlying petition for a writ of habeas corpus (Docket Nos. 1, 47) be denied. Although the Court assumes familiarity with the factual background discussed at length in the Report and Recommendation, see Docket No. 55, the basis for the petition can be encapsulated as follows: the state-court proceeding violated Petitioner's right to a trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution, because the jury was exposed to extraneous material, Ann Coulter's book,

"Guilty!," which was in the jury room during deliberations, and contained a bookmark listing the name of the judge, the prosecutor, and the defense attorney. Petitioner received no opportunity to prove that the jury's exposure to the book resulted in actual bias. After hearing, the Court denies the petition (Docket No. 1) and the motion for an evidentiary hearing (Docket No. 47).

STANDARD OF REVIEW

The Court reviews the petition and motion for an evidentiary hearing consistent with the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, this Court may not grant the petition based on any claim which the state court adjudicated on the merits unless:

> the adjudication of the claim--
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (2012). "[T]his standard is difficult to meet, . . . because it was meant to be." Harrington v. Richter, 562 U.S. 86, 102 (2011).

A state court decision is "contrary to" "clearly established" Federal law "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court]

cases." Williams v. Taylor, 529 U.S. 362, 405 (2000). The Supreme Court has "repeatedly pointed out" that "'circuit precedent does not constitute clearly established Federal law, as determined by the Supreme Court.'" Kernan v. Cuero, No. 16-1468, slip op. at 8 (U.S. Nov. 6, 2017) (per curiam) (quoting Glebe v. Frost, 135 S. Ct. 429, 431 (2014) (per curiam) in turn quoting 28 U.S.C. § 2254(d)(1)); Sanchez v. Roden, 753 F.3d 279, 298 (1st Cir. 2014) ("In evaluating whether a principle of federal law is 'clearly established,' we must look to cases decided by the Supreme Court rather than our own case law."). "AEDPA's carefully constructed framework 'would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law.' White v. Woodall, 134 S. Ct. 1697, 1706 (2014) (quoting Yarborough v. Alvarado, 541 U.S. 652, 666 (2004)). Alternatively, a state-court decision is "contrary to" clearly established Federal law "if the state court confronts a set of facts that are materially indistinguishable from a [Supreme Court] decision . . . and nevertheless arrives at a result different from [that] precedent." Williams, 529 U.S. at 406.

"In order for a state court's decision to be an unreasonable application" of Supreme Court case law, "the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice." Virginia v. LeBlanc, 137 S. Ct. 1726,

1728 (2017) (per curiam). A petitioner "is required to 'show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Woods v. Donald, 135 S. Ct. 1372, 1376 (2015) (per curiam) (quoting Richter, 562 U.S. at 103). "[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway [state] courts have in reaching outcomes in case-by-case determinations." Alvarado, 541 U.S. at 664. In a case that predates Sanchez, the First Circuit noted that "factually similar cases from the lower federal courts may inform a determination of whether a state court decision involves an unreasonable application of clearly established Supreme Court jurisprudence, providing a valuable reference point when the relevant Supreme Court rule is broad and applies to a kaleidoscopic array of fact patterns." Grant v. Warden, Me. State Prison, 616 F.3d 72, 79 n.5 (1st Cir. 2010). Indeed, "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" Panetti v. Quarterman, 551 U.S. 930, 953 (2007) (quoting Carey v. Musladin, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring in judgment)). But, "[t]he critical point is that relief is available under § 2254(d)(1)'s unreasonable-

application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." Woodall, 134 S. Ct. at 1706–07 (quoting Richter, 562 U.S. at 103).

Even if a state-court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," the writ may not be granted unless the state court's error had "substantial and injurious effect or influence in determining the jury's verdict." Fry v. Pliler, 551 U.S. 112, 116 (2007) (quoting Brecht v. Abrahamson, 507 U.S. 619, 631 (1993)). If not, the error is harmless. Id.

In reviewing a petition for a writ of habeas corpus under AEDPA, "a determination of a factual issue made by a State court shall be presumed to be correct" and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1) (2012). Fact findings entitled to this presumption are "basic, primary, or historical facts, such as witness credibility and recitals of external events." Moore v. Dickhaut, 842 F.3d 97, 100 (1st Cir. 2016) (quoting Sleeper v. Spencer, 510 F.3d 32, 38 (1st Cir. 2007)). To the extent there are facts in the record beyond these categories, such as legally determinative factual findings, they

are reviewed for reasonableness under section 2254(d)(2). See Teti v. Bender, 507 F.3d 50, 57–58 (1st Cir. 2007).

SUBSTANTIVE LAW

The Sixth Amendment guarantees "trial, by an impartial jury" in federal criminal prosecutions. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551 (1976) (quoting U.S. Const. amend. VI). The Sixth Amendment right to an impartial jury in criminal prosecutions extends to criminal prosecutions in state court by operation of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 148–50 (1968). An impartial jury is one that reaches its verdict "based upon the evidence developed at trial." Irvin v. Dowd, 366 U.S. 717, 722 (1961). A criminal defendant's constitutional rights are violated when the jury hearing the case is exposed to extraneous influences; that is, "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury[.]" Remmer v. United States, 347 U.S. 227, 229–30 (1954) (holding a rebuttable presumption of prejudice arose from third party's unauthorized communication with juror regarding ongoing trial).

Consistent with protecting Sixth Amendment rights, an exception to the general prohibition on receiving juror testimony exists where the juror is called to testify regarding whether "extraneous prejudicial information was improperly

brought to the jury's attention." Fed. R. Evid. 606(b)(2)(A). Information is "extraneous" if derived 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." Id. When a defendant makes a post-verdict claim of jury bias, the remedy "is a hearing in which the defendant has the opportunity to prove actual bias." Smith v. Phillips, 455 U.S. 209, 215 (1982) (habeas corpus action); United States v. Boylan, 898 F.2d 230, 258 (1st Cir. 1990) (where "colorable claim of jury misconduct surfaces" trial court's "primary obligation is to fashion a procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial").

Long ago, the Supreme Court warned that "[i]t is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment" and recounted that "[t]he text-books refer to many cases in which . . . the reading of newspapers containing imperfect reports of the trial, or objectionable matter in the form of editorial comments or otherwise, have been held fatal to verdicts." Mattox v. United States, 146 U.S. 140, 149–50 (1892). More recently, the Supreme Court suggested, in dicta, that a newspaper article about the trial, not in

evidence, considered by a juror could constitute an extraneous influence. See Tanner, 483 U.S. at 118.

Circuit courts routinely decide that books or articles discussed in the jury room are extraneous material, triggering a duty to investigate jury taint as prescribed in Smith v. Phillips. See United States v. Lara-Ramirez, 519 F.3d 76, 88–89 (1st Cir. 2008) (Bible); United States v. Lawson, 677 F.3d 629, 641 (4th Cir. 2012) (Wikipedia definition of a term that was a contested element in crime for which defendants were on trial); Oliver v. Quarterman, 541 F.3d 329, 336–40 (5th Cir. 2008) (habeas review involving the Bible); United States v. Williams-Davis, 90 F.3d 490, 502–03 (D.C. Cir. 1996) (dictionary definition of term in criminal statute); United States v. De La Vega, 913 F.2d 861, 869–71 (11th Cir. 1990) (book about jury duty). But see Robinson v. Polk, 438 F.3d 350, 363 (4th Cir. 2006) (concluding on habeas review that "no Supreme Court case address[es] whether allegations of Bible reading" in the jury room constitutes extraneous material or outside influence on jury partiality).

DISCUSSION

As an initial matter, Petitioner argues that the state court did not adjudicate his federal claim on the merits, instead analyzing the claim under a narrower state standard. See Docket No. 59 at 12–13. If petitioner is correct, the Court must

review the claim de novo, rather than under the deferential AEDPA standard. The trial court's decision on Petitioner's Sixth Amendment claim relied on Commonwealth v. Fidler, 385 N.E.2d 513 (Mass. 1979). Fidler cites federal caselaw and defines extraneous material as "specific facts not mentioned at trial concerning one of the parties or the matter in litigation." Id. at 518. There is little, if any, daylight between this definition and that announced in Remmer: "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury." 347 U.S. at 229. At most, Petitioner can point to the "directly or indirectly" language in Remmer as announcing a broader definition of extraneous material. However, that term is better read as referring to the manner in which the extraneous material reaches the jurors. Therefore, the Court declines to review Petitioner's jury taint claim de novo even though the trial court relied on Fidler rather than Remmer. See Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (holding state-court adjudication on the merits need not cite Supreme Court precedent to be entitled to deference under AEDPA). Furthermore, "a state-court adjudication of an issue framed in terms of state law is nonetheless entitled to deference under section 2254(d)(1) as long as the state and federal issues are for all practical purposes synonymous and the state standard is at least as

protective of the defendant's rights." Scott v. Gelb, 810 F.3d 94, 99 (1st Cir. 2016) (quoting Foxworth v. St. Amand, 570 F.3d 414, 426 (1st Cir. 2009)).

Here, Petitioner raised claims under the Sixth Amendment and Article 12 of the Massachusetts Declaration of Rights. S.A. at 24–38. The state court mentioned the Sixth Amendment in its decision. S.A. at 67. The Massachusetts Appeals Court also analyzed the claims under Fidler. S.A. at 342. As discussed above, the definitions of extraneous material in Fidler and Remmer are nearly identical. As such, the Court declines to consider Petitioner's jury taint claim de novo, and instead addresses it under the AEDPA standard.

Petitioner objects to the Magistrate Judge analyzing the state court's determination that the book did not constitute extraneous material as a finding of fact subject to a presumption of correctness under section 2254(e)(1). Here, Petitioner is correct that the trial court's finding that the book did not constitute extraneous material is not a finding of historical fact entitled to a presumption of correctness. The fact of a book being "extraneous material" for Sixth Amendment purposes does not constitute "basic, primary, or historical facts, such as witness credibility and recitals of external events." Moore, 842 F.3d at 100. Rather, the question of what constitutes extraneous material is a matter of law. Cf. Lawson,

677 F.3d at 641 (analyzing whether Remmer presumption of prejudice applied to Wikipedia article as a matter of law).

Certain facts found by the trial court are entitled to a presumption of correctness at this stage. For example, the trial court found that: 1) Petitioner's trial attorney found the book in the deliberation room the day after the jury returned its verdict; 2) the book was sitting on a window ledge in that room; 3) in the book, trial counsel found a "napkin or piece of paper" placed as a bookmark on which were written his name, as well as the names of the prosecutor and judge in the criminal trial. S.A. at 65. At a hearing on the post-trial motion, the trial judge also found that "at least there's a showing that's made that that book did belong to a juror, was brought here by a juror." S.A. at 672. The trial judge also found that the book cover included the word "GUILTY" in large white lettering, and that the book was "general political and social commentary," in which "a few isolated passages" spoke about "defense attorneys that 'lie.' S.A. at 65, 68. As it must, the Court accords these factual findings a presumption of correctness as it turns to the legal analysis under section 2254(d).

Finally, Petitioner argues that the trial court's determination that the book was not extraneous material was contrary to or an unreasonable application of clearly established Federal law under section 2254(d). At bottom, the

difficult question is: does the presence of Ann Coulter's book "GUILTY!" in the deliberation room -- with a piece of paper listing the defense attorney, prosecutor, and judge -- constitute a "private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury." Remmer, 347 U.S. at 229. The question can be narrowed further: does the phrase "matter pending before the jury" exclude from the definition of "extraneous material" a book that refers generally to defense attorneys as liars, references crimes similar to the one charged, and generally speaks about liberals using the criminal-justice system to gain an advantage over conservatives.

In Remmer, the extraneous material (an offer of a bribe to a juror) involved the case pending before the jury. However, the standard need not be so circumscribed, as the case law involving Bibles in the jury room illustrates. Still, the Supreme Court cases announcing the rule on extraneous material, specifically Mattox and Remmer involved material directly about the case pending before the jury that received the material. It cannot be said that the proper scope of "extraneous material" is "beyond any possibility for fairminded disagreement." Donald, 135 S. Ct. at 1376. "A federal court may not overrule a state court for simply holding a view different from its own, when the precedent

from [the Supreme] Court is, at best, ambiguous." Mitchell v. Esparza, 540 U.S. 12, 17 (2003) (per curiam).

Here, under the prevailing caselaw in this circuit, this Court would have deemed the book in question "extraneous material" and would have ordered a hearing to explore jury taint. All the circuits to consider such issues on direct review would have mandated the same. But there is room for disagreement as to the breadth of the phrase "matter pending before the jury." Thus, while the issue is close, the Court holds that the trial court's ruling was not "contrary to, or involved an unreasonable application of, clearly established Federal law," as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). The petition must be **DENIED**.

ORDER

For the foregoing reasons, the Court **DENIES** Petitioner's motion for an evidentiary hearing (Docket No. 47) and **DENIES** the petition for a writ of habeas corpus (Docket No. 1). The Court grants a certificate of appealability under 28 U.S.C. § 2253(c) on the question of whether the book in question is "extraneous material" entitling Petitioner to a hearing under "clearly

established Federal law." The Court orders the Commonwealth to preserve the juror list and the book pending appeal.

/s/ PATTI B. SARIS
Patti B. Saris
Chief United States District Judge