No. 19A996

IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD THOMAS, WARDEN,
CENTRAL PRISON, RALEIGH, NORTH CAROLINA

PETITIONER,

v.

WILLIAM LEROY BARNES,

RESPONDENT.

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

APPENDIX VOLUME

[CAPITAL CASE]

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APPENDIX INDEX

Caution
As of: May 13, 2020 8:59 PM Z

Barnes v. Thomas

United States Court of Appeals for the Fourth Circuit

May 8, 2019, Argued; September 12, 2019, Decided

No. 18-0005

Reporter
938 F.3d 526 *; 2019 U.S. App. LEXIS 27500 **; 2019 WL 4308636

WILLIAM LEROY BARNES, Petitioner - Appellant, v. EDWARD THOMAS, Warden, Central Prison, Raleigh, North Carolina, Respondent - Appellee.

Subsequent History: Rehearing denied by, En banc, Rehearing denied by Barnes v. Thomas, 2019 U.S. App. LEXIS 37725 (4th Cir. N.C., Dec. 18, 2019)

Prior History: [1]** Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. (1:08-cv-00271-TDS-JEP). Thomas D. Schroeder, Chief District Judge.

Barnes v. Thomas, 2018 U.S. Dist. LEXIS 129932 (M.D.N.C., Aug. 2, 2018)

Core Terms

Juror, sentence, death penalty, actual prejudice, deliberations, external, district court, conversation, injurious effect, co-defendant, juror misconduct, magistrate judge, harmless, verses, evidentiary hearing, jury's decision, law of the land, death sentence, prejudicial, prejudiced, religious, murder, recommended, courts, closing argument, jury's verdict, habeas relief, jury room, circumstances, dictionary

Case Summary

Overview
HOLDINGS: [1]-Where a juror improperly consulted with her pastor about whether she could vote to impose the death penalty without running afoul of her religious beliefs and then spent 30 minutes relaying his guidance to the entire jury, the juror's external communication was not harmless, and the district court erred in denying habeas relief.

Outcome
Judgment reversed and case remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Exceptions to Default > Cause & Prejudice Standard > Proof of Prejudice

Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims

HN1 **Cause & Prejudice Standard, Proof of Prejudice**

The court is not permitted to grant habeas relief unless it is convinced that the error had a substantial and injurious effect—otherwise known as actual prejudice—on the jury's sentence recommendation. A state court's failure to apply the Remmer presumption only results in

actual prejudice if the jury's verdict was tainted by the external communication.

Criminal Law & Procedure > ... > Review > Standards of Review > Harmless Errors

HN2[] Standards of Review, Harmless Errors

The substantial and injurious effect standard used to determine harmlessness on habeas appeal comes from the Supreme Court's decision in Kotteakos v. United States. That case instructs courts to look to what effect the error had or reasonably may be taken to have had upon the jury's decision. If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. However, if the federal court is in grave doubt about whether the trial error had a substantial and injurious effect or influence on the verdict and therefore finds itself in virtual equipoise about the issue, the error is not harmless.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Privacy of Deliberations

HN3[] Jury Deliberations, Privacy of Deliberations

Fed. R. Evid. 606(b)(1) provides that a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. Fed. R. Evid. 606(b)(1). While, under an exception to the rule, a juror may testify about whether extraneous prejudicial information was improperly brought to the jury's attention or any outside influence was improperly brought to bear upon any juror, Fed. R. Evid. 606(b)(2), juror testimony concerning the effect of the outside communication on the minds of jurors is inadmissible. Rule 606 thus presents unique difficulties in the context of juror misconduct claims. Given how Rule 606 limits the presentation of evidence in these circumstances, it is especially important for the court to view the record practically and holistically when considering the effect that a juror's misconduct reasonably may be taken to have had upon the jury's decision.

Criminal Law & Procedure > Juries & Jurors > Jury Deliberations > Outside Influences

HN4[] Jury Deliberations, Outside Influences

A prejudicial influence need not take the form of a third party directly telling jurors how they should vote or introducing new facts or law for their consideration. An improper external influence may include an outside influence upon the partiality of the jury, such as private communication, contact, or tampering with a juror.

Criminal Law & Procedure > ... > Review > Standards of Review > Harmless Errors

HN5[] Standards of Review, Harmless Errors

The focus of the harmless error inquiry is not on the sufficiency of the evidence absent the error, but rather on the impact of the error on the jury's verdict. Harmless error review looks to the basis on which the jury actually rested its verdict not to whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered. While the harmless error standard on habeas review is stringent, it does not require virtual certainty to grant relief.

Counsel: ARGUED: M. Gordon Widenhouse, Jr., RUDOLF WIDENHOUSE, Chapel Hill, North Carolina, for Appellant.

Jonathan Porter Babb, Sr., NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee.

ON BRIEF: George B. Currin, Asheville, North Carolina, for Appellant.

Joshua H. Stein, Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee.

Judges: Before AGEE, FLOYD, and THACKER, Circuit Judges. Judge Floyd wrote the opinion in which Judge

Thacker joined. Judge Agee wrote a separate dissenting opinion.

Opinion by: FLOYD

Opinion

[*528] FLOYD, Circuit Judge:

More than 20 years ago, Petitioner William Leroy Barnes was convicted of murder in North Carolina state court and sentenced to death. Following the trial, Barnes sought to overturn his death sentence, claiming that during sentencing deliberations, a juror improperly consulted with her pastor about whether she could vote to impose the death penalty without running afoul of her religious beliefs. She then relayed his guidance to the entire jury. Barnes' juror misconduct **[**2]** claim made its way through the North Carolina state courts, culminating in a final denial in state **[*529]** post-conviction proceedings. On Barnes' first federal habeas appeal, we held that the post-conviction court violated clearly established federal law by failing to afford Barnes a presumption of prejudice and an evidentiary hearing on his juror misconduct claim, as required by *Remmer v. United States, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954)*. We remanded for an evidentiary hearing to determine if this error resulted in actual prejudice, thus warranting habeas relief. We now hold that it did.

I.

William Leroy Barnes, an inmate on North Carolina's death row, appeals the district court's second denial of his petition for writ of habeas corpus against Edward Thomas, Warden of the Central Prison in Raleigh, North Carolina (hereinafter the "State"). In 1994, Barnes was convicted of first-degree murder in North Carolina state court for the deaths of B.P. and Ruby Tutterow. After Barnes was found guilty, the trial proceeded to the sentencing phase, where the jury was charged with determining whether Barnes and his two codefendants would be sentenced to death or life imprisonment. During closing arguments of the sentencing phase, an attorney representing Frank **[**3]** Chambers, one of Barnes' codefendants, made religiously charged statements about a juror's choice to impose the death sentence:

> Surely, one among you believes in God, the father, the son, the Holy Ghost, the teachings of Jesus Christ. And if you do, you know that Frank Chambers will have two judgment days. The one he's got today, where you sit as his judge, and you determine what happens with his earthly life. . . . [I]f you are a true believer, you know that he will have a second judgment day. . . . On that day, he will be judged not by the law of man, but by a higher law, the laws of God. . . . If you're a true believer and you believe that Frank Chambers will have a second judgment day, then we know that all of us will too. All of us will stand in judgment one day. And what words is it that a true believer wants to hear? Well done, my good and faithful servant. You have done good things with your life. You have done good deeds. Enter into the Kingdom of Heaven. Isn't that what a true believer wants to hear? Or does a true believer want to explain to God, yes, I did violate one of your commandments. Yes, I know they are not the ten suggestions. They are the ten commandments. I know **[**4]** it says, Thou shalt not kill, but I did it because the laws of man said I could. You can never justify violating a law of God by saying the laws of man allowed it. If there is a higher God and a higher law, I would say not. To be placed in the predicament that the State has asked you to place yourself in, is just that. To explain when your soul is at stake. Yes, I know the three that I killed were three creatures of yours, God. And that you made them in your likeness. I know you love us all, but I killed them because the State of North Carolina said I could. Who wants to be placed in that position? I hope none of us. And may God have mercy on us all.

J.A. 1530-33.

These statements were presented with no interjection from the prosecution or the trial court. The next day, the jury recommended that Barnes be sentenced to death. Immediately after the jury returned its sentencing recommendation and exited the courtroom, Barnes' attorney alleged to the trial court that one of the jurors had met with her pastor to discuss the death penalty during sentencing deliberations and had relayed the pastor's counsel to the other jurors. The trial court denied Barnes' request to inquire further into **[**5]** the matter, and Barnes appealed to the Supreme Court of North Carolina. The state **[*530]** supreme court denied relief, holding that Barnes had not proven that the alleged contact between the juror and her pastor

prejudiced Barnes or denied him the right to an impartial jury.

In 1999, Barnes sought state post-conviction relief by filing a Motion for Appropriate Relief (MAR) in Rowan County Superior Court (the "MAR Court"), in which he reasserted his juror misconduct claim, among others. With the motion, Barnes presented new information to further corroborate his juror misconduct claim. For example, Barnes introduced a summary of a 1995 interview his direct appeal team conducted with the juror accused of misconduct, Hollie Jordan (hereinafter "Juror Jordan"). Juror Jordan signed the summary and acknowledged that it was an accurate representation of the interview. According to the summary, Juror Jordan was offended by the religiously charged closing arguments, and although she "'did not accept the attorney's argument,' she did notice 'that another juror, a female, seemed visibly upset.'" *Barnes v. Joyner, 751 F.3d 229, 235 (4th Cir. 2014)* (hereinafter *Barnes I*) (quoting interview summary). "'To remedy the effect of the argument, [Juror] Jordan **[**6]** brought a Bible from home into the jury deliberation room' and read a passage to all the jurors, which provided 'that it is the duty of Christians to abide by the laws of the state.'" *Id.* (quoting interview summary).

The MAR Court summarily denied Barnes' juror misconduct claim as "procedurally barred and without merit" because the issue had been previously addressed and rejected by the Supreme Court of North Carolina on direct appeal.[1] J.A. 1883. The Supreme Court of North Carolina denied Barnes' request for certiorari review.

In 2008, Barnes filed a petition for writ of habeas corpus pursuant to *28 U.S.C. § 2254* in which he again raised his juror misconduct claim. Barnes argued that under *Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954)*, he was entitled to a presumption of prejudice and an evidentiary hearing upon presentation of a credible allegation of juror misconduct. A magistrate judge recommended that his juror misconduct claim be denied. After concluding that Barnes' claims did not require a hearing, the district court adopted the magistrate judge's recommendation and denied Barnes' habeas petition. Barnes then brought his first appeal.

On our first review of this case, we concluded that the MAR Court's disposal of Barnes' juror misconduct **[**7]** claim amounted to an unreasonable application of *Remmer v. United States, 347 U.S. at 229*, which "clearly established not only a presumption of prejudice, but also a defendant's entitlement to an evidentiary hearing, when the defendant presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury." *Barnes I, 751 F.3d at 242*. We distinguished Barnes' allegations of juror misconduct from cases in which we have held that an *internal* juror influence—*i.e.*, a juror's own bias or communication with fellow jurors—does not implicate a defendant's *Sixth Amendment* right to an impartial jury. *Id. at 245-46*; *see also Robinson v. Polk, 438 F.3d 350, 361-66 (4th Cir. 2006)* (holding that juror's request for bailiff to bring Bible into jury room was not an **[*531]** external influence raising *Sixth Amendment* concerns because bailiff did not "instruct[] the jury to consult the Bible" or do "anything other than simply provide the Bible upon the juror's request"); *Stockton v. Com. Of Va., 852 F.2d 740, 744 (4th Cir. 1988)* (distinguishing between internal "juror impairment or predisposition" and the more serious danger of "extraneous communication"). Because Barnes credibly alleged an improper *external* influence on the jury, we held, the MAR Court erred in failing to apply a presumption of prejudice and afford Barnes a hearing. *Barnes I, 751 F.3d at 247-48*. However, because habeas **[**8]** relief is only warranted if the petitioner suffered actual prejudice as a result of the constitutional error, we remanded the case for the district court to conduct an evidentiary hearing "solely on the issue of whether the state court's failure to apply the *Remmer* presumption and failure to investigate Juror Jordan's contact with Pastor Lomax had a substantial and injurious effect or influence on the jury's verdict." *Id. at 252*.

On remand, the parties held an evidentiary hearing before a magistrate judge. Barnes called four witnesses: Janine Fodor, Hollie Jordan, Ardith Peacock, and Leah Weddington. The State called no witnesses.

During the evidentiary hearing, the parties raised several objections to certain testimony regarding the jurors' mental thought processes under *Federal Rule of Evidence 606*. The magistrate judge acknowledged that there were "gray areas," or confusion, as to how *Rule*

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[1] *N.C. Gen. Stat. § 15A-1419(a)(2)* provides that a claim is procedurally barred for purposes of MAR review if, among other things, the issue "was previously determined on the merits upon an appeal from the judgment . . . in the courts of this State or a federal court." However, this provision is not a procedural bar for purposes of federal habeas review. *Brown v. Lee, 319 F.3d 162, 170 n.2 (4th Cir. 2003)*.

606 should apply to the hearing and allowed the State to maintain a standing objection. J.A. 2260. Even with this standing objection, however, the State made several Rule 606 objections throughout the hearing and engaged in extended colloquy with the magistrate judge on how to resolve the issue. *See, e.g.*, J.A. 2283-90. The magistrate judge did not **[**9]** exclude any testimony during the hearing, itself, but gave the parties an opportunity to further address the issue in their post-hearing briefing.

Barnes' first witness, attorney Janine Fodor, represented Barnes in his direct appeal. Fodor testified that while reviewing the trial record, she flagged Barnes' juror misconduct claim as an issue to raise on direct appeal. She then conducted interviews of some members of the jury and "asked about whether or not anybody remembered a juror contacting somebody or bringing a Bible into the jury room." J.A. 2255. Fodor testified that she interviewed Juror Jordan, who confirmed that she had contacted her pastor during sentencing deliberations and shared his thoughts with the jury.

Barnes next called Hollie Jordan. Juror Jordan testified that when she was a juror for Barnes' capital murder trial, she attended Old Country Baptist Church where Tom Lomax was the pastor. She testified that she attended church "[e]very time the doors were open" and considered Pastor Lomax a spiritual guide. J.A. 2267-68. According to Juror Jordan, the closing arguments of Chambers' attorney "stood out" to her because he stated that "if [defendants] got the death sentence **[**10]** that [the jurors] would burn in hell." J.A. 2269. Juror Jordan testified that she "didn't know the Bible all that well then" and sought further counsel from Pastor Lomax on the first night of jury deliberations, before the jury had reached a sentence. J.A. 2269. Juror Jordan said she spoke with Pastor Lomax for "a couple hours probably," but only discussed the case with him for a "few minutes." J.A. 2270-71. She told him "how horrific the pictures [of the crime scene] were," J.A. 2270, and "asked him if we gave [defendants] the death sentence would we burn in hell." J.A. 2269. Pastor Lomax answered no and told her the jurors **[*532]** "had to live by the laws of the land." J.A. 2271. Juror Jordan testified that Pastor Lomax pointed her to "some scriptures in the Bible . . . that explained everything." J.A. 2271. She testified that although she "was worried" that the jurors were "going to die because [they were] killing [the defendants]," she felt better after speaking with Pastor Lomax. J.A. 2272. Juror Jordan testified that she returned to the jury room the following day and spoke with her fellow jurors for 15 to 30 minutes about her conversation with Pastor Lomax.

In response to a question **[**11]** posed by Barnes' counsel, Juror Jordan also noted that when she spoke with Pastor Lomax, she had already "made up in [her] mind" on the sentence she was going to vote for; she "just wanted to know if [she] was going to burn in hell for it." J.A. 2272. Barnes moved to strike this statement under Federal Rule of Evidence 606. In its report and recommendation, the magistrate judge agreed with Barnes that the "juror's mental thought processes should not be considered" and did not consider this response. J.A. 2390. The district court likewise did not consider the statement.

Barnes next called Ardith Peacock (hereinafter "Juror Peacock"), another juror in Barnes' trial. Juror Peacock testified that on the second day of sentencing deliberations, Juror Jordan brought a Bible into the jury room and read several passages aloud. While she did not recall the specific passages that Juror Jordan read, she remembered that one dealt with an "eye for an eye and tooth for a tooth." J.A. 2281. Juror Peacock testified that Juror Jordan did not say, specifically, whether the verses were intended to advocate for or against the death penalty. But she agreed with Barnes' counsel's statement that Juror Jordan brought the passages to the **[**12]** jury's attention in order to rebut the religious statements made during the sentencing phase of trial.

Barnes next called Leah Weddington (hereinafter "Juror Weddington"), another juror at Barnes' trial. Juror Weddington testified that she recalled a female juror reading passages from a Bible in the jury room but did not recall the name of the juror or the specific passages that were read. When asked what may have prompted the juror to read the verses in the jury room, Juror Weddington responded "I guess she was trying to convince someone to—it was okay to give him the death penalty." J.A. 2295.

Following the evidentiary hearing, the magistrate judge issued a report and recommendation concluding that juror misconduct did not have a substantial and injurious effect on the outcome of Barnes' case. With regard to the Rule 606 issue, as noted, the magistrate judge excluded Juror Jordan's testimony that she would have voted to impose the death penalty regardless of Pastor Lomax's advice. However, the magistrate judge also noted that the State "did not address [its Rule 606 objections] with any additional authority or specificity" in its post-hearing briefing and the testimony to which the

State objected **[**13]** "appear[ed] to fall within the exceptions in Fed. R. Evid. 606(b)(2)(A) and (B)." J.A. 2390. The magistrate judge therefore overruled the State's Rule 606 objections. The district court held that the magistrate judge did not err in these evidentiary rulings.

In concluding that Barnes had not shown actual prejudice, the magistrate judge reasoned that there was no evidence Pastor Lomax had expressed his views on the death penalty or attempted to persuade Juror Jordan to vote for or against it. The magistrate judge reasoned that evidence did not indicate that Juror Jordan explicitly told the other jurors whether the **[*533]** passages she read were for or against imposing the death penalty. J.A. 2397 ("[T]he passages were related to Pastor Lomax's limited statement to Juror Jordan that the jurors would not 'burn in hell' and that they should follow the law."). Moreover, the magistrate judge noted, aggravating factors against Barnes likely factored more heavily into the jury's decision than Juror Jordan's communication with Pastor Lomax. The district court once again adopted the magistrate judge's report and recommendation and denied habeas relief. Barnes again appeals to this Court.

II.

We review the district court's denial of Barnes' **[**14]** habeas petition de novo. *See* Bauberger v. Haynes, 632 F.3d 100, 103 (4th Cir. 2011).

III.

A.

We concluded in *Barnes I* that the MAR Court's failure to properly apply the *Remmer* presumption and allow Barnes a hearing "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." Barnes I, 751 F.3d at 238 (quoting 28 U.S.C. § 2254(d)(1)). However, **HN1**[] "we are not permitted to grant habeas relief unless we are convinced that the error had a substantial and injurious effect"—otherwise known as actual prejudice—on the jury's sentence recommendation.[2] *See* Fullwood v. Lee, 290 F.3d 663, 679 (4th Cir. 2002) (internal quotation marks omitted). "[A] state court's failure to apply the [*Remmer*] presumption only results in actual prejudice if the jury's verdict was tainted" by the external communication. Barnes I, 751 F.3d at 253 (quoting Hall v. Zenk, 692 F.3d 793, 805 (7th Cir. 2012)). Therefore, while the constitutional error in this case lies with the MAR Court's failure to properly apply *Remmer*, in assessing actual prejudice, we look to the effect of Juror Jordan's external communication on the jury's sentencing decision.

HN2[] The substantial and injurious effect standard used to determine harmlessness on habeas appeal comes from the Supreme Court's decision in Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).[3] That case instructs us to look to "what effect the error had or reasonably may **[**15]** be taken to have had upon the jury's decision." Id. at 764. "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand." *Id.* However, "[i]f the federal court is 'in grave doubt' about whether the trial error had a 'substantial and injurious effect or influence' on the verdict and therefore finds itself 'in virtual equipoise' about the issue, the error is not harmless." Lawlor v. Zook, 909 F.3d 614, 634 (4th Cir. 2018) (holding that state court's failure to admit mitigating evidence regarding defendant's ability to adjust to prison was not harmless when the jury expressed confusion over whether and how it could consider such evidence).

B.

[*534] After reviewing the record, which now includes the evidentiary hearing to which Barnes was legally entitled, we hold that Juror Jordan's external communication was not harmless. Accordingly, we reverse and remand the district court's denial of habeas relief.

We note at the outset that our inquiry into whether Barnes has met his burden of showing actual prejudice under the *Kotteakos* standard is frustrated to some extent by the application of Federal Rule of Evidence 606 in this context. **HN3**[] That rule provides

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[2] As we noted in *Barnes I*, petitioners are not entitled to the *Remmer* presumption of prejudice when proving a substantial and injurious effect on habeas appeal. *See* Lawson 677 F.3d 629, 644 (4th Cir. 2012) (citing Vigil v. Zavaras, 298 F.3d 935, 941 n.6 (10th Cir. 2002)).

[3] The *Kotteakos* standard is a "less onerous harmless-error standard" than the requirement on direct appeal that an error be proven "harmless beyond a reasonable doubt." Brecht v. Abrahamson, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (holding that the *Kotteakos* standard applies to harmless error review on habeas appeal).

that **[**16]** a juror may not testify about "any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." Fed. R. Evid. 606(b)(1). While, under an exception to the rule, a juror may testify about whether "extraneous prejudicial information was improperly brought to the jury's attention" or any "outside influence was improperly brought to bear upon any juror," Fed. R. Evid. 606(b)(2), "juror testimony concerning the *effect* of the outside communication on the minds of jurors is inadmissible," Stockton v. Com. Of Va., 852 F.2d 740, 744 (4th Cir. 1988) (emphasis added).

Rule 606 thus presents unique difficulties in the context of juror misconduct claims. *See* Stockton, 852 F.2d at 750 (Widener, J., concurring in part and dissenting in part) ("To hold, as we do, that any extraneous communication to a juror is presumably prejudicial unless innocuous, and then prevent the State from proving lack of prejudice by the very juror involved, very nearly places the State in a box from which escape is difficult if not impossible."); Sherman v. Smith, 89 F.3d 1134, 1144 (4th Cir. 1996) (Murnaghan, J., dissenting) (noting that because of a "sparse inquiry into [a juror's misconduct] at a post-trial hearing" due to Rule 606, "we do not have all of the facts concerning **[**17]** the juror's" misconduct). For example, Barnes was tasked with proving that Juror Jordan's conduct affected the jury's decision, but he was prohibited from directly asking any of the jurors about this effect. This paradox led to confusion during the evidentiary hearing and lengthy colloquies between the parties and the magistrate judge as to the propriety of certain lines of questioning. Meanwhile, the State argues that the district court erred in using Rule 606 to exclude Juror Jordan's testimony stating that she already decided to vote for the death penalty before consulting with Pastor Lomax.

Given how Rule 606 limits the presentation of evidence in these circumstances, it is especially important for us to view the record practically and holistically when considering the effect that a juror's misconduct "reasonably may be taken to have had upon the jury's decision." Kotteakos, 328 U.S. at 764. Doing so in this case leaves us with "'grave doubt' about whether the trial error had a 'substantial and injurious effect or influence' on the [sentence]." Lawlor, 909 F.3d at 634.

Juror Jordan, a devoutly religious individual, was struck by an attorney's assertion that she would go to hell if she voted to impose the death penalty. She approached her pastor **[**18]** and spiritual guide in the middle of jury deliberations to obtain clarity on that very subject, and he assured her that, contrary to the attorney's arguments, her religious beliefs permitted her to vote for the death penalty. Aware that other jurors had been troubled by the attorney's remarks, she then spent up to 30 minutes discussing her pastor's counsel with the entire jury and reading several Bible verses that he had suggested out loud. Other members of the jury testified **[*535]** that Juror Jordan shared the biblical passages to rebut the attorney's religious statements and "convince someone . . . it was ok" to impose the death penalty.[4] J.A. 2295. While Rule 606 deprives us the benefit of "smoking gun" testimony,[5] the natural ramifications of this series of events are apparent. *Kotteakos* does not require us to ignore them.[6]

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[4] The dissent argues that Juror Weddington's statement that she "guess[ed] [Juror Jordan] was trying to convince someone . . . it was okay to give him the death penalty," J.A. 2295, is speculative and therefore useless to our analysis. But we do not think that the word "guess" voids Juror Weddington's testimony of any value, especially when her testimony aligns with other evidence indicating that Juror Jordan relayed Pastor Lomax's message to the jury in order to refute the religious statements made during closing arguments. Juror Peacock agreed that it would "be fair to say that [Juror Jordan] brought the Bible passages in to rebut Chambers' attorney's argument." J.A. 2292. And the 1995 interview of Juror Jordan conducted by Barnes' direct appeal team indicated that Juror Jordan sought Pastor Lomax's counsel and relayed it to the jury after noticing that another juror was visibly upset by the closing arguments. Because Barnes' evidentiary hearing came more than 20 years after he requested and was entitled to it, we are left to grapple with decades-old recollections of only a few jurors. We do not rely on Juror Weddington's testimony as isolated evidence of prejudicial effect, but as part of a larger and necessarily circumstantial body of evidence that speaks to the substance of Juror Jordan's communication and its effect on the jury.

[5] *See, e.g.,* Fullwood, 290 F.3d at 679-80 (holding that under Rule 606, habeas petitioner could not rely on an affidavit stating that external influence caused a juror to vote for the death penalty).

[6] In analyzing the effects that a private conversation reasonably may be taken to have had on the jury's sentencing decision, we are mindful of the profound distrust with which courts regard an extraneous influence on any juror. *See, e.g.,* Turner v. Louisiana, 379 U.S. 466, 473-74, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965) (concluding that defendant suffered prejudice from officers' association with jurors in their charge during a case for which the officers were key prosecution witnesses and their testimony conflicted with that of the

The State urges us to consider Juror Jordan's testimony that she had already decided to vote for the death penalty before consulting with Pastor Lomax and only consulted him to determine whether she would "burn in hell" for that decision. J.A. 2272. Because this testimony was elicited by Barnes' attorney, the State argues the testimony is admissible **[**19]** under the "invited error" doctrine. But even if we were to accept the State's argument, our conclusion would not change. Juror Jordan shared Pastor Lomax's counsel with the other jurors in an apparent effort to "convince someone . . . it was ok" to vote for the death penalty. J.A. 2295. And taking Juror Jordan at her word that she had already made up her mind, her testimony necessarily indicates that the only reason to bring Pastor Lomax's views into the jury room was to convince the other jurors to impose the death penalty. In other words, Juror Jordan's state of mind is not, alone, dispositive, and we may nonetheless reasonably conclude that Pastor Lomax's external influence affected the jury's decision.

Our dissenting colleague argues that Pastor Lomax's communication with Juror Jordan was neutral as to the death penalty and had no bearing on the jury's **[*536]** ultimate decision. Evidence does not indicate, the dissent argues, that the pastor provided a direct recommendation as to Barnes' sentence or otherwise "expanded the circumstances in which the jury could lawfully impose the death penalty." But ***HN4***[⬆] a prejudicial influence need not take the form of a third party directly telling jurors **[**20]** how they should vote or introducing new facts or law for their consideration. *See, e.g.*, *Turner v. Louisiana, 379 U.S. 466, 473-74, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965)* (holding that key prosecution witnesses' association with jurors throughout trial was prejudicial even though witnesses did not discuss details of the case with jurors). An improper external influence may include "an outside influence upon the partiality of the jury, such as 'private communication, contact, or tampering . . . with a juror.'" *Robinson, 438 F.3d at 363* (citing *Remmer, 347 U.S. at 229*). Pastor Lomax's thoughts on whether the Bible condones the death penalty—when, in urging jurors to vote against that punishment, an attorney had just insisted that it does not—constitutes an outside influence on the jury's partiality.

It is also somewhat specious to suggest that the message conveyed to the jury was neutral. Viewing the evidence in context, we may readily discern the thrust and objective of Pastor Lomax's conversation with Juror Jordan, and hers with the rest of the jury. Pastor Lomax's instruction that jurors would not go to hell if they "live[d] by the laws of the land," J.A. 2271, served to contradict the statements made by Chambers' attorney that while North Carolina law allowed jurors to impose the death penalty, God's law did **[**21]** not. It is reasonable to conclude that, especially coming from a figure of religious authority, Pastor Lomax's message assuaged reservations about imposing the death penalty that the attorney's comments may have instilled. Further, the length of Juror Jordan's conversation with the jury—up to 30 minutes in less than two full days of deliberation—counsels against concluding that the discussion had no effect on the jury's decision.

Finally, we are not convinced that the strength of the State's case against Barnes precludes us from holding that Barnes has shown actual prejudice. ***HN5***[⬆] The focus of the harmless error inquiry is "not on the sufficiency of the evidence absent the error, but rather on the impact of the error on the jury's verdict." *Sherman, 89 F.3d at 1155* (Motz, J., concurring in part and dissenting in part); *see also Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)* ("Harmless error review looks . . . to the basis on which the jury *actually* rested its verdict . . . not [to] whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered.").

While the harmless error standard on habeas review is stringent, it does not require virtual certainty to grant relief. The testimony presented at the evidentiary hearing was **[**22]** sufficient to leave us "in virtual equipoise" as to whether the error had a substantial and injurious effect on the jury's decision. *Lawlor, 909 F.3d at 634*.

IV.

At this stage in the proceedings, Barnes has met his evidentiary burdens as to both constitutional error and actual prejudice. Therefore, we REVERSE the district

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accused); *Parker v. Gladden, 385 U.S. 363, 363-65, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966)* (concluding that bailiff's comment to two jurors that the "wicked fellow (petitioner), he is guilty" and that "[i]f there is anything wrong (in finding petitioner guilty) the Supreme Court will correct it" was not harmless); *Fullwood, 290 F.3d at 681* (noting that, if true, defendant's allegations of juror misconduct may constitute actual prejudice when juror's spouse pressured her throughout the trial to impose the death penalty). This distrust is only amplified when, as in this case, extraneous information is offered to the *entire* jury.

court's denial of habeas relief and REMAND for further proceedings consistent with this opinion.

Dissent by: AGEE

Dissent

AGEE, Circuit Judge, dissenting:

To obtain relief under *28 U.S.C. § 2254*, a state prisoner must demonstrate actual prejudice. Barnes asserts that he has satisfied his burden by showing: (1) after a **[*537]** co-defendants' counsel argued the jurors would go to hell if they imposed the death penalty, a juror asked her pastor whether the Bible did indeed direct that course if they decided to impose the death penalty; (2) the pastor responded "no" and provided her with Bible verses supporting the view that Christians are called to follow the law of the land; and (3) the juror shared her pastor's response and the Bible verses with her fellow jurors during deliberations. The majority agrees with Barnes and grants him habeas relief based on its conclusion that this external communication may have "assuaged reservations about **[**23]** imposing the death penalty that the attorney's comments may have instilled" and thus actually prejudiced Barnes' sentencing. Maj. Op. 16. Because the record does not support the majority's conclusion that the external communication actually prejudiced Barnes, I respectfully dissent.

I.

In 1992, Barnes and two other men robbed and killed B.P. and Ruby Tutterow. In a joint jury trial held in North Carolina state court, all three men were convicted on two counts of first-degree murder, two counts of robbery with a dangerous weapon, and one count of first-degree burglary.

During closing arguments in the penalty phase of the trial, counsel for one of Barnes' co-defendants urged the jury not to impose the death penalty because although state law permitted it, God's law prohibited that penalty. Counsel argued that if the jurors were "true believer[s]," they knew that one day God would hold them accountable for their actions just as He would hold the defendants responsible. J.A. 2374. Counsel admonished the jurors that they would want God to say "Well done, my good and faithful servant. You have done good things with your life. You have done good deeds. Enter into the Kingdom of Heaven," and **[**24]** that they would not want to have to justify their decision to violate his commandment not to kill "because the laws of man said I could." J.A. 2374.[1]

Following deliberation, the jury recommended the death penalty for Barnes and one co-defendant—both of whom were identified by the third co-defendant as the individuals who shot the Tutterows—and mandatory life imprisonment for the third co-defendant. The trial court imposed the recommended sentences.

Just after the jury announced their sentencing decision, Barnes' counsel informed the court that he had discovered that one of the jurors spoke to a member of the clergy "about a particular question as to the death penalty." J.A. 1602. After counsel confirmed that he had no evidence that the juror discussed "the particular facts of this case with anybody outside the jury," the trial court judge denied counsel's request to question the jury about deliberations. J.A. 1602-03.

Barnes argued on both direct appeal and in his state motion for appropriate relief that it was error for the trial court not to investigate whether the sentencing deliberations had been prejudiced by juror contact with a third party. His claims were rejected at both stages. **[**25]** *State v. Barnes, 345 N.C. 184, 481 S.E.2d 44, 68 (N.C. 1997)*; J.A. 1882-83 (MAR court's denial).

After exhausting his state remedies, Barnes filed a petition under *28 U.S.C. § 2254* arguing that the state court's adjudication of his juror misconduct claim was contrary to or unreasonably applied *Remmer v. United States, 347 U.S. 227, 74 **[*538]** S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954)*, which held that "any private communication, contact, or tampering . . . with a juror during a trial about the matter pending before the jury is . . . presumptively prejudicial" and warranted an evidentiary hearing on that issue. *Id. at 229*. The district court disagreed and denied relief, *Barnes v. Lassiter, No. 1:08-cv-00271, 2013 U.S. Dist. LEXIS 44355, 2013 WL 1314466 (M.D.N.C. Mar. 28, 2013)*, but on appeal a majority of this Court agreed with Barnes that the state court misapplied *Remmer. Barnes v. Joyner, 751 F.3d 229 (4th Cir. 2014)*. As a consequence, the case was

[1] For reasons not apparent in the record, the prosecution did not object to counsel's manipulation of the jury's religious beliefs and the trial court gave no cautionary or limiting instruction.

remanded to the district court for a determination of whether actual prejudice resulted from the juror's third-party communication.

However, having concluded that Barnes was not entitled to relief under the highly deferential standard of review federal courts apply under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), I dissented from the majority's decision. *Id. at 253* (Agee, J., dissenting). That dissenting opinion explains why "'fairminded jurists could disagree' as to whether the communication Barnes alleges to have occurred **[**26]** constituted juror contact with a third party 'about a matter pending before the jury'" given that it "did not directly bear upon how the juror would vote" in this case. *Id. at 266* (Agee, J., dissenting).[2]

On remand, the district court referred the case to a magistrate judge to conduct the evidentiary hearing. Barnes called three members of the jury as witnesses: the juror who spoke with her pastor (Hollie Jordan) and two jurors who recounted aspects of the jury deliberations (Ardith Peacock and Leah Weddington).[3] In sum, Juror Jordan testified that she approached her pastor because she was concerned about the co-defendants' closing argument that the jurors "would burn in hell" if they imposed the death sentence. J.A. 2269. Jordan testified that her pastor said the Bible taught that "we had to live by the laws of the land" and "told [her] some scriptures in the Bible" to support that view, though she could not recall which verses he used. J.A. 2271. Juror Peacock also recalled that Jordan brought a Bible into deliberations and read "several passages" from it, adding that she believed one verse had to do with "the eye for an eye and tooth for a tooth," but she was not sure what verses or books of **[**27]** the Bible were read. J.A. 2281, 2292. Peacock testified that Jordan "did not state that [the verses she read] were for" or against the death penalty. J.A. 2290, 2292. Instead, she characterized Jordan's statements as flowing from "the closing argument . . . that one of the defense attorneys had" given. J.A. 2290. According to Peacock, Jordan read the Bible verses to "say[], you know, we are doing our duty" as a rebuttal to the defense attorney's contention that the Bible **[*539]** said they would go to hell should they sentence the defendants to death. J.A. 2291-92. Juror Weddington remembered a female juror reading from the Bible during deliberations, though she, too, could not recall which verses were read. Nor did Weddington testify to the context for the Bible reading. When asked "what might have prompted the juror . . . to bring the Bible into the jury room," Weddington replied, "I guess she was trying to convince someone to — it was okay to give [the defendants] the death penalty." J.A. 2295.

The magistrate judge's report and recommendation concluded Barnes' petition should be denied, finding any error was harmless "because there was no actual prejudice to [Barnes] since the jury verdict **[**28]** in this case was not tainted by the third-party contact between Juror Jordan and" her pastor. J.A. 2395. In particular, the magistrate noted that the evidence did not show that the juror's conversation with her pastor touched on the appropriate punishment for any defendant in this case, but rather centered on whether the Bible would *ever* allow a devout juror to impose the death penalty. The magistrate judge also pointed to the nature of Barnes' crimes and the jury's decision to sentence two defendants to death and one to life imprisonment as confirmation that the verdicts were based on the proper statutory facts before the jury rather than an improper external influence.

The district court adopted the magistrate judge's report and recommendation with only minor modifications, and it denied Barnes' petition. *Barnes v. Thomas, No. 1:08cv271, 2018 U.S. Dist. LEXIS 129932, 2018 WL 3659016 (M.D.N.C. Aug. 2, 2018)*. The district court characterized as "speculation" Juror Weddington's testimony that she "guess[ed]" Jordan's motive for reading the Bible during deliberations was to advocate for the death penalty. *2018 U.S. Dist. LEXIS 129932, [WL] at *6*. It pointed to the record evidence about the nature of Jordan's conversation with her pastor and the information shared with other jurors to support **[**29]**

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[2] The State petitioned for certiorari in the Supreme Court of the United States. The Supreme Court denied certiorari, though Justice Thomas wrote an opinion dissenting from the denial, which Justice Alito joined. *Joyner v. Barnes, 135 S. Ct. 2643, 192 L. Ed. 2d 944 (2015)* (mem.). According to Justice Thomas, the state court did not unreasonably apply Supreme Court precedent in concluding that a question posed by a juror to her minister "about the death penalty generally [] did not discuss the facts of the case" and "did not concern the matter pending before the jury" for purposes of applying *Remmer*. *Id. at 2647*.

[3] Barnes also called as a witness his counsel from the direct appeal, though as the magistrate judge noted in her report and recommendation, the attorney testified less as a fact witness than as an additional attorney's assessment of potential issues for appeal. Neither party relies on her testimony.

The record also shows that Jordan's pastor, Tom Lomax, had died prior to the district court proceedings.

the conclusion that neither the pastor nor Jordan advocated for one sentence over another, noting that the pastor's admonitions to follow the law of the land were precisely what the trial court instructed the jurors to do. And the district court recounted the strength of the state's case against Barnes as further evidence of harmlessness. Despite the court's confidence in its conclusion, given that the case involved the death penalty, it granted Barnes a certificate of appealability "on the issue of whether the extraneous communication between Juror Jordan and [her pastor] had a 'substantial and injurious effect or influence in determining the jury's verdict,' or rather was harmless." *2018 U.S. Dist. LEXIS 129932, [WL] at *11*.

II.

To be eligible for relief, Barnes must satisfy AEDPA's strict limits on when a federal court can grant relief to state prisoners. First, he must exhaust his state court remedies before being able to raise a claim in federal court. *28 U.S.C. § 2254(b)(1)*. Second, he must show that the state court's adjudication of the claim "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." *§ 2254(d)(1)*. And third, because **[**30]** "most constitutional errors can be harmless," *Arizona v. Fulminante, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)*, he must demonstrate that the error complained of caused actual prejudice. *Fullwood v. Lee, 290 F.3d 663, 679 (4th Cir. 2002)*.

For the detailed reasons set out in my previous dissenting opinion, I continue to adhere to the view that Barnes'*§ 2254* petition should be denied because it fails at **[*540]** the second stage of inquiry: the state court's adjudication of his juror misconduct claim did not involve an unreasonable application of *Remmer. Barnes, 751 F.3d at 253-66* (Agee, J., dissenting). But the panel majority has held otherwise, and this appeal centers on whether Barnes has cleared the third hurdle to obtaining habeas relief by showing that the error was not harmless: that is, that he suffered actual prejudice.

In the context of *§ 2254* proceedings, we apply the harmless error standard from *Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)*, which differs from the way harmlessness is analyzed in review upon direct appeal. "Because of the threat collateral attacks pose to finality, comity and federalism, habeas petitions may secure the writ only if the error actually prejudiced them." *Bauberger v. Haynes, 632 F.3d 100, 104 (4th Cir. 2011)*.[4] In this context, "actual prejudice" means showing that the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Fullwood, 290 F.3d at 679* (quoting *Brecht, 507 U.S. at 637*). In an "unusual" case, the question **[**31]** of whether a substantial or injurious effect or influence may be "so evenly balanced" that the Court is in "grave doubt" as to the harmlessness of an error; in that case, the Court should grant the *§ 2254* petition. *Bauberger, 632 F.3d at 104*. But in the ordinary case, the Court can assess the error and determine whether the defendant has demonstrated actual prejudice. *See id.* In the context of errors that occur during the sentencing phase of a death penalty case, the question before the Court is whether the error had a "substantial and injurious effect or influence on the jury's decision to sentence [the defendant] to death." *See Tuggle v. Netherland, 79 F.3d 1386, 1393 (4th Cir. 1996)*.

The evidence Barnes developed in the district court does not demonstrate actual prejudice for at least three reasons: (1) the third-party communication was neutral concerning how Barnes should be sentenced; (2) the communication did not alter the facts or the law that the jury was instructed to use in deciding how to sentence Barnes; and (3) the communication does not bear any other hallmarks of having had a substantial or injurious effect or influence on the deliberative process.

A.

Barnes first fails to demonstrate actual prejudice because the external communication that occurred in this **[**32]** case did not relate to what sentence the jury should impose for Barnes' crimes. Put another way, the nature of the communication was of such a neutral and tangential nature to the issue before the jury that it could not have had an "injurious effect or influence" on the jury's sentencing decision. *Brecht, 507 U.S. at 627*.

The Supreme Court has recognized that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)*. This means that when assessing instances of improper jury communication with a third-party, the Court must ensure that the defendant was tried by a "jury capable and willing to decide the case solely on the evidence before it." *Id.*; *see also Rushen v.*

[4] Here, and throughout the opinion, I have omitted internal quotation marks, alterations, citations unless otherwise noted.

Spain, 464 U.S. 114, 118-120, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983). Consequently, not every improper communication between a juror and non-juror is actually prejudicial to a defendant. Sometimes, the nature of the **[*541]** conversation will readily reveal whether it was innocuous—e.g., a salutation—or injurious—e.g., opinion about guilt.

Based on this understanding, courts have recognized that a petitioner may be able to satisfy his burden of showing actual prejudice when one or more jurors is exposed to a non-juror's opinion about the defendant's guilt or punishment. **[**33]** Indeed, the Supreme Court has stated that "it would be blinking reality not to recognize the extreme prejudice inherent" when a court employee offers his opinion about the defendant's culpability to the jurors. Parker v. Gladden, 385 U.S. 363, 365, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966) (per curiam). Specifically, in *Parker*, a bailiff assigned to a jury told several jurors, "Oh that wicked fellow (petitioner), he is guilty" and later said to another juror that "[i]f there is anything wrong (in finding petitioner guilty) the Supreme Court will correct it." Id. at 363-64 . Along this line, the U.S. Court of Appeals for the Ninth Circuit has recognized that although "not every incident of a juror's ex parte contact with friends or relatives would constitute actual prejudice to a defendant," a habeas petitioner had demonstrated actual prejudice when a juror engaged in "active[] discuss[ions]" about the case with her friends and those friends "presented . . . strong opinions concerning the proper outcome of [the defendant's case]." United States v. Maree, 934 F.2d 196, 202 (9th Cir. 1991) *abrogated on other grounds by* United States v. Adams, 432 F.3d 1092 (9th Cir. 2006).

In contrast to the bailiff in *Parker* and the juror's friends in *Maree*, the record developed in the district court here is unequivocal that Juror Jordan's pastor did not provide his opinion regarding an appropriate **[**34]** sentence for Barnes or comment on any of the evidence or law relevant to the jury's deliberations. This was so because Jordan did not ask her pastor's "advice or counsel about the case" and only asked him about "the closing argument as far as . . . if they got the death sentence for what they did and we sentenced them to death, were we going to die because we're killing them." J.A. 2272. She solicited her pastor's view on the narrow issue of whether the Bible said jurors could go to hell if they decided to sentence the defendants to death. Jordan repeatedly stated, without contradiction, that she did not seek her pastor's advice about the case or how she should vote. J.A. 2275-76 ("The only thing [that led me to talk to him] was as far as burning in hell. That's the only reason I went and talked to him."). There is no record evidence to the contrary.

The pastor's response was similarly limited: that jurors would not be condemned to hell for their sentencing decision because the Bible did not teach that view. Instead, the pastor noted the Bible instructed Christians to "live by the laws of the land." J.A. 2273. Pastor Lomax provided Jordan with a few Bible verses to support that view. **[**35]** Most importantly, at no time did the pastor lead Jordan to believe "the Bible supported [or] didn't support the death penalty," or give his view in any way as to the disposition of Barnes' case. J.A. 2273. Jordan relayed the same information to other jurors at the next day's deliberations.

Juror Peacock's testimony wholly supports Jordan's testimony on this point, reiterating that Jordan did not use the pastor's comments or the Bible verses to support or oppose the death penalty for Barnes or any of the other defendants.[5]

[*542] Juror Weddington's testimony does not alter this analysis. Her recollections were hazy and not well-developed, as she testified only that a female juror had read from the Bible during deliberations and did not provide any testimony connecting the juror's comments to a conversation with her pastor. When asked what might have prompted the juror to read from the Bible, Weddington speculated, "I *guess* she was trying to convince someone to — it was okay to give him the death penalty." J.A. 2295 (emphasis added). But guesses are not evidence. The Mattano, 52 F. 876, 880 (4th Cir. 1892) ("[L]oose conjecture is not testimony."); *see also* U.S. Steel Min. Co. v. Director, Office of Workers' Comp. Programs, U.S. Dep't of Labor, 187 F.3d 384, 390 (4th Cir. 1999) (noting the words used in the testimony—"it is *possible* that it *could*"—rendered **[**36]** the testimony "entirely speculative").

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[5] Given that none of the witnesses could recall where in the Bible the verses originated, Peacock's recollection that one verse had to do with an "eye for an eye and tooth for a tooth" is of limited evidentiary value. J.A. 2281. The phrase appears in both the Old and New Testaments, and in the New Testament appearance the phrase is followed by the admonition "But I say unto you, That ye resist not evil: but whosoever shall smite thee on they right cheek, turn to him the other also." Matthew 5:38-39; *see* Hurst v. Joyner, 757 F.3d 389, 392 n.1 (4th Cir. 2014) (discussing the four appearances of the phrase in the Christian Bible); Robinson v. Polk, 438 F.3d 350, 358 n.8 (4th Cir. 2006) (same).

Unable to recall details of Jordan's communication, Weddington provided no factual information about Jordan's statements during the deliberations that would allow for a factfinder to conclude that her "guess" was based on any reasonable impression formed from witnessing the events in question. Specifically, Weddington did not identify which female juror read from the Bible, what Bible verses were read, or whether they were from the Old or New Testament, and she did not provide any testimony regarding what else the juror said besides reading from the Bible. Juror Weddington thus offered no basis for connecting her "guess" about the juror's motive to what the juror did. At bottom, Weddington acknowledged she was "guess[ing]" at a reason and the district court properly took her at her word when it concluded Weddington's statement was speculative and thus not evidence of actual prejudice. J.A. 2443-45. The majority errs in relying on her conjecture as a basis for granting Barnes relief.

Further, the majority opinion simply ignores the uncontested fact that no witness—none—testified that Pastor Lomax said anything that attempted to influence Juror Jordan **[**37]** (directly) or another juror (indirectly) as to the merits of what sentence Barnes should receive under North Carolina law. Unlike the bailiff's express opinion of guilt in *Parker* or the friends' open discussion of the case in *Maree*, the external communication that occurred in this case did not address the merits of the case nor did it expose Juror Jordan or any other juror to a third-party's view of the evidence or the appropriate sentence. While an inappropriate third-party communication occurred, it was unrelated to the question of what sentence Barnes should receive and thus could not have prejudiced him by affecting or influencing the jury's decision making.

Courts have held that when a communication, as that here, is innocuous or not about the decision the jury must make, the error has not actually prejudiced the defendant even when the communication was tangentially related to the case. *E.g.*, *Rushen, 464 U.S. at 118-19* (concluding no prejudice arose from juror's ex parte communication with trial judge concerning juror's personal acquaintance with a prior victim of the defendant because judge had ensured juror could still be impartial during deliberations); *Crease v. McKune, 189 F.3d 1188, 1190, 1192-94 (10th Cir. 1999)* (holding petitioner **[*543]** had not demonstrated actual **[**38]** prejudice when a juror had an ex parte conversation with the judge during which she expressed discomfort with state law and the judge reiterated several jury instructions and "admonished her according to the jury instructions that she cannot allow prejudice and sympathy to enter into her deliberation" because the judge did not pressure her to vote to convict or suggest how she should vote); *United States v. Endicott, 869 F.2d 452, 454, 457 (9th Cir. 1989)* (concluding that no actual prejudice resulted from contact between a juror and a government witness where the juror complained to the witness that the defendants were "guilty," but "we will have to listen to all the rest of the b.s." because the exchange was "inconsequential"); *United States v. Day, 830 F.2d 1099, 1103-07 (10th Cir. 1987)* (holding no actual prejudice where a juror and a government witness engaged in "a casual, time-of-the-day greeting" about how the juror was "holding up" and that the testimony "may put you to sleep"); *see also United States v. Davis, 51 F.3d 269, 1995 WL 139323, *3 (4th Cir. 1995)* (unpublished table decision) (holding defendant failed to demonstrate actual prejudice when a juror asked the government's case agent what the Bureau of Alcohol, Tobacco, and Firearms did because "the conversation had not involved the merits of the pending case").

As in the cases cited above, Barnes has failed to **[**39]** demonstrate that the conversation between Juror Jordan and her pastor, by its nature, had a substantial and injurious effect or influence on his being sentenced to death. The communication involved a topic tangential to the jury's assessment of the law and facts relevant to the sentencing determination. At no point did the pastor communicate his views about Barnes, Barnes' co-defendants, or the case itself. Nor did he even mention the Bible's views of the death penalty generally, or under what circumstances the Bible may allow for such a sentence. Because Jordan's conversation with her pastor did not advocate for or against the death penalty in general—let alone as the appropriate punishment for Barnes—it could not have swayed her own or any other juror's decision about how to sentence Barnes. Thus, as many courts considering similarly tangential ex parte communications have concluded, an innocuous conversation like Jordan's with her pastor could not have not actually prejudiced Barnes.

The majority opinion's contrary conclusion stems from multiple missteps. At the outset, it draws the specious conclusion that the third-party communication advocated for the death penalty: a conclusion **[**40]** wholly without support in the record. That conclusion ignores the entirety of the testimony concerning what the pastor said: first, that jurors would not go to hell *if* they voted to impose the death penalty, and, second, that the Bible said individuals should follow the law of

the land. These statements are neutral on the question of how Barnes should be sentenced. What is more, the majority's conclusion contradicts the testimony of both Juror Jordan and Juror Peacock that the information relayed directly or indirectly from the pastor did not advocate for or against the death penalty.

Given that the pastor's comments could not possibly have been injurious to Barnes, the communication that occurred in this case could not have had a prejudicial effect or influence on the verdict. But after the majority opinion manipulates the communication into a broadly pro-death penalty influence, it then excuses Barnes for failing to prove that aspect of actual prejudice by blaming *Federal Rule of Evidence 606*. But this rule offers no refuge. *Rule 606* codifies the common-law prohibition of admitting juror testimony to impeach a jury verdict. *Fed. R. Evid. 606(b)(1)* ("During **[*544]** an inquiry into the validity of a verdict or indictment, a juror may not testify about **[**41]** . . . the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."). An exception to that rule found in both the federal and North Carolina rules of evidence allows jurors to testify as to "whether extraneous prejudicial information [that has been] improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *Robinson, 438 F.3d at 360 n.10* (citing *Fed. R. Evid. 606(b)*; N.C. Gen. Stat. § 8C-1, *Rule 606(b)*). This exception allowed Barnes to garner evidence concerning Juror Jordan's communication with her pastor and her conveyance of that information to the jury.

But Barnes' problem demonstrating actual prejudice did not arise from his inability to present witnesses who could confirm that they were persuaded to vote for the death penalty as a result of Juror Jordan's conversation with her pastor. Rather, Barnes' claim falters because he has an objective failure of proof that the communication exposed Jordan or another juror to a third party's opinion that they should sentence Barnes to death. Unlike the instances where the subject matter of the communication had a clear analytical bridge to the prejudicial effect or influence, the communication **[**42]** in this case touched on a different topic. The majority can only reach a contrary conclusion by misrepresenting what the conversation entailed and then speculating about its unproven influence on a juror. That reasoning falls far short of proof of actual prejudice and is contrary to the record.

B.

Barnes also failed to demonstrate actual prejudice because the external communication did not materially alter the facts or law by which the jurors were to determine Barnes' sentence. As the district court explained,

> [i]n the absence of additional evidence that either Pastor Lomax or Juror Jordan employed Bible verses to actively encourage jurors to impose the death penalty, the logical conclusion is that the extraneous influence encouraged the jurors to decide the case based on the facts presented and the law of North Carolina and not based on the religious constraints defense counsel sought to impose. This weighs against any finding that the extraneous influence had a substantial and injurious effect or influence in determining the jury's verdict.

*Barnes, 751 F.3d 229, 2018 WL 3659016, at *7*.

Conversely, a defendant could establish actual prejudice by showing external influences that alter the facts being considered during deliberations. **[**43]** For example, courts have held that a petitioner may be able to satisfy the *Brecht* standard when the jury considers inculpatory evidence that was not presented at trial. *E.g.*, *Sassounian v. Roe, 230 F.3d 1097, 1108-12 (9th Cir. 2000)* (holding actual prejudice was shown when jury considered a telephone call that had not been discussed during the trial and which related to the defendant's motive); *Bonner v. Holt, 26 F.3d 1081, 1084 (11th Cir. 1994)* (holding the defendant was actually prejudiced when jury returned a verdict of guilt only after learning that the defendant was a habitual offender, a fact that was not introduced at trial); *Marino v. Vasquez, 812 F.2d 499, 506 (9th Cir. 1987)* (observing that petitioner had established actual prejudice because there was "a direct and rational connection between the extrinsic material" and the jury's verdict when the jury engaged in an "unauthorized out-of-court experiment with [a] gun [that] relate[d] to the defense theory of self-defense, which was a material element"); *cf.* *Dorsey v. Quarterman, 494 F.3d 527, 531-32 **[*545]** (5th Cir. 2007)* (holding the defendant did not experience actual prejudice when jurors inadvertently received an unedited transcript that contained information about the defendant's prior bad acts because jurors "were questioned to insure that they would disregard the material" and "be impartial" during deliberations and the evidence against **[**44]** the defendant was overwhelming). Of course, there's no evidence in this case—none—that Juror Jordan conversation with her

pastor exposed any juror to any new facts that might be relevant to his sentence or shed a different light on the known facts.

Separately, external influences that materially alter the legal standard the jury uses to deliberate may establish actual prejudice. *E.g.*, Marino, 813 F.2d at 506 (observing that petitioner established actual prejudice because there was a "direct and rational connection between the extrinsic material" and the jury's verdict when the jury consulted a dictionary definition that changed the meaning of the offense's material element in dispute).

But where the external influence did not materially alter the jury's understanding of the circumstances in which it could reach its verdict, that influence—even when it changed the jury's comprehension of a material legal element—did not rise to the level of being actually prejudicial. In *Bauberger*, we held that the petitioner had not demonstrated actual prejudice for purposes of § 2254 arising from the jurors' decision to review "dictionary definitions of several words in the judge's instructions." 632 F.3d at 102.[6] In relevant part, that jury was **[**45]** tasked with determining whether Bauberger was guilty of second-degree murder and the only disputed element in the case was whether he had acted with "malice." The court instructed the jurors:

> 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.

Id. at 105. On a lunch break, the jury foreperson obtained a dictionary and, when deliberations resumed, read several of its definitions to other jurors, including the terms "recklessly"—defined as "lack of due caution"—and "wantonly"—defined as "arrogant recklessness of justice or the feelings of others." Id. at 105-06. Later that day, the jury convicted Bauberger of second-degree murder. In his § 2254 petition, Bauberger argued that the jury's decision to consult the dictionary during deliberations had a substantial and injurious effect because one or more jurors may have relied on those definitions, which he contended lowered the government's burden of proving malice as defined by the law.

The Court disagreed, **[**46]** concluding that the definitions of malice "even as possibly modified by the definitions the jurors consulted, fully conveyed the essence of North Carolina law concerning malice." Id. at 107. In short, we held that "Bauberger's verdict was not substantially and injuriously affected by the dictionary's definition of 'recklessly' because the altered instruction as a whole remained materially equivalent to the one given by the judge." *Id.* The Court reached the same conclusion regarding the jury's consideration of the term **[*546]** "wantonly," explaining that "[a]ny modification of the instruction that came about by virtue of the dictionary's definition of 'wantonly' did not materially affect that instruction's malice standard." *Id.* Lastly, the Court "look[ed] to the strength of the evidence in assessing whether the dictionary use substantially and injuriously affected Bauberger's verdict," concluding that because the evidence on this element was "not likely a close one," meaning that "it is less likely that the error impacted the jury's decision." Id. at 108.

Bauberger counsels that the external communication in this case, which related to the jury's decision far less than the unauthorized use of a dictionary in *Bauberger* ***[**47]*** did, could not have substantially and injuriously affected Barnes' sentence. As discussed, Juror Jordan's pastor relayed two thoughts that Jordan then shared with the jury: that the Bible commanded jurors to follow "the laws of the land" and that the Bible did not say that jurors would go to hell if they decided to impose the death penalty. J.A. 2271. While those positions countered the co-defendants' closing argument, they were fully consistent with the jurors' duty in making their sentencing decision: to sentence Barnes based on North Carolina's capital sentencing criteria, not the Bible's view for or against the death penalty. The external communication that occurred in this case—while inappropriate—neither introduced an improper consideration into the deliberative process nor expanded the circumstances in which the jury could lawfully impose the death penalty.

Simply put, the view that jurors must follow the law of the land—regardless of their personal convictions regarding the morality of the death penalty—corresponds precisely with federal and state law establishing a juror's sworn obligation during

[6] Although third-party communications differ from other sorts of external influences on a jury for certain aspects of the analysis, *see* United States v. Lawson, 677 F.3d 629, 644 (4th Cir. 2012), both could demonstrate actual prejudice if they resulted in an alteration to the legal standard by which the jury weighed the evidence.

deliberations. Jurors in a capital case are charged with determining an appropriate **[**48]** sentence based on the legally relevant factors as applied to the facts of the case. *See, e.g.,* Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). To that end, prospective jurors can be questioned and excused for cause if they hold any views that would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); *see also* N.C. Gen. Stat. § 15A-1212(8) (stating that jurors can be challenged for cause on the ground that the juror "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina"); Robinson, 444 F.3d at 226 (Wilkinson, J., concurring in denial of rehearing en banc) ("Courts have always recognized that jurors' personal convictions, including religious ones, may impede the dutiful performance of their momentous responsibility."). In addition, North Carolina courts have "repeatedly cautioned counsel that they should base their jury arguments solely upon the secular law and the facts," although various arguments invoking the Bible have been held not to so infect a trial with unfairness as to violate a defendant's due process rights. State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 624-25 (N.C. 2001); *see also* State v. Williams, 350 N.C. 1, 510 S.E.2d 626, 643 (N.C. 1999) ("Our trial courts must vigilantly ensure that counsel **[**49]** for the State and for defendant do not distract the jury from its sole and exclusive duty to apply secular law.").

Juror Jordan's conversation with her pastor, which she relayed to the other jurors, reinforced the very framework by which the jurors had already been instructed to use when assessing a proper sentence: to rely solely on North Carolina's sentencing criteria.

[*547] The same conclusion can be drawn from the comment that the Bible did not say jurors would go to hell if they decided to impose the death penalty. As with the earlier statement, this communication did not expand the circumstances in which the jury could sentence Barnes to death under North Carolina law. Instead, it directed the jurors to follow their obligation to review the relevant factors under North Carolina law and determine whether the circumstances of Barnes' case warranted death or life imprisonment. In sum, the external communication mitigated the argument by Barnes' co-defendant's counsel that the jurors would face eternal damnation, but mitigating that argument did not implicate the jury's duty during deliberations: to determine an appropriate sentence for Barnes based on the facts and North Carolina law.

As **[**50]** was true in *Bauburger*, the external communications that occurred in this case were consistent with "the essence of North Carolina law" concerning the jurors' sentencing options and did not "materially affect[]" that standard. Bauberger, 632 F.3d at 107. Because the external communication at issue here did not lead the jury to consider additional facts or incorrect law in making its sentencing determination, the communication did not have an injurious effect or influence on that process. Absent this influence, the admonition to jurors to follow their sworn duty cannot support a finding of actual prejudice.

C.

Additional factors reinforce the conclusion that Barnes was not actually prejudiced as a result of the external communication between Juror Jordan and her pastor, including: the comparatively short duration of the communication, the jury's split sentencing decision between the three co-defendants, and the jury's specific findings in the penalty phase.

Courts have considered the timing and duration of any error as part of their actual prejudice assessment. Fitzgerald v. Greene, 150 F.3d 357, 366 (4th Cir. 1998) (concluding no actual prejudice had resulted from a juror's statement the defendant claimed to demonstrate implied bias because when the statement was made, **[**51]** the jury had already voted to convict the defendant and recommended the death penalty for one charge); Marino, 812 F.2d at 506 (noting that the "length of time [extrinsic material] was available to the jury," "the extent to which the [jury] discussed and considered it," and when the material was introduced and "at what point in the deliberations" were all factors to be considered as part of the total actual prejudice assessment). Here, Juror Jordan's conversation with her pastor lasted only a "few minutes" during a substantially longer conversation with him about other matters. J.A. 2271. Then, during deliberations that spanned more than one day, Juror Jordan spent "15 to 30 minutes" discussing the view that Christians were to "live by the laws of the land" and "read[ing] the Bible verses to them" that her pastor had given to her. J.A. 2273-75. All told, there is no evidence that the pastor's comments concerning the Bible's instruction to follow the law of the land took a place of prominence during the deliberative process. Nor is there any indication, as has been present in other cases, that this discussion occurred at a

critical juncture—such as between a deadlocked jury and final verdict—in the deliberations. **[**52]** *E.g.*, *Marino, 812 F.2d at 506*; *Bulger v. McClay, 575 F.2d 407, 411-12 (2d Cir. 1978)*(relying in part on the jury's "difficulty in reaching a verdict" before being exposed to extra-record information as the basis for concluding the error "may well have been determinative" to the verdict).

Courts have also looked to the strength or weakness of the prosecution's case when **[*548]** assessing whether an error had a substantial and injurious effect or influence. *Jones v. Angelone, 94 F.3d 900, 909 n.10 (4th Cir. 1996)* (observing that this factor is relevant to determining whether the error was "substantial"); *accord Broom v. Mitchell, 441 F.3d 392, 412 (6th Cir. 2006)*; *Malicoat v. Mullin, 426 F.3d 1241, 1250-52 (10th Cir. 2005)*. Given that the decision to impose the death penalty involves a level of subjective assessment that is not present when assessing guilt in the first instance, I recognize that this factor has a limited utility. Nonetheless, when combined with the reasons already discussed and the following aspects of the sentence deliberations, there is no room for any "grave doubt" as to the harmlessness of the external communication that occurred in this case.

First, the jurors returned different sentences for the three co-defendants. As noted, the jury was deliberating the appropriate sentence for Barnes and his two co-defendants at the same time. All three men could have received the death penalty. But the jurors decided that **[**53]** only Barnes and one co-defendant should receive the death penalty, while they sentenced the second co-defendant to life imprisonment. This determination reflects that the jurors understood their duty to individually assess the appropriate punishment for each defendant, as consistent with the jury instructions. Moreover, they imposed the death penalty against the two individuals (including Barnes) who had been identified by a co-defendant as the individuals who actually shot the victims, while imposing a life sentence against the third co-defendant, who had participated in the robbery scheme and was present during the murders. This, too, reflects that the jurors imposed a sentence based on their view of the defendants' relative culpability in the murders as opposed to a Biblical mandate for or against the death penalty.

Second, the jurors returned an individualized assessment of mitigating and aggravating factors for Barnes based on North Carolina's capital sentencing criteria. Part of the jury's deliberations in the penalty phase required them to find specific mitigating and aggravating factors under North Carolina law. They found 10 mitigating factors and 4 aggravating factors relevant **[**54]** to their decision to sentence Barnes to death. As the district court noted, the mitigating factors "related primarily to [Barnes'] childhood," while the aggravating factors focused on Barnes' criminal conduct, including the pecuniary motive for the murders, that it was part of a course of violent criminal conduct, and its "especially heinous, atrocious, or cruel" nature. J.A. 2452.

In sum, these additional factors reinforce the conclusion that the jury was "capable and willing to decide the case solely on the evidence before it" as opposed to having been swayed by the improper communication between Juror Jordan and her pastor. *McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984)*.

* * * *

Considering the nature of the external communication that occurred in this case alongside the proceedings as a whole, no "grave doubt" exists as to the harmlessness of the error. *Bauberger, 632 F.3d at 104*. To the contrary, Barnes simply did not satisfy his burden of demonstrating actual prejudice, and the district court did not err in denying his *§ 2254* petition.

III.

For the reasons set forth above, I would affirm the judgment of the district court. Therefore, I respectfully dissent.

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Barnes v. Thomas

United States Court of Appeals for the Fourth Circuit

December 18, 2019, Filed

No. 18-5

Reporter
2019 U.S. App. LEXIS 37725 *

WILLIAM LEROY BARNES, Petitioner - Appellant v. EDWARD THOMAS, Warden, Central Prison, Raleigh, North Carolina, Respondent - Appellee

Prior History: **[*1]** 1:08-cv-00271-TDS-JEP.

Barnes v. Thomas, 938 F.3d 526, 2019 U.S. App. LEXIS 27500 (4th Cir. N.C., Sept. 12, 2019)

Core Terms

jurors, death penalty, sentencing, law of the land, en banc, conversation, verses, deliberations, actual prejudice, injurious effect, state court, courts, dissenting opinion, burn, religious, fellow, views, appropriate sentence, no evidence, co-defendant, third-party, relayed

Counsel: For WILLIAM LEROY BARNES, Petitioner - Appellant: George Bullock Currin, Raleigh, NC; M. Gordon Widenhouse, Jr., Chapel Hill, NC.

For EDWARD THOMAS, Warden, Central Prison, Raleigh, North Carolina, Respondent - Appellee: Jonathan Porter Babb, Sr., Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, NC; Josh Stein, OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA, Raleigh, NC.

Judges: WYNN, Circuit Judge, concurring in the denial of rehearing en banc. WILKINSON, Circuit Judge, with whom NIEMEYER, Circuit Judge, joins, dissenting from the denial of rehearing en banc. AGEE, Circuit Judge, with whom NIEMEYER, Circuit Judge, joins, dissenting from the denial of rehearing en banc.

Opinion

ORDER

The court denies the petition for rehearing and rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Gregory, Judge Motz, Judge King, Judge Keenan, Judge Wynn, Judge Diaz, Judge Floyd, Judge Thacker, and Judge Harris voted to deny rehearing en banc. Judge Wilkinson, Judge Niemeyer, Judge Agee, Judge Richardson, Judge Quattlebaum, and Judge **[*2]** Rushing voted to grant rehearing en banc.

Judge Wynn submitted a statement concurring in the denial of rehearing en banc. Judge Agee and Judge Wilkinson each submitted statements dissenting from the denial of rehearing. These statements are attached to this order.

Entered at the direction of Judge Floyd.

Concur by: WYNN

Concur

WYNN, Circuit Judge, concurring in the denial of rehearing en banc:

The question in this case is whether juror misconduct—seeking the religious advice of a pastor about the death penalty during jury deliberations and then relaying that communication to fellow jurors—had a substantial and injurious effect or influence on the jury's decision to impose the death penalty on Petitioner Barnes. The question is not what legal standard applies. *See* Brecht v. Abrahamson, 507 U.S. 619, 638, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) ("[W]e hold that the Kotteakos [v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)] harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type."). And the question is not whether this Court's previous decision in Barnes' favor was incorrect. Barnes v. Joyner, 751 F.3d 229 (4th Cir. 2014) (hereinafter *Barnes I*). And the question is not whether, systemically, federal courts grant too much habeas relief. Habeas relief does not operate on a quota system.

Again, to be **[*3]** absolutely clear: The question in this case is whether juror misconduct—seeking the religious advice of a pastor about the death penalty during jury deliberations and then relaying that communication to fellow jurors—had a substantial and injurious effect or influence on the jury's decision to impose the death penalty on Petitioner Barnes.

The facts show that it did.

The panel majority opinion presented a compelling account of what transpired. In a North Carolina court, a jury found Petitioner Barnes guilty of first-degree murder. Barnes v. Thomas, 938 F.3d 526, 529 (4th Cir. 2019) (hereinafter *Barnes II*). At closing arguments in the sentencing phase, an attorney representing a co-defendant argued that the jury, if it imposed the death penalty, would be judged by God for violating one of the ten commandments, specifically, "Thou shalt not kill." *Id.* (quoting J.A. 1532). One of the jurors, Hollie Jordan, was offended by the argument and saw that another juror looked upset. *Id. at 530*. After the first day of deliberations, before the jury had reached a decision, Juror Jordan discussed the case—including a discussion of pictures of the crime scene—with her pastor and asked if the jurors would "burn in hell" if they imposed a death sentence. *Id. at 531* (quoting **[*4]** J.A. 2269). She asked this question despite allegedly having already decided to vote for the death sentence.[1] *Id. at 532*. The pastor replied that the jurors would not burn in hell, gave her Bible verses to support his opinion, and told Juror Jordan that the jurors "had to live by the laws of the land." *Id. at 531-32* (quoting J.A. 2271).

The very next day, Juror Jordan spoke with her fellow jurors about her conversation with the pastor. *Id. at 532*. She relayed to them that they would not "burn in hell," and she read the Bible verses her pastor had suggested. J.A. 2274. Another juror testified that she thought Juror Jordan "was trying to convince someone to -- it was okay to give him the death penalty."[2] J.A. 2295. The jury subsequently voted to impose the death penalty.

The unmistakable import of these facts is that Juror Jordan sought out her pastor's opinions about the death penalty and then presented those opinions to her fellow jurors for the purpose of influencing another juror's vote. She solicited an authoritative outside opinion about sentencing, and the pastor gave her one. The prejudice is clear and meets the standard of "grave doubt" and "virtual equipoise." *Barnes II, 938 F.3d at 534, 536* (quoting *Lawlor v. Zook, 909 F.3d 614, 634 (4th Cir. 2018))*.

Nevertheless, the dissent contends that **[*5]** "the record here shows only a conversation that did not touch upon Barnes' guilt or the appropriate sentence." Dissent of Agee, J., *infra* at 14. The argument is that the pastor's communication was "of such a neutral and tangential nature to the issue before the jury that it could not have had an 'injurious effect or influence' on the jury's sentencing decision." *Barnes II, 938 F.3d at 540* (Agee, J., dissenting) (quoting *Brecht, 507 U.S. at 627*). This requires accepting that the conversation about burning in hell for imposing the death penalty was not about the death penalty. *See* Dissent of Agee, J., *infra* at 14 ("Nor is there any evidence that the pastor opined about the

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[1] There is some dispute whether Juror Jordan's testimony that she was not asking her pastor how to vote was admissible. *Id. at 532, 535*. As the panel majority opinion explains though, crediting this testimony does not change the conclusion of prejudice here. *Id. at 535*. If anything, it makes the conclusion inescapable.

[2] Juror Jordan herself previously indicated she intended to "remedy the effect of the [defense counsel's] argument." *Barnes I, 751 F.3d at 235* (quoting a summary of a 1995 interview with Juror Jordan, which was signed in 2000 by Juror Jordan as an accurate description of what she said).

morality of the death penalty generally . . . . [T]he conversation was limited to whether serving on a jury faced with the decision between life imprisonment and the death penalty may result in the juror 'burn[ing] in hell.'" (quoting J.A. 2273)).

Put simply, this part of the dissenting opinion's analysis divorces answer from question. The question of going to hell for imposing a sentence was not neutral and tangential to sentencing. It was a question about sentencing. Thus, the pastor's answer was about sentencing.

The dissenting opinion diverts attention from the natural reading of the **[*6]** pastor's answer by shifting focus to the pastor's advice to "live by the laws of the land." *Barnes II, 938 F.3d at 541* (Agee, J., dissenting) ("Instead, the pastor noted the Bible instructed Christians to 'live by the laws of the land.'" (quoting J.A. 2273)). The dissenting opinion suggests this is comparable to a judge reiterating jury instructions, *id. at 542-43* (citing *Crease v. McKune, 189 F.3d 1188, 1190, 1192-94 (10th Cir. 1999)*), or to "a casual, time-of-the-day greeting," *id. at 543* (quoting *United States v. Day, 830 F.2d 1099, 1104 (10th Cir. 1987)*). But an instruction of a pastor to follow the law is not the same as the instruction of a judge to follow the law. A judge who explains the felony murder rule to a juror, *Crease, 189 F.3d at 1190*, is a secular legal authority speaking on secular legal matter. A pastor opining to a juror on the death penalty as it relates to God, the Bible, hell, and the "law of the land" is a religious authority speaking on a mixed religious-secular legal matter. These are not equivalent.

Moreover, it is unclear on the record what the pastor meant by "live by the laws of the land." Juror Jordan testified that the pastor's verses from the Bible "explained everything." J.A. 2271. Thus, to fully understand "live by the laws of the land," we need to know what else the pastor said. However, as the dissenting opinion rightly points out, the evidence **[*7]** does not pincite which Bible verses the pastor used to clarify his meaning. *Barnes II, 938 F.3d at 541 n.5* (Agee, J., dissenting). But we do have information about their substance.

One juror recalled that one of the Bible passages that Juror Jordan read to the jury concerned "eye for an eye and tooth for a tooth." J.A. 2281. While we may not know whether the verse came from the Old Testament or the New Testament, *Barnes II, 938 F.3d at 541 n.5* (Agee, J., dissenting), we do know that over twenty years later, the impact of the pastor's curated verses was such that the part this juror remembered was "eye for an eye and tooth for a tooth." J.A. 2281. This statement suggests that equivalent retribution is the measure of an appropriate sentence. Artificially isolating the phrase "live by the laws of the land" to claim it impartially endorses North Carolina law ignores both the context of the question asked and the limited evidence we have about the rest of the pastor's answer. No evidence in the record supports the dissenting opinion's characterization that the pastor's views merely matched the laws of North Carolina and the jury instructions (which Juror Jordan violated by speaking with him); we know that different religious authorities interpret **[*8]** the same Biblical passages in different ways. "Live by the laws of the land," like the rest of the pastor's comments, expresses an opinion—one incompletely explained in the record but connected to "[an] eye for an eye"—about how the jurors should sentence the defendants.

Viewing the dissenting opinion as a whole—the way it splits the answer from the question, the way it treats a pastor like a judge, the way it purports to interpret "live by the laws of the land" without considering the accompanying gloss—the dissenting opinion treats the opinions of the pastor as legal authority rather than religious opinion. This approach might be understandable if prejudice could only be found on a material alteration of the facts or law by which the jurors determine an issue. *See* *Barnes II, 938 F.3d at 544* (Agee, J., dissenting). Misconduct involving an officer of the court likely affects such matters. But this approach is unsound—as illustrated by this case—because, as the panel majority opinion correctly states, "a prejudicial influence need not take the form of a third party directly telling jurors how they should vote or introducing new facts or law for their consideration." *Id. at 536* (citing *Turner v. Louisiana, 379 U.S. 466, 473-74, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965)*). By making assumptions on this incomplete **[*9]** record that ignore the diversity of religious views on the death penalty, and by not treating the pastor as a pastor, the dissenting opinion misses the forest while looking for a perfectly archetypal tree.

Ultimately, this case turned on the facts. On the facts, Barnes was prejudiced. Accordingly, I concur in denying the petition for rehearing en banc.

Dissent by: WILKINSON; AGEE

Dissent

WILKINSON, Circuit Judge, with whom NIEMEYER, Circuit Judge, joins, dissenting from the denial of rehearing en banc:

I respectfully dissent from the denial of rehearing en banc for the reasons given so well by Judge Agee. *See* Barnes v. Joyner, 751 F.3d 229, 253-66 (4th Cir. 2014) (Agee, J., dissenting) ("*Barnes I*"); Barnes v. Thomas, 938 F.3d 526, 536-48 (4th Cir. 2019) (Agee, J., dissenting) ("*Barnes II*"). While this immediate appeal concerns a federal district court's determination regarding the existence vel non of actual prejudice, the panel decision ultimately flows from an earlier judgment that abrogated what should have been the final word of North Carolina's state courts. As Judge Agee aptly explained in *Barnes I*, there is not a colorable argument that the North Carolina Supreme Court decision as adopted by the MAR court amounted to an "unreasonable application of[] clearly established Federal law, as determined by the **[*10]** Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

Quite apart from the deference to state courts required under 28 U.S.C. § 2254(d), the result reached here does not comport with our constitutional design. State courts are obliged under the Fourteenth Amendment and Supremacy Clause to apply federal law. Testa v. Katt, 330 U.S. 386, 394, 67 S. Ct. 810, 91 L. Ed. 967 (1947). But federal courts are obliged under the rudimentary dictates of dual sovereignty to respect state court adjudications.

That, I think, is the gist of the constitutional bargain. That, to me, is the essence of our constitutional structure. To read the Suspension Clause in a manner at such perennial odds with the comity envisioned for our federal and state systems is not right.

Some time ago, Justice Paul Reardon of the Supreme Judicial Court of Massachusetts regretted "the effect of Federal habeas corpus proceedings on State courts." He lamented the "humiliation of review from the full bench of the highest State appellate court to a single United States District Court judge" and how excessive federal habeas powers contributed in his view to the "growing denigration of the State courts and their functions in the public mind." Address at the Annual Dinner of the Section of Judicial Administration, American Bar Association, San Francisco, California, Aug. 14, 1972, pp. 5, **[*11]** 9, and 10.

In some ways, the problem has only grown worse. The wound is only salted when the rebuke to state judiciaries is administered by a federal appellate court under what is supposed to be a deferential standard. It must be grating in the extreme to state judges, who take their responsibility to apply federal law as solemnly as we do ours, to be upbraided as "unreasonable" jurists. 28 U.S.C. § 2254(d)(1). This is not the first case to do so, nor will it be by any means the last.

But we would do well to reflect in medias res on how far we have strayed and how much we have lost. Our Constitution, whether viewed originally or contemporaneously, can only weep when a coordinate judicial system is rendered routinely subordinate, as has happened here. AEDPA was meant to vindicate constitutional values but if AEDPA and the Constitution are working as here at cross purposes, then Congress's effort will go increasingly for naught.

Perhaps the relationship of federal and state courts should come down to the old saying: I'm OK—You're OK. It's a needed maxim for our day and time. I regret the fact that our fine court has passed up this opportunity to restore the constitutional, statutory, and decisional respect that **[*12]** our state court colleagues are due.

AGEE, Circuit Judge, with whom NIEMEYER, Circuit Judge, joins, dissenting from the denial of rehearing en banc:

I have twice previously expressed the reasons why William Leroy Barnes has failed to satisfy the high burden a state prisoner faces to obtain relief under 28 U.S.C. § 2254. Largely for the same reasons provided in the prior dissenting opinions, I now dissent from the Court's denial of en banc rehearing. *See* Barnes v. Thomas, 938 F.3d 526, 536 (4th Cir. 2019) (hereinafter *Barnes II*) (Agee, J., dissenting); Barnes v. Joyner, 751 F.3d 229, 253 (4th Cir. 2014) (hereinafter *Barnes I*) (Agee, J., dissenting).[1]

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[1] As explained in the *Barnes I* dissent, rehearing is also appropriate because the panel majority incorrectly held as a threshold matter in the prior appeal that the state court's adjudication of Barnes' claim was "contrary to, or involved an unreasonable application of," Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954). 28 U.S.C. § 2254(d)(1); *see* Barnes I, 751 F.3d at 253-66; Joyner v. Barnes, 135 S. Ct. 2643, 192 L. Ed. 2d 944 (2015) (Thomas, J., dissenting from the denial of certiorari). Judge Wilkinson's separate dissent from today's denial of

En banc rehearing was necessary to maintain uniformity with the Supreme Court and this Court's precedent concerning when a petitioner has demonstrated "actual prejudice" resulting from an error alleged to have occurred during trial. Because the full Court will not rehear the case, the panel majority's decision stands, granting Barnes relief despite his failure to come forward with any evidence that the error he complained of actually prejudiced him.

The facts are not in dispute. In 1992, a state jury sentenced Barnes and one co-defendant to death and another co-defendant to life imprisonment for their roles in the murders of an elderly couple. During **[*13]** closing arguments in the penalty phase, counsel for one of Barnes' co-defendants urged the jury not to impose the death penalty because God's law prohibited capital punishment. Counsel elaborated that "true believer[s]" wanted God to welcome them "into the Kingdom of Heaven" for having obeyed God's commands, and he cautioned that they could not justify before God their decision to kill another human being just "because the laws of man said [they] could." J.A. 2374. For reasons not explained in the record, the State did not object and the court offered no instruction to the jury concerning this argument.

One evening during deliberations, a juror—Hollie Jordan—asked her pastor if the Bible said that jurors would "burn in hell" if they imposed the death sentence. J.A. 2269. The pastor told Jordan that the Bible taught that individuals should "live by the laws of the land" and provided her with "some scriptures in the Bible" to support that view. J.A. 2271. During the next day's deliberations, Jordan shared this conversation with her fellow jurors and read several of the Bible verses aloud. Neither Jordan nor the other two jurors who testified at the evidentiary hearing (Ardith Peacock **[*14]** and Leah Weddington) could recall which Bible verses were read. Jordan and Peacock testified that Jordan did not use this information to support or oppose the death penalty, either generally or with regard to Barnes and his co-defendants. Instead, they both characterized the discussion as affirming that the jurors were "doing [their] duty" in assessing an appropriate sentence under North Carolina law. J.A. 2291. Weddington was not asked about Jordan's conversation with her pastor, but was asked only whether she recalled Bible verses being read. When asked "what might have prompted the juror — the female juror to bring the Bible into the jury room," Weddington responded, "I *guess* she was trying to convince someone to — it was okay to give [the defendants] the death penalty." J.A. 2295 (emphasis added). This is the sum total of the record.

After showing the other requirements for § 2254 relief, a petitioner such as Barnes must come forward with evidence that the complained-of error caused "actual prejudice." *Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)*. In *Brecht*, the Supreme Court reiterated that in the context of a habeas petition, "actual prejudice" means a showing that the error "had substantial and injurious effect or influence **[*15]** in determining the" sentence. *Id.*; *see Fullwood v. Lee, 290 F.3d 663, 679 (4th Cir. 2002)* (noting that to be entitled to habeas relief, the petitioner need to "demonstrate[] that the verdict was actually influenced by improper external influence"); *Tuggle v. Netherland, 79 F.3d 1386, 1393 (4th Cir. 1996)* (observing that in the context of an error during the penalty phase of a capital case, this means showing that the error had a "'substantial and injurious effect or influence' . . . on the jury's decision to sentence [the defendant] to death"). The record Barnes developed does not satisfy his burden to show that Jordan's third-party communication with her pastor had a "substantial and injurious effect or influence" on the jury's decision to impose the death penalty.

Most significantly, the communication did not improperly taint any juror with the pastor's assessment of the proper punishment in this case. Not every improper communication between a juror and non-juror will prejudice a defendant. Instead, courts have looked to whether the communication exposes jurors to a non-juror's opinion about the defendant's guilt or punishment. *E.g.*, *Parker v. Gladden, 385 U.S. 363, 363-65, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966)* (per curiam) (concluding it would "blink[] reality not to recognize the extreme prejudice inherent" in a bailiff telling several jurors that the defendant **[*16]** was "wicked" and "guilty," and that the courts would "correct it" if the jury made a mistake in finding the defendant guilty); *United States v. Maree, 934 F.2d 196, 202 (9th Cir. 1991)*, *abrogated on other grounds by United States v. Adams, 432 F.3d 1092 (9th Cir. 2006)* (holding that actual prejudice was demonstrated where a juror "actively discussed" the case with her friends, who "presented . . . strong opinions concerning the proper outcome of" the case). In contrast to this kind of prejudicial third-party conversation, the record here

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rehearing discusses these important matters further and underscores how the Antiterrorism and Effective Death Penalty Act of 1996 mandates federal respect for state court adjudications.

shows only a conversation that did not touch upon Barnes' guilt or the appropriate sentence.

Jordan stated without contradiction that she did not ask the pastor "about what to do in the case," nor did he provide any such opinion to her. J.A. 2272. There is no evidence in the record that Jordan's pastor offered an opinion as to Barnes' guilt, whether he was deserving of the death penalty, or about the case and the defendants in general. Nor is there any evidence that the pastor opined about the morality of the death penalty generally, as Jordan testified that her pastor did not discuss whether "the Bible supported [or] didn't support the death penalty." J.A. 2273. Instead, the conversation was limited to whether serving on a jury faced with the decision between **[*17]** life imprisonment and the death penalty may result in the juror "burn[ing] in hell." J.A. 2273. And the pastor's response was limited to sharing that the Bible instructed individuals to "live by the laws of the land" and providing some verses in support of that principle. J.A. 2273.

Given the limited nature of Jordan's conversation with her pastor, it is unsurprising that the testimony Barnes elicited regarding Jordan's communication of that conversation was similarly limited. Specifically, Barnes provided no evidence that Jordan shared her pastor's views on the proper sentence in this case or about the pastor or Bible's views on the death penalty. Peacock expressly testified that Jordan did not use the pastor's comments or Bible verses to support or oppose the death penalty. Weddington's testimony was even hazier and limited to her recollection that a female juror read several unspecified Bible verses during deliberations. And when asked what *might* have prompted Jordan to read the Bible, Weddington "*guess*[*ed*] she was trying to convince someone . . . it was okay to give him the death penalty." J.A. 2295 (emphasis added). By the statement's plain terms, Weddington was "guess[ing]" about **[*18]** Jordan's motive but offered no testimony about the contents of what Jordan said that might support her speculation. Consequently, Weddington's statement is pure conjecture and cannot demonstrate that Jordan's improper communication with her pastor had a "substantial and injurious effect or influence" on Barnes' sentencing.[2]

Courts have held that a petitioner may be able to satisfy the *Brecht* standard when the jury considers inculpatory evidence that was not presented at trial. *See* Sherman v. Smith, 89 F.3d 1134, 1142-43 (4th Cir. 1996) (holding that the defendant failed to demonstrate *Brecht* actual prejudice where a juror improperly took an unsupervised visit to the crime scene principally because it was "cumulative" of evidence about the crime scene admitted at trial); *see also* Sassounian v. Roe, 230 F.3d 1097, 1108-12 (9th Cir. 2000) (holding actual prejudice was shown when jury considered a telephone call that had not been discussed during the trial and which "directly related" to the defendant's motive). The third-party communication that occurred in this case did not improperly taint any juror with extra-record evidence on which to base their decision. Barnes presented no evidence that the pastor directly or indirectly exposed any juror to any new facts that bore upon their decision of what **[*19]** sentence to impose.

Further, the third-party communication in this case reinforced North Carolina law regarding how jurors were to undertake their sentencing duty. In contrast to what occurred here, courts have acknowledged that the *Brecht* standard may be satisfied if jurors consult third-party sources that alter their understanding of the law and thereby materially change the standard for assessing the prosecution's burden. *Accord* Bauberger v. Haynes, 632 F.3d 100, 107 (4th Cir. 2011) (holding no actual prejudice arose when the jurors consulted a dictionary to define several words used in the jury instructions because the definitions "fully conveyed the essence of North Carolina law" and did not materially affect the standard). Here, Barnes does not contend—nor could he—that jurors should not have applied "the law of the land" when determining his sentence. The pastor's communication and Jordan's reiteration of it reinforced the precise instruction the trial court had given to the jurors about their duty to apply North Carolina law. As such, the communication did not introduce an improper consideration into the deliberative process, nor did it expand the circumstances in which the jury could lawfully impose the death penalty on Barnes. **[*20]** Instead, the communication was neutral with regard to the deliberative choice before the jurors

[2] Even Weddington's non-speculative testimony is limited to Jordan reading the Bible during deliberations. And because she could not recall which verses were read or whether they were from the Old or New Testament, this testimony is of no evidentiary value. To the extent that Barnes and the majority suggest improper external influence from the mere recitation or reading of the Bible during deliberations, the Supreme Court has never held that to be improper or violate the defendant's constitutional rights. Indeed, this Court has previously denied § 2254 relief to a state prisoner who asserted his rights were violated by such conduct. Robinson v. Polk, 438 F.3d 350, 366 (4th Cir. 2006).

and mirrored the jurors' instruction to follow North Carolina law. Accordingly, the communication cannot be said to have had an "injurious" effect on Barnes' sentencing.

Lastly, other facts reinforce the conclusion that the communication did not have a "substantial and injurious effect or influence" on the deliberative process. Significantly, the jury returned a split sentencing decision, recommending that the two defendants (including Barnes) who were identified as the individuals who shot the victims receive the death penalty and that the other defendant, who did not shoot, receive life imprisonment. This differentiation of the defendants during the same sentencing deliberation supports the conclusion that the jurors understood their duty under North Carolina law to individually assess the appropriate punishment for each of the defendants.

Courts have also looked to the timing and duration of any error as part of the actual prejudice assessment. *See, e.g.*, *Fitzgerald v. Greene, 150 F.3d 357, 366 (4th Cir. 1998)*; *Marino v. Vasquez, 812 F.2d 499, 506 (9th Cir. 1987)*. In this case, Jordan's conversation with her pastor lasted only a "few minutes" and she discussed that conversation during deliberations **[*21]** for fifteen to thirty minutes during a multi-day deliberation. J.A. 2271. All told, there is simply no evidence that the communications dominated the deliberative process or otherwise occurred at a critical time. These additional factors bolster the conclusion that the jurors decided on the appropriate sentence based on North Carolina's sentencing criteria, just as they should have.

Despite Barnes' failure to produce any evidence showing that Jordan's communication with her pastor satisfied the *Brecht* standard, the panel majority nonetheless granted Barnes relief. It improperly concluded that the pastor's communication with Jordan must have advocated in favor of the death penalty when no evidence—none—exists to support that conclusion. The unrebutted testimony of Jordan and her two fellow jurors demonstrates that the pastor relayed no personal views about the appropriate punishment in this case nor did he directly or indirectly expose them to additional arguments for or against the death penalty. The only evidence in the record concerning the pastor's communication is that it relayed the view that jurors "had to live by the laws of the land." J.A. 2271. A juror following that principle **[*22]** would still face the choice of which sentence was appropriate under North Carolina law. In short, the communication could not have had a "substantial and injurious effect or influence" because it was neutral as to an appropriate punishment and reiterated the very instructions under North Carolina law given by the trial judge.

To correct the panel's misapplication of *Brecht*'s actual prejudice standard, the Court should have heard this case en banc. Therefore, I respectfully dissent. It will now be the Supreme Court's task to correct this error by reaffirming that the Court meant what it said in *Brecht* and *Remmer* and that lower courts are not at liberty to deviate from that precedent.

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United States District Court, M.D. North Carolina.

William Leroy BARNES, Petitioner,

v.

Edward THOMAS, [1] Warden, Central Prison, Raleigh, North Carolina Respondent.

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Signed 08/02/2018

Attorneys and Law Firms

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Jonathan Porter Babb, N. C. Department Of Justice, Raleigh, NC, for Respondent.

MEMORANDUM OPINION AND ORDER

THOMAS D. SCHROEDER, Chief District Judge.

***1** Petitioner William Leroy Barnes ("Barnes" or "Petitioner") brings this habeas proceeding under 28 U.S.C. § 2254, challenging his underlying conviction and death sentence resulting from his role in the 1992 murders of B.P. and Ruby Tutterow. This case returns to the court on remand from the Court of Appeals for the Fourth Circuit with instructions to conduct an evidentiary hearing with respect to Barnes's allegations of juror misconduct during the sentencing phase of his trial. Barnes's petition was referred to the United States Magistrate Judge, who held an evidentiary hearing and entered a Recommendation to deny the petition. (Doc. 54.) Notice was served on the parties, and Barnes filed timely objections. (Doc. 58.) Barnes also moves for the appointment of substitute counsel. (Docs. 59, 60.)

After a thorough review and for the reasons set forth below, the court now adopts the Recommendation, as modified herein, denies Barnes's petition, and denies his motion to appoint substitute counsel.

I. BACKGROUND

In 1994, Barnes was convicted of first-degree murder and sentenced to death following a trial in the Superior Court of Rowan County, North Carolina. Barnes sought to challenge his sentence and underlying conviction on multiple grounds, including raising a claim of juror misconduct arising from a juror's alleged communication with her pastor during the sentencing phase of the proceedings. The Supreme Court of North Carolina affirmed Barnes's conviction and sentence on direct appeal. State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), cert. denied, 523 U.S. 1024 (1998).

In February 1999, Barnes sought state post-conviction relief on several grounds by filing a motion for appropriate relief ("MAR") in Rowan County Superior Court. In his MAR petition, Barnes reasserted his claim of juror misconduct and presented additional evidence to support his claim that a sitting juror, Hollie Jordan ("Juror Jordan"), improperly communicated with her pastor during sentencing proceedings and then relayed information to the other jurors. On May 31, 2007, the state MAR court denied this claim without conducting a hearing, adopting the same reasoning as the Supreme Court of North Carolina. The Supreme Court of North Carolina subsequently denied review. See State v. Barnes, 362 N.C. 239, 660 S.E.2d 53 (2008).

Barnes filed his present petition on April 17, 2008. (Doc. 1.) On March 28, 2013, this court denied his petition but granted a certificate of appealability with respect to the single issue involving alleged juror misconduct. (Doc. 28 at 56.) On appeal, a divided panel of the Fourth Circuit held that the MAR court unreasonably applied clearly established federal law, as determined by the Supreme Court of the United States, by denying Barnes's juror misconduct claim without applying a presumption of prejudice and holding an evidentiary hearing pursuant to Remmer v. United States, 347 U.S. 227 (1954). Barnes v. Joyner, 751 F.3d 229, 252 (4th Cir. 2014). The Fourth Circuit remanded the case "for an evidentiary hearing to determine whether the state court's failure to apply the Remmer presumption and its failure to investigate Barnes' allegations of juror misconduct in a hearing had a substantial and injurious effect or influence on the jury's verdict." Id. at 253.

***2** The magistrate judge held an evidentiary hearing during which Barnes presented four witnesses: Juror Jordan, Janine Fodor, [2] Ardith Peacock ("Juror Peacock"), and Leah

Weddington ("Juror Weddington"). (Doc. 47.) Respondent did not present any witnesses. After thoroughly reviewing the evidence and relevant testimony from the evidentiary hearing, the magistrate judge issued a Recommendation denying Barnes's claim. (Doc. 54.) Barnes now objects to several aspects of the Recommendation. (Doc. 58.)[3] After the magistrate judge issued her Recommendation, Barnes filed a pro se motion requesting that the court appoint substitute counsel. (Docs. 59, 60.)

The court will first address Barnes's objections to the Recommendation before considering his motion for substitute counsel. Because the facts underlying Barnes's conviction, post-conviction proceedings, and evidentiary hearing are set forth in the Recommendation, they will be repeated here only insofar as necessary to address the objections raised.

II. ANALYSIS

A. Objections to Recommendation

Barnes raises several objections to the Recommendation. He first objects to the magistrate judge's "incomplete characterization" of the circumstances that gave rise to Juror Jordan's communications with her pastor, Tom Lomax ("Pastor Lomax"),[4] as well as the characterization of Jordan's communication with him and with the other jurors. (Doc. 58 at 2, 7.) Barnes also objects to the magistrate judge's finding that the state court's error in failing to apply the Remmer presumption was harmless, arguing that the magistrate judge failed to appropriately consider the evidence regarding Juror Jordan's communication with her pastor as well as the evidence in his case. (Doc. 58 at 14, 18.)

***3** When considering a magistrate judge's report and recommendation, a district court must conduct a "de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). In doing so, the district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The Fourth Circuit has recognized that "a 'de novo determination' is not necessarily the same as a de novo hearing and that the decision to rehear testimony is within the sole discretion of the district judge, even as to those findings based on the magistrate's judgment as to the credibility of the witnesses before [her]." Proctor v. State Gov't of N. Carolina, 830 F.2d 514, 518 n.2 (4th Cir. 1987) (citing United States v. Raddatz, 447 U.S. 667 (1980)). The district court must review the entire record, including the transcript, to determine whether the magistrate judge's findings are adequately supported by the record. See Johnson v. Knable, 1991 WL 87147, at *1 (4th Cir. 1991) (per curiam); United States v. Mallicone, No. 5:17-CR-9, 2017 WL 3575894, at *2 (N.D.W. Va. Aug. 18, 2017) ("[T]he first step is for the district judge to review the record, including the transcript, and to determine whether the entire record supports the magistrate judge's findings. If the magistrate judge's findings are supported by the record, the finding can be adopted by the district judge." (quoting United States v. Jones, 2011 WL 2160339, *5 (C.D. Ill. June 1, 2011)). Where a party fails to object to a recommendation, however, the court's review is for clear error. Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005).

As to the governing law, the Fourth Circuit stated, "[i]t is clearly established under Supreme Court precedent that an external influence affecting a jury's deliberations violates a criminal defendant's right to an impartial jury." Barnes, 751 F.3d at 240 (collecting cases). The Supreme Court in Remmer "clearly established not only a presumption of prejudice, but also a defendant's entitlement to an evidentiary hearing, when the defendant presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury." Id. at 242. In this case, the Fourth Circuit ultimately concluded that the state MAR court unreasonably applied clearly established federal law, as determined by the Supreme Court, by denying Barnes's juror misconduct claim without applying a rebuttable presumption of prejudice and ordering an evidentiary hearing. Id. at 251-52.

Nevertheless, "principles of comity and respect for state court judgments preclude federal courts from granting habeas relief to state prisoners for constitutional errors committed in state court absent a showing that the error 'had a substantial and injurious effect or influence in determining the jury's verdict.' " Richmond v. Polk, 375 F.3d 309, 335 (4th Cir. 2004) (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)). As the Fourth Circuit explained, "[t]he Remmer presumption is meant to protect against the potential Sixth Amendment harms of extraneous information reaching the jury, but a state court's failure to apply the presumption only results in actual prejudice if the jury's verdict was tainted by such information." Barnes, 751 F.3d at 252 (quoting Hall v. Zenk, 692 F.3d 793, 805 (7th Cir. 2012)). Within the context of a federal habeas proceeding, however, "Barnes will not be entitled to the Remmer presumption" and must "affirmatively

prove actual prejudice by demonstrating that the jury's verdict was tainted by the extraneous communication between Juror Jordan and Pastor Lomax." Id. at 252-53.

A habeas petitioner is entitled to relief if the court is in "grave doubt" as to the harmlessness of the error. O'Neal v. McAninch, 513 U.S. 432, 436 (1995). " 'Grave doubt' exists when, in light of the entire record, the matter is so evenly balanced that the court feels itself in 'virtual equipose' [sic] regarding the error's harmlessness." Barnes, 751 F.3d at 252 (quoting Fullwood v. Lee, 290 F.3d 663, 679 (4th Cir. 2002)). In North Carolina, a court may not impose the death penalty unless the jurors unanimously agree to such a sentence. N.C. Gen. Stat. § 15A-2000(b). Thus, the court must determine whether it can say "with fair assurance" that the judgment was "not substantially swayed by the error." Kotteakos v. United States, 328 U.S. 750, 765 (1946); Allen v. Lee, 366 F.3d 319, 345 (4th Cir. 2004) (Gregory, J., concurring) (noting the court must "assess whether [it] can say 'with fair assurance,' that not a single resolute juror would have voted for a life sentence." (quoting Kotteakos, 328 U.S. at 765)).

***4** In determining whether extraneous information that reached the jury was likely to have prejudiced a defendant, the court may consider several factors, including the nature of the extraneous information, the manner in which it reached the jury, and the strength of the State's evidence. Hall, 692 F.3d at 806-07 ("But in deciding whether extraneous information that reached the jury was likely to have prejudiced a defendant, there is more to consider than just the nature of the extraneous information; a court may also consider, among other things, the power of any curative instructions, and the strength of the legitimate evidence presented by the State." (internal brackets and citations omitted)); McNeill v. Polk, 476 F.3d 206, 226 (4th Cir. 2007) (King, J., concurring) (considering similar factors in determining whether petitioner was actually prejudiced by jury's use of dictionary definition (citing Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d 919, 924 (10th Cir. 1992)); McNair v. Campbell, 416 F.3d 1291, 1307-08 (11th Cir. 2005) (noting relevant factors include "the nature of the extrinsic evidence, how the evidence reached the jury, and the strength of the State's case").

1. Communication between Juror Jordan and Pastor Lomax

Barnes raises several objections to the magistrate judge's characterization of Juror Jordan's communication with her pastor and subsequent communication to the other jurors. Barnes first claims that the magistrate judge failed to consider the circumstances that gave rise to Juror Jordan's communications. Barnes contends that the argument about the Bible and the jurors' own salvation made by co-defendant Frank Junior Chambers's defense attorney during his closing argument was precipitated by the closing argument of the prosecutor [5] and thus placed competing arguments before the jury about how the Bible should inform the juror's decision on whether to impose the death penalty. (Doc. 58 at 6.) Barnes argues that the jury was composed of "very religious" people [6] and at least one juror was "visibly upset" by the closing argument by Chambers's counsel. (Doc. 58 at 6 (citing Doc. 12-3 at 12).) [7] He further notes that Juror Jordan, whom Barnes characterizes as a "true believer," testified that her church "[p]layed a big role in her life" and she considered Pastor Lomax to be her spiritual guide and leader. (Id. at 5 n.4 (citing Doc. 54 at 11.) Relying on the Fourth Circuit's decision in this case, Barnes contends that "[a]gainst this backdrop, Jordan's improper communications with her pastor were both about the subject matter before the jury and tainted the jury verdict." (Id. at 6 (emphasis added).)

***5** However, Barnes conflates the Fourth Circuit's finding that the state court's adjudication of his juror misconduct claim was "an unreasonable application of clearly established federal law" with the independent inquiry into whether the error "actually prejudiced" him. Barnes, 751 F.3d at 252 (quoting Bauberger v. Haynes, 632 F.3d 100, 104 (4th Cir. 2011)). As the magistrate judge noted, the Fourth Circuit's decision focused on the first prong of this inquiry and expressly stated that based on the record presented it was "unclear whether Barnes can demonstrate actual prejudice or whether the MAR Court's unreasonable application of federal law was harmless." Id. at 252. To the extent that the magistrate judge may have failed to consider the nature of the closing argument made by the prosecutor, the court finds that it would not alter the outcome in this case.

Barnes also objects to the magistrate judge's finding that "[t]here is no evidence that Pastor Lomax knew any details regarding the facts of the case or gave any advice or statement to what jurors should do or the verdict they should return." (Doc. 54 at 19.) Barnes notes that Juror Jordan testified that she told him she was on a jury and mentioned the "horrific" crime scene pictures that were introduced during the closing argument. (Doc. 47 at 50-51.) However, the magistrate judge explicitly acknowledged this testimony in making her factual finding. (Doc. 54 at 19.) Moreover, Juror

Jordan testified that she "just told him that the pictures were horrific" and "didn't specify which pictures." (Doc. 47 at 50-51.) To the extent that Pastor Lomax was made aware of some facts regarding the case, it is true that there is no evidence that he "gave any advice or statement to what jurors should do or the verdict they should return" (Doc. 54 at 19); rather, he told Juror Jordan that the jurors would not burn in hell and "we had to live by the laws of the land." (Doc. 47 at 51.)

Barnes next objects to the Recommendation's finding that "there is no evidence that [Pastor Lomax] attempted to persuade Juror Jordan to vote for or against the death penalty, or that he suggested the Bible supported a particular sentence." (Id. at 19.) Barnes challenges the magistrate judge's characterization that the juror spoke with her pastor for "a few minutes" about the trial, noting that Jordan testified that she met with the pastor for "roughly an hour or two" and spent "15 to 30 minutes" discussing the Bible verses with the jurors. (Doc. 58 at 7-8.) He charges that it "defies common sense" to assume that most of the "roughly two hour conversation" centered on "family" and "other things," as Juror Jordan testified. (Id. at 8.) Barnes also points out that Juror Peacock testified that one of the Bible passages Jordan read was "an eye for an eye and a tooth for a tooth." (Id. at 9.) Barnes contends that "[i]nasmuch as the closing argument of Chambers' attorney was undeniably against the imposition of the death penalty, the Bible verses that rebutted this closing argument are ipso facto in favor of the death penalty." (Id. at 13.)

As to timing, it is Barnes who seeks to reject the only record evidence and thus speculate that Juror Jordan's conversation with her pastor lasted "roughly two hours" and concerned mostly a discussion about the case. Juror Jordan testified that her conversation regarding the case lasted "[j]ust the few minutes that [she] asked him would we burn in hell and he said no, we had to live by the laws of the land." (Doc. 47 at 51.) She testified that "[h]e told me some scriptures in the Bible, you know, that explained everything." (Id.) Otherwise, the remainder of the conversation was about "family" and "other things." (Id. at 51-52.) In the absence of further cross-examination (which was available) or other testimony (which was not elicited), the magistrate judge's finding is well-supported by the record.

***6** Here, the evidence indicates that Juror Jordan offered the Bible verses to rebut the closing argument by Chambers's attorney. (Doc. 12-3 at 12; Doc. 47 at 54-55.) Juror Weddington testified during the evidentiary hearing that she recalled a female juror reading Bible verses out loud during the jury's sentencing deliberations but could not recall the juror's name or the verses read. (Doc. 47 at 74-75.) The following exchange then occurred:

> Q. Do you have any knowledge about what might have prompted the juror – the female juror to bring the Bible into the jury room?
>
> A. I guess she was trying to convince someone to - it was okay to give him the death penalty.

(Doc. 47 at 75.)[8] Juror Peacock testified that she believed Juror Jordan offered the verses to rebut the closing argument offered by Chambers's attorney, but she could not say whether Juror Jordan offered the verses to promote a particular sentence, apart from providing the general message that the jurors should apply the law. (Doc. 47 at 70-72.) Notably, neither Jurors Peacock nor Weddington could confirm what passages were read or whether they were from the Old or New Testament. See Robinson v. Polk, 438 F.3d 350, 359 n.8 (4th Cir. 2006) (noting stark differences between "eye for an eye" passages in the Old and New Testament, but assuming for the sake of argument that the juror read from the Old Testament).

The magistrate judge characterized Juror Weddington's testimony as to Juror Jordan's purported motive for reading the Bible passages as speculation. (Doc. 54 at 15.) Barnes objects to this characterization and contends that Juror Weddington's "prefatory remark that 'I guess' was merely superfluous, as her testimony was based on what she actually observed Jordan doing in relation to another juror." (Doc. 58 at 14.) Barnes notes that Weddington's statement conforms with a summary of Weddington's testimony provided in a sworn affidavit from Daniel Williams, an investigator retained by Barnes's counsel, (Doc. 12-3 at 6-7), as well as Juror Jordan's previous signed statement in which she stated that she "noticed that another juror, a female, seemed visibly upset by the [defense closing] argument, and that she (Jordan) brought in the Bible to remedy the effect of the argument." (Doc. 58 at 13 n.8 (citing Doc. 12-3 at 12).)

Regardless of whether Juror Weddington prefaced her statement with "I guess," her opinion regarding another person's motive can only be considered speculation, particularly where she could not recall the name of the juror who read the Bible verses or which verses were read. (Doc. 47 at 74-75.) Furthermore, the statement itself does not directly contradict Juror Jordan's own testimony that she did not

communicate these Bible verses to convince jurors to impose a particular sentence, but rather to advise them that as jurors they should apply the law of the land and would not "burn in hell" if they imposed the death penalty. (Doc. 47 at 52 ("Just the closing argument as far as, like I said, if they got the death sentence for what they did and we sentenced them to death, were we going to die because we're killing them.") and ("I just wanted to know if I was going to burn in hell for it."); at 55-56 ("The only thing was as far as burning in hell. That's the only reason I went and talked to him.")

2. Actual Prejudice and Harmless Error

***7** Barnes next challenges the Recommendation's conclusion that the state court's error in failing to apply the Remmer presumption is harmless because Barnes suffered no actual prejudice as a result of the communication between Pastor Lomax and Juror Jordan. (Doc. 58 at 14.) Barnes claims that the magistrate judge relied on an "incorrect and overly narrow assessment of the evidence" regarding Juror Jordan's communication with her pastor in making this finding. (Id.) In addition, Barnes objects to what he terms as the Recommendation's "incomplete" consideration of the evidence in his case. (Id. at 18.) He contends that the evidence against him was "largely circumstantial and hardly overwhelming." (Id.) He further argues that when weighing the strength of the prosecution's case against the mitigating factors, the magistrate judge's assessment of the evidence is "fundamentally flawed." (Id. at 25.)

There is little indication that Pastor Lomax in his interaction with Juror Jordan or Juror Jordan in her interaction with the jury employed the Bible verses to support the imposition of a particular sentence as opposed to authorizing the jurors to apply the law. No witness testified that Juror Jordan ever claimed to offer the Bible passages to encourage any juror to impose the death penalty. Barnes did present evidence during the state MAR proceeding that Juror Jordan brought her Bible to the jury room because a juror was "visibly upset" by the closing argument of Chambers's attorney that jurors would "one day face God's judgment for killing these defendants." (Doc. 12-3 at 12; see id. at 7.) And Juror Peacock testified that one of the Bible passages Jordan read was an "eye for an eye and a tooth for a tooth." (Doc. 47 at 61.) However, Juror Peacock testified that Juror Jordan did not state whether the Bible verses were offered for or against the death penalty. (Id. at 72.) During the evidentiary hearing, Barnes's counsel and Juror Peacock had the following exchange:

> Q. Would it be fair to say that [Juror Jordan] brought the Bible passages in to rebut Chambers attorney's argument?
>
> A. Yes.
>
> Q. Okay. And that it would be okay to impose the death penalty in the case, correct?
>
> A. She didn't -
>
> Q. That was -
>
> A. She didn't say either way. I did not hear her say either way.

(Doc. 47 at 72 (emphasis added).) In addition, no witness could recall what specific Bible verses were read or identify whether they originated from the Old or New Testament. (Doc. 47 at 54, 61 (recalling only "the eye for an eye and tooth for a tooth ... - the passage that dealt with that"), 72, 75.)

This is a slim basis on which to conclude that either Pastor Lomax or Juror Jordan relied on the Bible to advocate for any particular sentence other than the one based on a correct application of the law. Cf. Oliver v. Quarterman, 541 F.3d 329, 340, 344 (5th Cir. 2008) (holding that Sixth Amendment violation arose from Bible reading by jurors during deliberations "where the passage the jury read described the defendant's method of killing," but concluding that petitioner failed to present clear and convincing evidence to rebut state court's factual finding that the reading did not influence the decision); Robinson v. Polk, 444 F.3d 225, 227 (4th Cir. 2006) (Wilkinson, J., concurring) ("If the presence of a Bible in the jury room drives the collective discussion, and renders a capital sentence the result of religious command, then in my view, an important line has been crossed.").

In that regard, this case can be distinguished from other cases in which an extraneous influence was found to deprive a petitioner of his constitutional right to a fair trial. Cf. Parker v. Gladden, 385 U.S. 363, 363-64 (1966) (per curiam) (holding that petitioner was entitled to post-conviction relief where bailiff told one juror in the presence of other jurors that "wicked fellow [the petitioner] ... is guilty" and on another occasion that "[i]f there is anything wrong (in finding petitioner guilty) the Supreme Court will correct it"); Stockton v. Com. of Va., 852 F.2d 740, 745-46 (4th Cir. 1988) (holding that the state failed to rebut the presumption of

prejudice from improper third party contact, where restaurant owner approached a group of jurors during lunch, inquired about their sentencing deliberations, and told them that "they ought to fry the son-of-a-bitch"). In the absence of additional evidence that either Pastor Lomax or Juror Jordan employed Bible verses to actively encourage jurors to impose the death penalty, the logical conclusion is that the extraneous influence encouraged the jurors to decide the case based on the facts presented and the law of North Carolina and not based on the religious constraints the defense counsel sought to impose. [9] This weighs against any finding that the extraneous influence had a substantial and injurious effect or influence in determining the jury's verdict. See Frye v. Warden, San Quentin State Prison, No. 2:99-CV-0628 KJM CKD, 2015 WL 300755, at *77 (E.D. Cal. Jan. 22, 2015) ("Because the most logical interpretation of Juror Fairfield's statement is that the writing directed her to follow the law, and it can hardly be said that this message was objectively prejudicial to petitioner, this court finds Juror Fairfield's contact with her minister and consideration of any extraneous evidence did not have a substantial and injurious effect or influence in determining the jury's verdict." (citation omitted)). Cf. Fields v. Brown, 503 F.3d 755, 781 (9th Cir. 2007) (en banc) (holding that juror's notes compiling arguments "for" and "against" the death penalty based on Bible verses did not amount to a "substantial and injurious effect in determining the jury's verdict"); McNair, 416 F.3d at 1309 (affirming denial of § 2254 petition based on jury misconduct arising from the reading of Bible passages by the jury foreman, relying in part on the state court's factual finding that the Bible passages "merely had the effect of encouraging the jurors to take their obligations seriously and to decide the question of guilt or innocence based only on the evidence" (internal quotations omitted)).

***8** Furthermore, the strength of the State's evidence mitigates against finding any prejudice resulting from the contact between Juror Jordan and Pastor Lomax. In this case, the State produced substantial evidence linking Barnes to the crime, including the eyewitness testimony placing him with the co-defendants before the crime as well as contemporaneous statements that indicated a willingness to kill someone on the day of the murders. See Barnes, 345 N.C. at 242, 481 S.E.2d at 76-77 (summarizing the relevant evidence against Barnes in the light most favorable to the State and holding that "the jury could reasonably find that Barnes killed the victims after premeditation and deliberation"). The State also produced evidence that Barnes disposed of one of the murder weapons used in the offense, and there was gunshot residue on Barnes's hands at the time of his arrest, which tended to show that he had fired or handled a handgun soon after it had been fired within a period of time close to the killings. See id. Furthermore, despite Barnes's denial, the North Carolina Supreme Court found that "during court proceedings in November, Barnes wore a gold necklace and a watch belonging to the Tutterows," the victims. Id. at 202, 481 S.E.2d at 53.

During the sentencing hearing, Barnes's co-defendant, Robert Lewis Blakeney, testified that he did not shoot the Tutterows but that Barnes and co-defendant Chambers shot them while he was in another room of the house. Id. at 223, 481 S.E.2d at 65. While Barnes now attacks Blakeney's "blame shifting" confession as unreliable (Doc. 58 at 20), Barnes chose not to testify during the sentencing hearing and failed to offer any evidence challenging his co-defendant's testimony. Id. at 223-24, 481 S.E.2d at 65-66. In addition, the State introduced evidence at sentencing tending to show that Barnes had previously committed a violent, attempted robbery of a sixteen-year-old girl. Id. at 237-38, 481 S.E.2d at 74.

Ultimately, the jury found four aggravating circumstances as to both Barnes and Chambers: (1) both had previously been convicted of a felony involving the use or threat of violence; (2) the murders were committed for pecuniary gain; (3) the murders were part of a course of conduct involving other violent crimes; and (4) the murders were "especially heinous, atrocious, or cruel." Id. at 249-50, 481 S.E.2d at 81. One or more jurors found several mitigating factors as to Barnes during sentencing, which related primarily to his difficult childhood and resulting inability to develop into an adequately adjusted adult. Id. at 250, 481 S.E.2d at 81. The jury found that Blakeney was only an accomplice in or accessory to the capital felony murder and his participation was relatively minor. Id. at 236-37, 481 S.E.2d at 73. It recommended the death penalty for Barnes and Chambers, but it sentenced Blakeney to life imprisonment. Id. at 199, 481 S.E.2d at 51.

Even though the jury did find some mitigating factors as to Barnes at sentencing, these factors related primarily to his childhood and were overshadowed by the aggravating factors and overall strength of the State's case. As the Supreme Court of North Carolina noted, the evidence tended to show that "defendants Barnes and Chambers robbed and viciously murdered two elderly victims. In the course of the murders and the events that followed, Barnes and Chambers showed an utter disregard for the value of human life."

Id. at 251, 481 S.E.2d at 82. The fact that the jury voted *against* the death penalty for co-defendant Blakeney provides further evidence that the improper contact did not prevent the jury from judging each co-defendant individually or otherwise precluded them from rejecting the death penalty as an appropriate punishment, as the magistrate judge noted in her Recommendation. (Doc. 54 at 23.) Thus, the State's strong evidence of guilt weighs against a finding of prejudice in this instance. See Brecht, 507 U.S. at 639 (holding government's improper use of petitioner's post-Miranda silence for impeachment purposes did not substantially influence the jury's verdict, relying in part on the fact that "the State's evidence of guilt was, if not overwhelming, certainly weighty").

***9** Under these circumstances, the court has no "grave doubt" that the extraneous influence arising from the improper communication between Pastor Lomax and Juror Jordan did not substantially influence the jury's decision as to whether Barnes should receive the death penalty, and thus was harmless. O'Neal, 513 U.S. at 436-37. Put another way, mindful that a unanimous verdict is required to impose the death penalty, Allen, 366 F.3d at 345 (Gregory, J., concurring), it can be said with "fair assurance" that the extraneous influence did not have a "substantial and injurious effect or influence in determining the jury's verdict," Kotteakos, 328 U.S. at 765. Therefore, the court finds that any error by the state MAR court's "failure to apply the Remmer presumption and its failure to investigate Barnes' allegations of juror misconduct in a hearing," Barnes, 751 F.3d at 253, was harmless.

B. Motion to Appoint Substitute Counsel

After the objections were filed by counsel, Barnes filed two pro se motions for the appointment of counsel pursuant to 18 U.S.C. § 3599(a)(2) to assert a claim under Martinez v. Ryan, 566 U.S. 1 (2012). (Docs. 59, 60.) In addition, Barnes claims that his appointed counsel are colleagues with counsel who represented him on direct appeal. (Doc. 60 at 1.) He further cites the "lack of [c]onstant adequate [c]ommunication with Petitioner and Petitioner's grave concerns that [p]ost-conviction counsel is deliberately attempting to derail Petitioner from relief[.]" (Id. at 2.)

Barnes's counsel take no position on the relief sought but represent that they "have consistently and thoroughly represented Mr. Barnes" throughout his § 2254 proceedings, including successfully obtaining an evidentiary hearing for him on his juror misconduct claim, handling that hearing, and filing objections to the magistrate judge's Recommendation. (Doc. 61 at 1-2.) Counsel represent that they have provided Barnes with all copies of their filings. (Id. at 2.)

While 18 U.S.C. § 3599 entitles indigent defendants to the appointment of counsel in habeas proceedings for capital cases, habeas petitioners are not entitled to the counsel of their choice. Christeson v. Roper, 135 S. Ct. 891, 893-94 (2015). Nevertheless, "a court may 'replace' appointed counsel with 'similarly qualified counsel ... upon motion' of the petitioner." Id. at 894 (quoting 18 U.S.C. § 3559(e)). "Substitution of that federally-appointed counsel is warranted only when it would serve 'the interests of justice.' " Lambrix v. Sec'y, Fla. Dep't of Corr., 756 F.3d 1246, 1259 (11th Cir. 2014) (quoting Martel v. Clair, 565 U.S. 648, 658 (2012)); see 18 U.S.C. § 3006A(c).

When considering a motion to substitute counsel, a court should consider both "the timeliness of the motion" and "the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's responsibility, if any, for that conflict)." Christeson, 135 S. Ct. at 894 (quoting Martel, 565 U.S. at 658). However, "a district court is not required to appoint substitute counsel just so that a state prisoner can file a futile petition" or "pursue wholly futile claims that are conclusively time barred or could not form the basis for federal habeas relief." Lambrix, 756 F.3d at 1259 (citations omitted).

Barnes's request is untimely. He filed the present motion on March 12, 2018, nearly ten years after filing his initial petition, over five years after the Supreme Court's decision in Martinez, and only after the magistrate judge issued her Recommendation denying his claim. Barnes offers no explanation for his delay.

Even if his untimeliness could be excused, Barnes fails to identify any viable claim. To the extent Barnes's motion for new counsel is predicated on a desire to pursue a claim pursuant to Martinez, such a claim is futile because it exceeds the scope of the Fourth Circuit's remand in this case. The Fourth Circuit remanded this matter to this court "for an evidentiary hearing to determine whether the state court's failure to apply the Remmer presumption and its failure to investigate Barnes' allegations of juror misconduct in a hearing had a substantial and injurious effect or influence on the jury's verdict." Barnes, 751 F.3d at 253. The resolution of that issue by this court does not involve questions of procedural default or otherwise implicate Martinez. To the extent Barnes is attempting to assert a new claim, the request

exceeds the scope of the remand and would violate the mandate of the Fourth Circuit. See Doe v. Chao, 511 F.3d 461, 465 (4th Cir. 2007); Briggs v. Pennsylvania R. Co., 334 U.S. 304, 306 (1948) ("[A]n inferior court has no power or authority to deviate from the mandate issued by an appellate court."). Barnes has not offered any suggestion that the court should deviate from the mandate rule due to "exceptional circumstances." Doe, 511 F.3d at 467. [10]

***10** To the extent Barnes's request for the appointment of counsel is predicated on a conflict of interest outside his request to pursue a Martinez claim, he fails to identify any actual conflict aside from noting that appointed counsel are colleagues with the counsel who represented him on direct appeal. (Doc. 60 at 1.) Barnes thus fails to identify a sufficient conflict of interest to warrant the appointment of substitute counsel. Cf. Christeson, 135 S. Ct. at 895 (holding that district court erred in denying motion to substitute counsel due to "a significant conflict of interest" where petitioner's argument in favor of tolling the statute of limitations depended on establishing that his current attorneys had effectively abandoned his case).

Finally, Barnes cites a "lack of [c]onstant adequate [c]ommunication with Petitioner and Petitioner's grave concerns that [p]ost-conviction counsel is deliberately attempting to derail Petitioner from relief[.]" (Doc. 60 at 2.) While Barnes appears to claim that his counsel failed to adequately keep him informed regarding the status of the proceedings, his counsel stated in their response that he has been given copies of all filings in this case. (Doc. 61 at 2.) Barnes has offered no other evidence or specific factual support for his conclusory claims. Nor does his counsel's conduct in proceedings before the court suggest any attempt to prevent Barnes from obtaining relief - to the contrary, counsel have been zealous advocates for his claims.

Accordingly, Barnes's motion for new counsel will be denied, as it has not been demonstrated to best serve the interests of justice.

C. Certificate of Appealability

When denying a habeas petition under 28 U.S.C. § 2254, the court must determine whether the petitioner is entitled to a certificate of appealability with respect to one or more of the issues presented in the petition. Rules Governing § 2254 Cases, R. 11(a). Under the Antiterrorism and Effective Death Penalty Act of 1996, a district court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate that "reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Allen, 366 F.3d at 323 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack, 529 U.S. at 484. "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." Miller-El v. Cockrell, 537 U.S. 322, 342 (2003). The standard for granting a certificate has been described as "low." Frost v. Gilbert, 835 F.3d 883, 888 (9th Cir. 2016) (citation omitted). "[A] claim can be debatable even though every jurist of reason might agree, after the [certificate of appealability] has been granted and the case has received full consideration, that petitioner will not prevail." Buck v. Davis, 137 S. Ct. 759, 774 (2017) (quoting Miller-El, 537 U.S. at 338). Further, within the context of capital cases, courts have recognized that the severity of the sentence is an appropriate consideration when deciding whether to issue a certificate. See, e.g., Smith v. Dretke, 422 F.3d 269, 273 (5th Cir. 2005) ("Because the present case involves the death penalty, any doubts as to whether a [certificate of appealability] should [be] issued must be resolved in [the petitioner's] favor." (quoting Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir. 2000))); Jermyn v. Horn, 266 F.3d 257, 279 n.7 (3d Cir. 2001) (noting "in a capital case, the nature of the penalty is a proper consideration" (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983))).

***11** In light of the Fourth Circuit's determination that Juror Jordan's communication with Pastor Lomax about the spiritual implications of imposing the death penalty concerned "the matter before the jury," and because this is a capital case, a review of the complete record persuades the court to conclude that, while it is confident in its determination, a reasonable jurist could at least debate the court's resolution of the constitutional claim. Therefore, the court will issue a certificate of appealability on the issue of whether the extraneous communication between Juror Jordan and Pastor Lomax had a "substantial and injurious effect or influence in determining the jury's verdict," or rather was harmless.

III. CONCLUSION

The court has carefully reviewed those portions of the Recommendation of the United States Magistrate Judge to which objections were made, whether or not specifically addressed herein, and has made a *de novo* determination. The court's determination is in accord with the Recommendation, which is ADOPTED, as modified herein.

IT IS THEREFORE ORDERED that Barnes's petition (Doc. 1) be DENIED as to the single claim on remand from the Court of Appeals for the Fourth Circuit.

IT IS FURTHER ORDERED that Barnes's motion for the appointment of substitute counsel (Docs. 59, 60) be DENIED.

For the reasons noted, the court will grant a certificate of appealability on the issue of whether the extraneous communication between Juror Jordan and Pastor Lomax had a "substantial and injurious effect or influence in determining the jury's verdict," or rather was harmless. See 28 U.S.C. § 2253(c)(2).

A Judgment will be entered contemporaneously with this Memorandum Opinion and Order.

All Citations

Not Reported in Fed. Supp., 2018 WL 3659016

Footnotes

1 Edward Thomas is now the present Warden of North Carolina's Central Prison and has been substituted as Respondent. See Fed. R. Civ. P. 25(d).

2 Janine Fodor represented Barnes in his direct appeal while she worked in the North Carolina State Appellate Defender's Office. (Doc. 47 at 23-24.) The magistrate judge accepted Fodor's testimony subject to several objections by Respondent. (Doc. 54 at 10 n.1, 10-11 n.2.) The magistrate judge permitted Fodor's testimony regarding her review of the legal issues of the case but considered that proffer as an argument of counsel rather than opinion testimony. (Id. at 10 n.1.) During the evidentiary hearing, the magistrate judge sustained the Respondent's hearsay objection to Fodor's testimony regarding what Juror Jordan told Fodor about her consultation with Pastor Lomax during an interview, but permitted Barnes to make an offer of proof as to the challenged testimony. (Id. at 10-11 n.2.) The magistrate judge ultimately concluded that "[e]ven if the Court considers this testimony, the Court finds that the testimony of Juror Jordan herself is more direct and more credible than the general characterizations by Attorney Fodor of her recollection from the summary of her notes of her interviews with Juror Jordan." (Id.) Barnes has not raised any objection to this credibility determination or these evidentiary rulings, and the court does not find that the magistrate judge erred in making these findings.

3 During the evidentiary hearing, the parties raised several objections to certain testimony regarding the jurors' mental thought processes under Federal Rule of Evidence 606(b). Consistent with her evidentiary rulings during the hearing, the magistrate judge held that certain portions of testimony should not be considered. (Doc. 54 at 10-11 n.2, 13 n.3, 14 n.4.) Barnes does not challenge these evidentiary rulings, nor does the court find that the magistrate judge erred in excluding such testimony. See United States v. Lawson, 677 F.3d 629, 646-47 (4th Cir. 2012).

4 Pastor Lomax is deceased, and thus no testimony was provided from him. (Doc. 47 at 48.)

5 Portions of the trial transcript which Barnes cites as the closing argument of the prosecutor are actually the closing argument of counsel for Barnes's co-defendant, Chambers. (See Doc. 58 at 3 (citing Trial Tr. Vol. VII at 393-95 (arguing that the State was "asking you to go back and commit premeditation, deliberation, and with malice in your heart order the killing of those three men," and stating that "[y]ou do not violate the laws of North Carolina when you return a death verdict" and "I'll not comment on the laws of God at this time"), 401-02 (contending that the State has put the jurors, as "true believers," in "the predicament" of having "[t]o explain [on judgment day] when your soul is at stake" that "yes, I did violate one of your commandments").)

6 Barnes relies on the fact that eleven jurors acknowledged a church affiliation during voir dire. (Doc. 58 at 2.)

7 During his closing argument, Chambers's counsel stated:

> If you're a true believer and you believe that Frank Chambers will have a second judgment day, then we know that all of us will too. All of us will stand in judgment one day. And what words is it that a true believer wants to hear? ["]Well done, my good and faithful servant. You have done good things with your life. You have done good deeds. Enter into the Kingdom of Heaven. ["] Isn't that what a true believer wants to hear? Or does a true believer want to explain to God, ["]yes, I did violate one of your commandments. Yes, I know they are not the ten suggestions. They are the ten commandments. I know it says, Thou shalt not kill, but I did it because the laws of man said I could.["] You

> can never justify violating a law of God by saying the laws of man allowed it. If there is a higher God and a higher law, I would say not.
>
> To be placed in the predicament that the State has asked you to place yourself in, is just that. To explain when your soul is at stake. ["]Yes, I know the three that I killed were three creatures of yours, God. And that you made them in your likeness. I know you love us all, but I killed them because the State of North Carolina said I could.["] Who wants to be placed in that position? I hope none of us. And may God have mercy on us all.

Barnes, 751 F.3d at 233. As the Fourth Circuit noted, "[t]he prosecution did not object at any point during this argument." Id. Apart from objecting to the prosecutor's statement that "you have nothing to feel guilty about for imposing the sentence that is required by the law," neither Barnes nor his co-defendants otherwise objected to the references to religion in the prosecutor's closing argument that Barnes contends precipitated this argument by Chambers's counsel. (See Trial Tr. Vol. VII at 359-61.)

8 During the evidentiary hearing, the Respondent maintained a standing objection under Federal Rule of Evidence 606(b) and specifically objected to this testimony. (Doc. 47 at 75.) The magistrate judge acknowledged the objection and invited both parties to address the issue in the post-hearing briefing. (Doc. 54 at 13 n.3.) After noting the Respondent's failure to address the issue with any additional specificity in the post-hearing briefing, the magistrate judge overruled the Respondent's objections, concluding that the testimony fell within the exceptions in Rule 606(b)(2)(A) and (B). (Doc. 54 at 13 n.3.) The Respondent has not challenged this evidentiary ruling. Whether or not this statement falls within an exception under Rule 606(b)(2)(A) or (B), it is nevertheless sheer speculation.

9 To be sure, while the closing argument by Chambers's attorney effectively placed the spiritual implications of imposing the death penalty before the jury, Barnes, 751 F.3d at 249, there is no evidence to indicate that the trial court instructed the jurors that this factor was at all relevant. See Barnes, 345 N.C. at 227, 236, 481 S.E.2d at 68, 73 (summarizing trial court's instructions). Moreover, there is no indication that after Juror Jordan's discussion of the Bible passages for "15 or 30 minutes" in the jury room (Doc. 47 at 55), any juror subsequently discussed them.

10 Even if such a claim were considered to fall within this court's remand jurisdiction, it would be futile on the merits. "Because a prisoner does not have a constitutional right to counsel in state post-conviction proceedings, ineffective assistance in those proceedings does not qualify as cause to excuse a procedural default." Davila v. Davis, 137 S. Ct. 2058, 2062 (2017) (citing Coleman v. Thompson, 501 U.S. 722 (1991)). In Martinez v. Ryan, 566 U.S. 1 (2012) and Trevino v. Thaler, 569 U.S. 413 (2013), the Supreme Court recognized a narrow exception to this rule, which "treats ineffective assistance by a prisoner's state postconviction counsel as cause to overcome the default of a single claim - ineffective assistance of trial counsel - in a single context - where the State effectively requires a defendant to bring that claim in state postconviction proceedings rather than on direct appeal." Id. at 2062-63. Unlike the petitioner in Martinez, Barnes did raise a claim of ineffective assistance of trial counsel in his post-conviction MAR proceeding, and this claim was not subject to procedural default. In his federal petition, he again raised this issue, and this court held that he failed to demonstrate that the rejection of this claim by the state courts was contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. (Doc. 28 at 38.) Accordingly, any attempt to rely on Martinez to raise or re-raise such claims would be futile. Lambrix, 756 F.3d at 1260-61 ("[T]he Martinez rule relates to excusing a procedural default of ineffective-trial-counsel claims in an initial § 2254 petition and does not apply to cases like [petitioner's]-where ineffective-trialcounsel claims were reviewed on the merits in the initial § 2254 proceeding.") To the extent Barnes now seeks to raise a new claim of ineffective assistance of trial counsel under Martinez, it would be time-barred under 28 U.S.C. § 2254(d). Id. at 1262 (holding that any new ineffective assistance of trial counsel claim was time-barred, noting that "Martinez does not alter the statutory bar against filing untimely § 2554 [sic] petitions").

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Reversed and Remanded by Barnes v. Thomas, 4th Cir.(N.C.), September 12, 2019

2018 WL 4765207
Only the Westlaw citation is currently available.
United States District Court, M.D. North Carolina.

William Leroy BARNES, Petitioner,
v.
Carlton JOYNER, Respondent.

1:08CV271
|
Signed 01/25/2018

Attorneys and Law Firms

George Bullock Currin, Raleigh, NC, M. Gordon Widenhouse, Jr., Rudolf Widenhouse & Fialko, Chapel Hill, NC, for Petitioner.

Jonathan Porter Babb, N. C. Department of Justice, Raleigh, NC, for Respondent.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Joi Elizabeth Peake, United States Magistrate Judge

***1** This case involves a federal Habeas Petition [Doc. #1] under 28 U.S.C. § 2254, challenging a state court sentence imposing the death penalty as to Petitioner William Leroy Barnes. The matter is presently before the Court on remand from the Court of Appeals for the Fourth Circuit to conduct an evidentiary hearing with respect to Petitioner's allegations of misconduct by a juror during the sentencing phase of his case. This Court held an evidentiary hearing, after which the parties filed post-hearing briefing. For the reasons set out below, the Court finds that any error by the state court was harmless. The Court therefore recommends that the juror misconduct claim set out in the Habeas Petition be denied.

I. BACKGROUND

The Court first sets out the facts underlying Petitioner's conviction and sentence in this case, as summarized by the North Carolina Supreme Court.

Defendants William Leroy Barnes, Robert Lewis Blakney, and Frank Junior Chambers were tried jointly and capitally upon indictments charging them each with two counts of first-degree murder, two counts of robbery with a dangerous weapon, and one count of first-degree burglary in connection with the killings of B.P. and Ruby Tutterow. The jury returned verdicts finding all three defendants guilty of both counts of first-degree murder on the theory of premeditation and deliberation as well as under the felony murder rule. The felonies the jury relied upon in finding defendants guilty of felony murder were burglary and both counts of armed robbery. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A–2000, the jury recommended that defendants Barnes and Chambers be sentenced to death for each murder and that defendant Blakney be sentenced to a mandatory term of life imprisonment for each murder. The trial court accordingly sentenced defendants Barnes and Chambers to death for the first-degree murders and sentenced defendant Blakney to two terms of life imprisonment. Defendants were also each sentenced to two terms of forty years' imprisonment for armed robbery and a term of forty years' imprisonment for burglary. All sentences are to be served consecutively.

....

... [A] brief synopsis of the evidence introduced at trial is as follows: On 29 October 1992, all three defendants went to the Salisbury home of B.P. and Ruby Tutterow to rob the Tutterows. Defendant Chambers had met B.P. while incarcerated at the Rowan County jail, where B.P. cooked part-time and served as a deputy sheriff. B.P. was known to carry significant amounts of money in his wallet and had given defendant Chambers money to buy cigarettes and food while Chambers was in jail.

Chambers was released from jail on the afternoon of 29 October, and shortly thereafter met up with defendant Blakney and Antonio Mason at a nearby convenience store. Chambers told Blakney and Mason that he had been released from jail without any money and that he knew someone who lived nearby who had plenty of money. Chambers said that he was willing to kill someone if it was necessary to get some money. After being unable to convince Mason to cooperate in their efforts, Chambers and Blakney joined up with defendant Barnes, who was at that time in the convenience store parking lot. Chambers, Blakney, and Barnes then went with others to the apartment of Cynthia Gwen, where the three defendants talked

together about "mak[ing] a lick," or robbing someone. Barnes got into an argument with another man while at Gwen's apartment, and Gwen asked him to leave. The three defendants then left Gwen's apartment together around 10:00 p.m.

***2** Patricia Miller was speaking with B.P. Tutterow on the phone around 10:00 p.m. that evening when she heard a commotion on the line and the phone went dead. After attempting to reach the Tutterows several times, Miller telephoned the police around 11:30 p.m. Salisbury police officers arrived at the Tutterow home around 12:30 a.m. on 30 October and found the Tutterows dead and the house ransacked.

The Tutterows' daughters determined that several things were missing from their parents' home including B.P.'s .357 Magnum pistol and a .38–caliber revolver, B.P.'s gold wedding band and gold watch, several items of jewelry, two bank bags that usually contained cash, and a bag of antique coins including some Susan B. Anthony dollars and Kennedy half-dollars.

Physical evidence in the home tied defendants Blakney and Chambers to the crime. The DNA profile of a sample drawn from one cigarette butt found in the house matched that of Chambers, and the profile on another butt matched that of Blakney. A latent fingerprint on a money box found in one bedroom matched Chambers' left middle finger. A print obtained from another money box matched that of Blakney's left palm.

Around 11:00 p.m. on the night of the murders, Barnes, Blakney, and Chambers went to the apartment where Antonio, Sharon, and Valerie Mason lived. Blakney and Chambers told Sharon that they would pay her for the use of her car to go to Kannapolis to dispose of some guns. Although Sharon refused, Blakney gave the two women around twenty to forty dollars and gave Valerie a wedding band with one small diamond. When Valerie asked Blakney where he got the ring, he replied that "we f----- up a police" and that it was a "three-person secret." Blakney further told Valerie that he, Barnes, and Chambers had some jewelry and guns. Barnes and Chambers each then showed Valerie and Sharon a gun.

Defendants then left with Antonio to buy drugs. They bought about sixty dollars worth of crack at a nearby apartment complex and returned to the Mason apartment to smoke it, after which defendants left the apartment again. Shortly thereafter, Antonio, Sharon, and Valerie heard sirens and followed the sounds to the Tutterow home, where they learned of the murders. Valerie told an officer at the scene that "[Blakney] shouldn't have killed those people like that" and went to the police department around midnight to tell the police what she knew.

Some time after midnight, Everette Feamster, a Salisbury cab driver, drove defendants to the Bradshaw Apartments in Salisbury. Feamster and a passenger in the cab, Charles Fair, testified that they heard defendants talking about money and saw them passing money back and forth. Upon arriving at the Bradshaw Apartments, Barnes purchased three hundred dollars' worth of crack cocaine from Wayne Smith and bought more crack from Willie Peck. Barnes later sold B.P.'s .38–caliber revolver for five rocks of crack. Defendants then went to several other parties throughout the early morning, during which time they bought as much as one thousand dollars' worth of crack from Smith and varying amounts of crack from other sellers. At the home of Paula Jones, Smith saw Barnes with a pistol stuck in his pants and Blakney with a pistol in his pants. Blakney then gave his pistol to Chambers.

During the early morning of 30 October 1992, Blakney pawned two rings—a "mother's ring" with three birthstones and a wedding band—and some antique coins. Barnes attempted to sell a gold watch with diamonds on the face to Joseph Knox. Chambers attempted to hide Mr. Tutterow's .357 Magnum pistol at the home of Carl Fleming. Barnes was taken into custody on the morning of 30 October, Blakney was arrested that afternoon, and Chambers turned himself in that afternoon.

***3** All three defendants later made statements to police, but each denied having been involved in the killings of the Tutterows. Chambers admitted to having been in the Tutterow home and told Rachel Eberhart, "Hell yeah, I killed the m-----f-----," although he later said he was merely kidding. Blakney told police that he took items from the bedrooms but that he did not take part in the shootings. Barnes denied having seen Blakney or Chambers on 29 October 1992 and stated that he had nothing to do with the killings. Special Agent Michael Creasy testified that the palms of Barnes' hands had indications of gunshot residue on them and explained that the concentrations on Barnes' palms could have been a result of Barnes having merely handled a gun rather than having actually shot one. Gunshot residue was also found on the waistbands of Barnes' and Chambers' pants. Furthermore, during court proceedings

in November, Barnes wore a gold necklace and a watch belonging to the Tutterows.

Dr. Brent Hall testified that Ruby Tutterow died as a result of multiple gunshot wounds. She suffered ten wounds in all, four of which were to the head. Hall testified that two of these wounds, one to the head and one to the back, had the potential to be rapidly fatal. Dr. Deborah Radisch testified that B.P. Tutterow also suffered multiple gunshot wounds and died as a result of a gunshot to the chest in combination with several shots to the face and head. B.P. had also been beaten and had suffered a number of defensive wounds. Special Agent Thomas Trochum testified that the Tutterows were shot with both a .357 Magnum revolver and .38–caliber revolver, although he added that he could not say whether a third gun was involved.

....

Blakney testified at sentencing that he did not shoot the Tutterows, that Barnes and Chambers did shoot the Tutterows while he was in another room, and that he had not planned to kill anyone during the robbery. Neither Barnes nor Chambers testified during the sentencing hearing.

State v. Barnes, 345 N.C. 184, 199-202, 223 (1997).

Petitioner's sentence was upheld on direct appeal and in his state post-conviction proceedings. He then filed a Habeas Petition in this Court, which was denied on March 28, 2013. However, the Court granted a certificate of appealability on a single issue alleging juror misconduct based on evidence that a juror improperly communicated with her pastor about the death penalty during the sentencing phase of Barnes' trial and then relayed the information to other jurors. Barnes v. Joyner, 751 F.3d 229, 232 (4th Cir. 2014). As to that issue, the Fourth Circuit summarized the relevant background as follows:

During the closing arguments of the sentencing phase, an attorney representing co-defendant Chambers stated, in pertinent part, as follows:

If you're a true believer and you believe that Frank Chambers will have a second judgment day, then we know that all of us will too. All of us will stand in judgment one day. And what words is it that a true believer wants to hear? [”]Well done, my good and faithful servant. You have done good things with your life. You have done good deeds. Enter into the Kingdom of Heaven. [”] Isn't that what a true believer wants to hear? Or does a true believer want to explain to God, [”]yes, I did violate one of your commandments. Yes, I know they are not the ten suggestions. They are the ten commandments. I know it says, Thou shalt not kill, but I did it because the laws of man said I could.[”] You can never justify violating a law of God by saying the laws of man allowed it. If there is a higher God and a higher law, I would say not.

To be placed in the predicament that the State has asked you to place yourself in, is just that. To explain when your soul is at stake. [”]Yes, I know the three that I killed were three creatures of yours, God. And that you made them in your likeness. I know you love us all, but I killed them because the State of North Carolina said I could.[”] Who wants to be placed in that position? I hope none of us. And may God have mercy on us all.

***4** J.A. 1532–33. The prosecution did not object at any point during this argument.

The next day, the jury recommended that Barnes and Chambers be sentenced to death for each murder and that Blakney be sentenced to a mandatory term of life imprisonment for each murder. After the jury returned its sentencing recommendations and exited the courtroom, the following colloquy took place between the court and defense counsel:

THE COURT: I take it everyone wants to enter some Notice of Appeal. Is that correct?

MR. HARP [CHAMBERS' COUNSEL]: The first thing we would like to get in is that late yesterday afternoon we were informed, after talking to alternate jurors, that on Tuesday, before deliberation and before instructions were given by the Court, one of the jurors carried a Bible back into the jury room and read to the other jurors from that. That it was also discovered by us that one of the jurors, one of the other jurors, called a member of the clergy, perhaps a relative of hers, to ask her about a particular question as to the death penalty. We also informed you of it this morning at ten o'clock and that we need to enter that on the record for purposes of preserving that.

MR. FRITTS [BARNES' COUNSEL]: Judge, for Mr. Barnes we join in on that. We would for those reasons make a Motion for Mistrial and we would request the

> Court to inquire of the jurors, and I understand the Court's feelings on that, but that would be our request.
>
> THE COURT: No evidence that anybody discussed the particular facts of this case with anybody outside the jury. Is that correct?
>
> MR. HARP: No evidence that they did or did not as far as the conversation with the minister is concerned.
>
> THE COURT: No evidence that they did though. Is that correct?
>
> MR. HARP: No, sir.
>
> THE COURT: All right. Well, I'm going to deny the request to start questioning this jury about what may or may not have taken place during their deliberations of this trial.
>
> J.A. 1601–03. Thereafter, the trial court denied the defense's post-sentence motions and rejected their request to conduct an evidentiary hearing with respect to juror misconduct.

Barnes v. Joyner, 751 F.3d at 233-34.

Petitioner continued to pursue this claim on direct appeal and on a post-conviction Motion for Appropriate Relief ("MAR") in state court, with supporting affidavits. Specifically, as later summarized by the Fourth Circuit,

> Barnes offered new information to the MAR Court to try to demonstrate that Hollie Jordan ("Juror Jordan"), a sitting juror, improperly communicated with her pastor about the death penalty during the sentencing phase of Barnes' trial. This new information was presented through a number of exhibits compiled by post-conviction counsel and their investigator, which were based on post-verdict interviews with several of the jurors.
>
> One of the exhibits attached to Barnes' MAR was an "Interview Summary" of a May 31, 1995 interview of Juror Jordan. According to the Interview Summary, Juror Jordan was offended by the closing argument in which co-defendant Chambers' attorney argued "that if jurors voted for the death penalty, they would one day face God's judgment for killing these defendants." J.A. 1898. Although Juror Jordan "did not accept the attorney's argument," she did notice "that another juror, a female, seemed visibly upset" by it. Id. "To remedy the effect of the argument, [Juror] Jordan brought a Bible from home into the jury deliberation room" and read a passage to all the jurors, which provided "that it is the duty of Christians to abide by the laws of the state." Id. The Interview Summary does not mention any conversation with Juror Jordan's pastor; it states that Juror Jordan knew the Bible passage from church.
>
> ***5** In addition to Juror Jordan's Interview Summary, Barnes' MAR relied on a September 7, 2000 affidavit from Daniel C. Williams ("Investigator Williams"), an investigator hired by Barnes' post-conviction counsel. In his affidavit, Investigator Williams described interviews he conducted with three jurors from Barnes' trial, including Juror Jordan. According to Investigator Williams, Juror Jordan explained, "she called her pastor Tom Lomax" ("Pastor Lomax") in response to a defense attorney's closing argument in which the attorney "suggested that if jurors returned a death sentence, they, the jurors[,] would one day face judgment for their actions." J.A. 1892. Juror Jordan stated that she "discussed the lawyer's argument with [Pastor] Lomax." Id. During their conversation, "[Pastor] Lomax told [Juror] Jordan about another biblical passage which contradicted the passage relied upon by the defense attorney." Id. The next day, Juror Jordan brought her Bible into the jury deliberation room and "read the passage suggested to her by [Pastor] Lomax to all of the jurors." Id.
>
> Investigator Williams also interviewed jurors Leah Weddington ("Juror Weddington") and Ardith F. Peacock ("Juror Peacock"), both of whom recalled that a member of the jury brought a Bible into the jury room during sentencing deliberations. Juror Weddington told Investigator Williams that "[t]he person who brought in the Bible read a passage to a juror who was having a hard time with the death penalty." J.A. 1892–93. Juror Peacock could not recall the details of the verse, but she stated that it "dealt with life and death." Id. at 1893. In a separate affidavit dated April 7, 2004, Juror Peacock stated that a defense attorney's remarks that jurors would have to face God's judgment if they imposed the death penalty "made the jury furious." Id. at 1900. In response to this argument, one of the jurors read a passage from the Bible to the other jurors. Juror Peacock did not recall which juror brought the Bible or the exact verse that was read.
>
> Investigator Williams also interviewed Pastor Lomax. Pastor Lomax confirmed that Juror Jordan attends his church. Moreover, although Pastor Lomax "could not recall the conversation recounted by [Juror] Jordan," he "stated

that it [was] possible that he did talk to her about the death penalty while she was a juror, but he simply does not remember it." J.A. 1893.

Barnes' MAR also attached an October 10, 2000 affidavit of Cynthia F. Adcock, an attorney with the North Carolina Resource Center, which recounted interviews with several jurors. According to Ms. Adcock, in a February 25, 1995 interview, Juror Weddington stated that "a juror named 'Hollie' brought a Bible into the jury room and read from it" and that "Hollie also talked to her pastor during the case." J.A. 1902. Additionally, Ms. Adcock's affidavit explains that in a separate February 25, 1995 interview, Juror Wanda Allen ("Juror Allen") "recalled discussions about the fact that one of the jurors had brought in a [B]ible and had talked with her pastor." Id.

Barnes, 751 F.3d at 235-36.

The state MAR court summarily denied the juror misconduct claim without a hearing, and Petitioner then raised the claim in his Habeas Petition in this Court. This Court rejected that claim but granted a certificate of appealability on that issue. On appeal, the Fourth Circuit ultimately concluded that the state MAR court unreasonably applied clearly established federal law by simply denying Petitioner's juror misconduct claim without applying a presumption of prejudice and ordering a hearing under Remmer v. United States, 347 U.S. 227 (1954). However, the Fourth Circuit further noted that on habeas review, federal courts are "not permitted to grant habeas relief unless we are convinced that the error had a 'substantial and injurious effect or influence in determining the jury's verdict.' " Barnes, 751 F.3d at 252-53 (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)). The Fourth Circuit therefore remanded the matter to his Court for an evidentiary hearing "to determine whether the state court's failure to apply the Remmer presumption and its failure to investigate Barnes' allegations of juror misconduct in a hearing had a substantial and injurious effect or influence on the jury's verdict." Barnes v. Joyner, 751 F.3d 229, 253 (4th Cir. 2014).

II. EVIDENTIARY HEARING EVIDENCE

***6** This Court set the matter for an evidentiary hearing, at which Petitioner presented four witnesses: Janine Fodor, Hollie Jordan, Ardith Peacock, and Leah Weddington. Respondent did not present any witnesses.

Petitioner's first witness was Janine Fodor, an attorney who represented Petitioner in his direct appeal while she worked in the North Carolina State Appellate Defender's Office. She also represented Petitioner as state post-conviction counsel after she left the Appellate Defender's Office. Attorney Fodor noted that in identifying issues for the direct appeal, she noticed that the trial transcript reflected a potential claim of juror misconduct based on the concern that a juror had contacted a pastor during deliberations. (Tr. at 24.) Attorney Fodor further noted that the trial transcript reflected that the defense attorney for co-defendant Chambers made a "fairly extensive argument that God's law would prohibit the jurors from deciding to impose the death penalty," (Tr. at 31), and she also noted that the jurors were questioned during the voir dire about their religious affiliation (Tr. at 32). [1]

Attorney Fodor further testified that during her representation of Petitioner on direct appeal and in post-conviction proceedings, she conducted interviews of some members of the jury. She testified that, among other matters, she "asked about whether or not anybody remembered a juror contacting somebody or bringing a Bible into the jury room." (Tr. at 35.) When asked if she recalled who she spoke with, Attorney Fodor testified that she talked to juror Hollie Jordan and another juror, but she did not remember the other juror's name. Specifically as to Juror Jordan, Attorney Fodor testified that Juror Jordan confirmed that she was the juror who had contacted a pastor during sentencing deliberations. [2]

***7** Petitioner's next witness was Hollie Jordan, a juror at Petitioner's trial. Ms. Jordan testified that during Petitioner's trial, she was attending Old Country Baptist Church where Pastor Lomax was the preacher. (Tr. at 47-48.) She testified that she and her family attended church there "[e]very time the doors were open," which included Sunday morning, Sunday night, and Wednesdays, and her churchgoing was "[v]ery important" and "[p]layed a big role" in her life. (Tr. at 47-48.) She and her husband were married by Pastor Lomax, and she considered him a spiritual guide or leader and would seek his advice about important things in her life. (Tr. at 47-48.) She testified that Pastor Lomax has since died. (Tr. at 48.)

With respect to her jury service, she recalled that a defense attorney argued to the jurors that if the defendants received the death penalty that the jurors would "burn in hell." She went to Pastor Lomax and "asked him if we gave them the death sentence would we burn in hell." He told her "No." (Tr. at 49.) She testified that this conversation with Pastor Lomax happened "during the deliberation .... after church one night

when everybody had left," and occurred outside the church with no one else present. (Tr. at 50-51.) With respect to this conversation, she testified as follows:

Q. And did you tell him you were on a jury?

A. Yes.

Q. And did you talk to him -- did you talk to him about --

A. I just told him -- the only thing I told him was how horrific the pictures were.

....

Q. All right. And I think you said you talked to him for about two hours?

A. It was, yeah, roughly an hour or two.

Q. All right. And of the -- however long you talked to him, an hour or two, how much of that conversation was about the Barnes/Chambers/Blakney trial?

A. Just the few minutes that I asked him would we burn in hell and he said no, we had to live by the laws of the land. He told me some scriptures in the Bible, you know, that explained everything. And just that the photos were horrific. The rest of the time it was about family and, you know, other things like.

Q. All right. Do you remember which Bible verses he gave you?

A. I have no idea now. I'd have to find that Bible and I don't know where it is.

Q. All right. Do you remember how many verses it might have -- it was?

A. No, I don't.

Q. All right. Did you -- were you seeking his advice or counsel about the case?

A. Just the closing argument as far as, like I said, if they got the death sentence for what they did and we sentenced them to death, were we going to die because we're killing them. Do you know what I'm saying?

Q. Yes, I think so.

A. I was worried about it.

Q. So you had concerns about that and went to him?

A. Right.

Q. Did you feel better after you spoke with him?

A. Yes, I did.

Q. Were you worried about what to do in the case when you went to talk to Pastor Lomax?

A. As far as giving him the death sentence, no. I just -- I knew what I wanted to do. I mean, that was made up in my mind. I just wanted to know if I was going to burn in hell for it.

Q. So the -- okay. So the --

A. It wouldn't have made any difference either way. If he had said, "Yes, you're going to burn in hell," it wouldn't have changed my mind about how I felt about what he would have gotten. [3]

....

Q. Did Pastor Lomax lead you to believe the Bible supported the death penalty?

A. No.

Q. Did he lead you to believe the Bible didn't support the death penalty?

A. No. I mean, we have to live by the laws of the land. That's all he said. So, no, he just told me I wouldn't burn in hell for the decision we were -- you know, I was about to make.

....

Q. All right. Okay. And did you talk to your fellow jurors about what Pastor Lomax told you?

A. Yeah, that we wouldn't burn in hell.

Q. Did you read the Bible verses to them that he suggested to you?

***8** A. Yes.

....

Q. Do you know how much time you spent telling the jurors about what Pastor Lomax had told you?

A. I'm going to say maybe 15 to 30 minutes. I wouldn't say any longer than that.

....

Q. Do you remember -- what was your concern that caused you to go talk to Pastor Lomax after prayer meeting that night? [Objection omitted.]

A. The only thing was as far as burning in hell. That's the only reason I went and talked to him.

Q. That concerned you?

A. (Nods head.) I would have still made the same decision, though. [4]

(Tr. at 50-56.)

Petitioner's next witness was another juror, Ardith Peacock. She testified that during the second day of sentencing deliberations, Juror Jordan brought a Bible into the jury room. (Tr. at 60.) She testified that Juror Jordan read aloud from the Bible several passages including "the eye for an eye and tooth for a tooth," but Juror Peacock did not recall verbatim what passages they were or whether they were from the Old or New Testament. (Tr. at 61.) Juror Peacock further testified as follows:

Q. Okay. Ms. Peacock, in addition to reading the Bible verses, did Ms. Jordan state to the other jurors in your presence where you could hear her that these Bible verses supported imposition of the death penalty? [Objection omitted.]

A. She did not state that they were for the death penalty. It was basically -- it was based on the closing argument that we had -- that one of the defense attorneys had.

Q. Was she -- she wasn't arguing that the Bible verses supported a life sentence, was she?

***9** [Objection omitted.]

A. She didn't say either way.

Q. Okay. So Ms. Jordan -- what you're -- let me make sure I understand. You're saying that Ms. Jordan was reading the Bible verses to the jury based on the closing argument of one of the lawyers. Is that what you just said?

A. Yes.

Q. Okay. All right. Do you want to explain? Can you explain what you mean by that?

A. Well, during the closing arguments, the defense attorney had said that his client would have to meet his judgment day for what he did nor did not do in this situation and then we would in turn have to meet our judgment day for what we decide.

Q. And?

A. And then the next day is when she brought the Bible and read those verses.

Q. So is it fair to say that she was reading those Bible verses to rebut what that closing argument had said by one of the defense attorneys? Is that what you're trying to say she was doing, rebutting that?

A. It's saying, you know, we are doing our duty.

....

Q. Would it be fair to say that she brought the Bible passages in to rebut Chambers attorney's argument?

A. Yes.

Q. Okay. And that it would be okay to impose the death penalty in the case, correct?

A. She didn't --

Q. That was --

A. She didn't say either way. I did not hear her say either way.

(Tr. at 70-72.)

Petitioner's final witness was Leah Weddington, another juror in Petitioner's trial. Juror Weddington testified that she recalled a Bible being brought in during deliberations, that it was "probably" during the sentencing deliberations, that she did not know the name of the juror, that she thought it was a female juror, and that the juror read Bible verses out loud. (Tr. at 74-75.) Juror Weddington did not recall which Bible verses they were, and did not recall if they were from the Old

Testament or New Testament. Juror Weddington speculated that she "guess[ed]" the juror read the Bible verses to "try[ ] to convince someone to -- it was okay to give him the death penalty." (Tr. at 75.)

There were no other forms of evidence admitted at the evidentiary hearing, other than what is already part of the record including the trial transcript.

III. GOVERNING LAW

Under the Sixth Amendment to the United States Constitution, every person accused of a crime has the right to a trial by an impartial jury and the right to confront the witnesses against him or her. U.S. Const. amend. VI. "It is clearly established under Supreme Court precedent that an external influence affecting a jury's deliberations violates a criminal defendant's right to an impartial jury." Barnes, 751 F.3d at 240-41 (collecting authorities); see Fullwood v. Lee, 290 F.3d 663, 677 (4th Cir. 2002) ("The Supreme Court has clearly stated that private communications between an outside party and a juror raise Sixth Amendment concerns."). "In light of these significant constitutional concerns, the Supreme Court in Remmer created a rebuttable presumption of prejudice applying to communications or contact between a third party and a juror concerning the matter pending before the jury." Barnes, 751 F.3d at 241 (citing Remmer, 347 U.S. at 229). In addition, "Remmer clearly established not only a presumption of prejudice, but also a defendant's entitlement to an evidentiary hearing, when the defendant presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury." Barnes, 751 F.3d at 242. In this case, the Fourth Circuit concluded that the state MAR court unreasonably applied clearly established federal law by simply denying Petitioner's juror misconduct claim without applying a presumption of prejudice and ordering a hearing under Remmer v. United States, 347 U.S. 227 (1954).

***10** However, "principles of comity and respect for state court judgments preclude federal courts from granting habeas relief to state prisoners for constitutional errors committed in state court absent a showing that the error 'had a substantial and injurious effect or influence in determining the jury's verdict.' " Richmond v. Polk, 375 F.3d 309, 335 (4th Cir. 2004) (quoting Brecht, 507 U.S. at 623). Therefore, as noted above, the Fourth Circuit directed that this Court conduct "an evidentiary hearing solely on the issue of whether the state court's failure to apply the Remmer presumption and failure to investigate Juror Jordan's contact with Pastor Lomax had a substantial and injurious effect or influence on the jury's verdict." Barnes, 751 F.3d at 252; see Remmer v. United States, 347 U.S. 227 (1954). In this regard, the Fourth Circuit noted that "a state court's failure to apply the [Remmer] presumption only results in actual prejudice if the jury's verdict was tainted by such information." Barnes, 751 F.3d at 252 (citing Hall v. Zenk, 692 F.3d 793, 805 (7th Cir. 2012)). Thus, the Fourth Circuit held that "to be entitled to habeas relief, Barnes will need to affirmatively prove actual prejudice by demonstrating that the jury's verdict was tainted by the extraneous communication between Juror Jordan and Pastor Lomax." Barnes, 751 F.3d at 253. The Fourth Circuit made clear in its opinion that Petitioner is not entitled to "the Remmer presumption [of prejudice] in attempting to make this showing [of actual prejudice] because the presumption does not apply in the federal habeas context when proving a substantial and injurious effect or influence on the jury's verdict." Barnes, 751 F.2d at 252-53.

In applying this standard, the Supreme Court has held that a habeas petitioner is entitled to relief if the court is in "grave doubt" as to the harmlessness of the error. See O'Neal v. McAninch, 513 U.S. 432, 436 (1995). " 'Grave doubt' exists when, in light of the entire record, the matter is so evenly balanced that the court feels itself in 'virtual equipose' regarding the error's harmlessness." Barnes, 751 F.3d at 252 (internal quotation omitted). The Supreme Court has further explained that:

> As an initial matter, we note that we deliberately phrase the issue in this case in terms of a judge's grave doubt, instead of in terms of "burden of proof." The case before us does not involve a judge who shifts a "burden" to help control the presentation of evidence at a trial, but rather involves a judge who applies a legal standard (harmlessness) to a record that the presentation of evidence is no longer likely to affect. In such a case, we think it conceptually clearer for the judge to ask directly, "Do I, the judge, think that the error substantially influenced the jury's decision?" than for the judge to try to put the same question in terms of proof burdens (e.g., "Do I believe the party has borne its burden of showing ...?"). As Chief Justice Traynor said:
>
> "Whether or not counsel are helpful, it is still the responsibility of the ... court, once it concludes there was error, to determine whether the error affected the judgment. It must do so without benefit of such aids as presumptions or allocated burdens of proof that expedite fact-finding at the trial." R. Traynor, The Riddle of Harmless Error 26 (1970) (hereinafter Traynor).

O'Neal, 513 U.S. at 436-37.

IV. FINDINGS

Based on the evidence presented, and for the reasons set out below, the Court finds that any error by the state MAR court in failing to apply the Remmer presumption or conduct an evidentiary hearing in this case is harmless because there was no actual prejudice to Petitioner since the jury verdict in this case was not tainted by the third-party contact between Juror Jordan and Pastor Lomax.

With respect to the nature of the third-party contact, the Court finds that during the sentencing phase of Petitioner's trial, after the guilty verdicts had been returned, defense counsel for co-defendant Chambers made a closing argument contending that the jurors themselves would face a "final judgment" for their decision as jurors and would have to explain to God why they had "violate[ ] one of your commandments." Counsel further argued that, "You can never justify violating a law of God by saying the laws of man allowed it," and that it would not be sufficient to say, "I killed them because the State of North Carolina said I could." That evening, Juror Jordan went to a church service and afterwards approached her pastor, Pastor Lomax. She spoke to him alone for a few minutes about the trial. She told him that she was on a jury, she told him that the crime scene pictures were horrific, and she asked him if the jurors would "burn in hell" if the defendants received the death penalty. Pastor Lomax told her "No," he told her that the jurors should live by the laws of the land, and he referred her to several Bible verses. According to Juror Jordan, Pastor Lomax did not lead her to believe that the Bible supported the death penalty. He only told her that the jurors would not burn in hell and that "we have to live by the laws of the land." There is no evidence that Pastor Lomax knew any details regarding the facts of the case or gave any advice or statement as to what the jurors should do or the verdict they should return. There is no evidence he attempted to persuade Juror Jordan to vote for or against the death penalty, or that he suggested that the Bible supported a particular sentence. Instead, he simply told Juror Jordan that the jurors would not "burn in hell" for fulfilling their duty as jurors, and further advised her that the jurors should follow the law of the land.

***11** The next day, during sentencing deliberations, Juror Jordan told the other jurors that "we wouldn't burn in hell." She read the Bible passages to the jurors, but did not indicate whether the passages were for or against imposing the death penalty. She does not recall what verses they were. Juror Peacock recalled that one of the verses was "the eye for an eye and tooth for a tooth," but she could not recall any other references or whether the verse was from the Old or New Testament. Juror Peacock further confirmed that Juror Jordan did not state either way whether the verses were for or against the death penalty. Juror Weddington recalled that Bible verses were read, and she speculated as to why Juror Jordan may have read the Bible verses, but she did not indicate that Juror Jordan made any statements or arguments in favor of the death penalty.

Ultimately, there is no basis to conclude that the Bible passages were given or used to support a particular sentence or to advocate for the death penalty. Instead, the passages were related to Pastor Lomax's limited statement to Juror Jordan that the jurors would not "burn in hell" and that they should follow the law.

In addition, in considering whether the jury's decision to impose the death penalty was substantially swayed or influenced by this contact between Pastor Lomax and Juror Jordan, the Court has considered the nature of the evidence before the jury. Petitioner and his two codefendants had already been convicted of the first-degree murders of B.P. Tutterow and his wife Ruby Tutterow. Ruby Tutterow sustained ten gunshot wounds, four of which were to her head. Barnes, 345 N.C. at 202. B.P. Tutterow was also shot multiple times and died as a result of shots to his chest along with several shots to his face and head. Id. He also was beaten and showed signs of defensive wounds. Id. The Tutterows were shot with both a .357 handgun and .38 caliber revolver. Id. Petitioner's co-defendant Blakney testified at sentencing that he did not shoot the Tutterows, but that Petitioner and co-defendant Chambers shot them while he was in another room of the house. Id. at 223. Neither Petitioner nor co-defendant Chambers testified at sentencing, and they did not present evidence to challenge Blakney's claim. Id. The jury found only as to Blakney that he was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor. Id. at 236-37. The jury found that the murders were "especially heinous, atrocious, or cruel," that Petitioner previously had been convicted of a felony involving the use or threat of violence to the person, that the murders were committed for a pecuniary gain, and that the murders were part of a course of conduct including other violent crimes. Id. at 249-50. Petitioner and co-defendant Chambers were sentenced to death, while co-defendant Blakney was sentenced to life imprisonment.

The Supreme Court of North Carolina found that the evidence, taken in the light most favorable to the State, tended to show that:

> [Petitioner] shot the Tutterows. The evidence revealed that [Petitioner] had fired a handgun or had handled a handgun soon after it was fired within a period close to the time of the killings. Furthermore, the fact that [Petitioner] disposed of one of the murder weapons permits a reasonable inference that he had fired the weapon. The State's evidence also tended to show that [Petitioner] demonstrated a willingness to kill someone at different times on the day of the murders. [Petitioner] told Maurice Alexander that he would to anything he had to do to make a living and asked him if he had any enemies that he wanted [Petitioner] to take out. [Petitioner] threatened to shoot Robert Beatty and described a pistol in his possession as the one he had used to shoot Gil Gillespie a couple of weeks earlier.

***12** Id. at 242. In addition, as noted in the factual background set out above, the evidence reflected that "during court proceedings in November, [Petitioner] wore a gold necklace and a watch belonging to the Tutterows." Id. at 202.

With respect to Petitioner's criminal history, the State introduced evidence tending to show that Petitioner had earlier committed a violent, attempted robbery of a sixteen-year-old girl, Terry Hull. Id. at 237-38. As summarized by the North Carolina Supreme Court,

> During her closing argument, assistant district attorney Symons, while lying on the floor, described Barnes' encounter with Ms. Hull:
>
> > And they went skipping up the hill, hand in hand, these two sisters, and Mr. Barnes grabbed Terry [Hull] from behind, dragged her across the street with little sister Melissa still holding her hand, and he flung her down on the ground. And they fought and she screamed for help and he pinned her down with his knees on her arms, and he put his hands around her neck like this and choked her. Terry [Hull] told you that her breath was cut off. Terry [Hull] told you her eyes started to go. Her vision went; she couldn't see. She told you her head was red and felt like it was going to explode. And she told you he would have killed me if that man didn't pull him off. It's a felony involving the use of violence.

Barnes, 345 N.C. at 237-38.

The jury found several mitigating factors as to Petitioner during sentencing, but these centered primarily around his childhood such as being constructively abandoned by his parents and being a neglected child, which contributed to his not developing into an adequately adjusted adult. Id. at 250.

As noted by the North Carolina Supreme Court, "[Petitioner] and Chambers robbed and viciously murdered two elderly victims. In the course of the murders and the events that followed, [Petitioner] and Chambers showed an utter disregard for the value of human life." Id. at 251. The jury determined Petitioner's involvement in these crimes before the contact between Pastor Lomax and Juror Jordan, and there is no basis to conclude that the communication between Pastor Lomax and Juror Jordan would have influenced the jury's evaluation of the facts and evidence in any way.

The Court also finds it noteworthy that the jury voted against the death penalty for codefendant Blakney. Therefore, even after the exchange between Pastor Lomax and Juror Jordan, the jury successfully judged each co-defendant individually and was not influenced to the extent that they could not reject the death penalty as the appropriate punishment for one of the three defendants. In addition, there is no evidence that the jury was hesitant to sentence Petitioner to death or that the jury discussed Juror Jordan's comments or Bible passages in considering whether the death penalty was appropriate for Petitioner.

In the circumstances, the Court finds that the contact between Pastor Lomax and Juror Jordan could not reasonably to be said to have tainted the jury's verdict. The Court finds no "substantial and injurious effect or influence" on the jury's verdict and has no "grave doubt" on this point. Ultimately, setting aside all burdens of production or proof, and considering whether "I, the judge, think that the error substantially influenced the jury's decision?", see

O'Neal, 513 U.S. at 436-37, the Court concludes that the communication between Pastor Lomax and Juror Jordan did not substantially influence the jury's decision as to whether Petitioner should receive the death penalty. Thus, any error by the state MAR court in failing to provide a hearing or apply the Remmer presumption is harmless because there was no actual prejudice to Petitioner since the jury's verdict was not tainted by the contact between Pastor Lomax and Juror Jordan.

***13** Finally, the Court notes that Petitioner contends that "the Fourth Circuit essentially decided, as a matter of law, that if the evidence adduced at the evidentiary hearing confirmed [Petitioner's] allegation that a juror in his case communicated with a third-party about the spiritual or moral implications of imposing the death penalty, and then relayed this information to her fellow jurors, the 'natural effect' of this communication would be to taint the integrity of the sentencing verdict and prejudice [Petitioner's] constitutional right to a fair and impartial jury." (Pet. Br. [Doc. #48] at 10-11.) However, the Fourth Circuit's opinion focused on the importance of a hearing. Barnes, 751 F.3d at 249-50 (noting that where the allegations were of such a character as to reasonably draw into question the integrity of the verdict, "further inquiry in a Remmer hearing was required" and that the "critical component" was the need for a hearing). Moreover, with respect to the harmless of the error on habeas review, and Fourth Circuit specifically noted that on the record presented it was "unclear whether [Petitioner] can demonstrate actual prejudice or whether the MAR Court's unreasonable application of federal law was harmless." Barnes, 751 F.3d at 252. Thus, a hearing was necessary. Having now conducted a hearing and having considered the evidence presented, this Court has found that Pastor Lomax did not express his views of the death penalty either generally or as applied to this case, he did not attempt to persuade Juror Jordan to vote for or against the death penalty, and he did not suggest that the Bible supported a particular sentence in this case. Instead, as set out above, he simply told Juror Jordan that she would not "burn in hell" and that she should follow the law. This Court concludes with "fair assurance" that the communication did not taint the jury's verdict, and thus any error by the state MAR court in failing to provide a hearing or apply the Remmer presumption is harmless.

IT IS THEREFORE RECOMMENDED that as to the single claim before the Court on remand from the Court of Appeals for the Fourth Circuit, that the Court find that any error by the state court was harmless, and that the Habeas Petition [Doc. #1] be denied as to that claim.

All Citations

Not Reported in Fed. Supp., 2018 WL 4765207

Footnotes

1 The Court accepted Attorney Fodor's testimony subject to several objections by Respondent. Respondent first objected to any legal analysis or opinion testimony by Attorney Fodor regarding her review of the legal issues on direct appeal. As to that issue, as noted at the hearing, the Court allowed Attorney Fodor to highlight parts of the record for the Court's review, but the Court considered that proffer as an argument of counsel rather than opinion testimony. Respondent has not presented any basis that would require handling that information any differently.

2 Respondent objected to Attorney Fodor's testimony to the extent that it was hearsay as to what Juror Jordan had said. The Court sustained that objection but allowed Petitioner to make an offer of proof and to address the matter further in the post hearing briefing if he wanted to present a basis for admission of that evidence. Petitioner did not address the matter further in the post hearing briefing. Ultimately, the Court concludes that consideration of the proffered testimony would not affect the determination in any event. Attorney Fodor testified that Hollie Jordan told her that during an evening recess during sentencing deliberations, she contacted her pastor and the pastor gave her Bible passages that Attorney Fodor understood could be used to support the death penalty or that showed that it was appropriate for Christians to consider the death penalty, but Attorney Fodor could not recall what passages they were. Attorney Fodor testified that Juror Jordan told her that she read those Bible passages to the jury. Even if the Court considers this testimony, the Court finds that the testimony of Juror Jordan herself is more direct and more credible than the general characterizations by Attorney Fodor of her recollection from the summary of her notes of her interviews with Juror Jordan. Thus, even if the offer of proof from Attorney Fodor is considered, it would not affect the determination of the Court. Finally, the Court notes that Respondent objected to portions of Attorney Fodor's testimony as violating Fed. R. Evid. 606(b). However, the Court has not excluded the testimony on this basis, as it appears to fall within the exception set out in Fed. R. Evid. 606(b)(2)(A) and (B), and did not include evidence of a juror's mental process in connection with the verdict.

3 Although this statement came in response to Petitioner's question, Petitioner moved to strike the response under Fed. R. Evid. 606. The Court agrees that the juror's mental thought process should not be considered, and therefore will grant the request and has not considered that response. See Fullwood v. Lee, 290 F.3d 663, 679 80 (4th Cir. 2002). The Court sets out the testimony here for the record. The Court also notes that during the testimony, Respondent maintained a standing objection based on Fed. R. Evid. 606, and the Court gave Respondent the opportunity to address that issue further in the post hearing briefing. However, Respondent did not address that issue with any additional authority or specificity, and the testimony appears to fall within the exceptions in Fed. R. Evid. 606(b)(2)(A) and (B). Therefore, Respondents' objections under Fed. R. Evid. 606 are overruled. However, as noted above, the Court has not considered the specific testimony to which Petitioner objected regarding the juror's thought process and in particular the effect of any outside communications on the minds of the juror in reaching the verdict. See id.; United States v. Cheek, 94 F.3d 136, 143 (4th Cir. 1996).

4 Again, although this statement came in response to Petitioner's question, Petitioner moved to strike the response under Fed. R. Evid. 606. The Court agrees that the juror's mental thought process should not be considered, and therefore will grant the request and has not considered that response. The Court sets out the testimony here for the record.

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