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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted August 13, 2021
Decided August 20, 2021

Before

MICHAEL S. KANNE, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No. 21-1227

CARLOS SANTOS,
Petitioner-Appellant,

v.

CHRISTINE BRANNON-DORTCH,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 15-cv-05325

Marvin E. Aspen,
Judge.

ORDER

Carlos Santos has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254, which we construe as an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal and find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is **DENIED**.

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2021 WL 1561920
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

Carlos SANTOS, Petitioner,
v.
Christine BRANNON,
Warden, Respondent.

Case No. 15-cv-05325
|
Signed 04/21/2021

Attorneys and Law Firms

Susan M. Pavlow, Law Offices of Susan M. Pavlow, Chicago, IL, Federal Defender Program, for Petitioner.

Jason Foster Krigel, Assistant Attorney General, Mary Claire Lusher, Illinois Attorney General's Office, Chicago, IL, for Respondent.

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

*1 Presently before us is Petitioner Carlos Santos's request for a certificate of appealability and motion to proceed on appeal *in forma pauperis* under 28 U.S.C. § 1915(a).[1] For the reasons stated below, we deny Santos's motions.

BACKGROUND

Santos filed a habeas corpus petition under 28 U.S.C. § 2254 challenging his first-degree murder conviction following a Cook County, Illinois' 2006 jury verdict. (Dkt. No. 1.) Santos alleged constitutional violations when the trial judge communicated *ex parte* with the jury, provided them with a dictionary, and failed to determine how the dictionary was used by the jury. (Dkt. No. 1 at 5, 11–13.) He also alleged a violation of his due process rights under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). (Dkt. No. 1 at 5, 14–16.)

We denied Santos's *Brady* claim. *Santos v. Williams*, No. 15 C 5325, 2016 WL 7077104, at *9 (N.D. Ill. Dec. 2, 2016) ("*Santos I*"). But we ordered an evidentiary hearing to determine whether Santos the *ex parte* communication and use of the dictionary prejudicially violated his constitutional rights. *Id.* at *7-8. For the purposes of this order, we assume familiarity with the evidentiary hearing as detailed by Magistrate Judge Finnegan's Report & Recommendation as we adopted it, and do not recount them here. In doing so, we held that Santos did not suffer prejudice as a result of the conduct underlying his claims. (Dkt. No. 195 at 4–5.) Santos seeks a certificate of appealability over that holding. (Dkt. No. 198.)

STANDARD OF LAW

A. Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2254 Proceedings requires a district court "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A certificate of appealability may be issued only if the "applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *White v. United States*, 745 F.3d 834, 835 (7th Cir. 2014); *Watson v. Hulick*, 481 F.3d 537, 543 (7th Cir. 2007). This showing is met when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Dalton v. Battaglia*, 402 F.3d 729, 738 (7th Cir. 2005) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039 (2003)). A full consideration of the factual or legal bases in support of the claims is not needed; a court need only conduct a general assessment of the merits of the claims. *United States ex rel. Barrow v. McAdory*, No. 01 C 9152, 2003 WL 22282520, at *1 (N.D. Ill. Sept. 29, 2003) (citing *Miller-El*, 537 U.S. at 336, 123 S. Ct. at 1039).

B. Proceeding *In Forma Pauperis* on Appeal

*2 Prisoners do not have a right to counsel on collateral review, though the court often appoints counsel for prisoners on appeal. *Lavin v. Rednour*, 641 F.3d 830, 834 (7th Cir. 2011). In civil cases, including habeas corpus actions on collateral review, petitioners seeking to obtain appointed counsel on appeal from a district court must request reappointment. *Johnson v. Chandler*, 487 F.3d 1037, 1038 (7th Cir. 2007). If the petitioner was allowed to proceed *in forma pauperis* in the district court action, no further authorization is needed. Fed. R. App. P. 24(a)(3). Parties that

did not proceed *in forma pauperis* in the district court yet wish to do so on appeal must file a motion in the district court. Fed. R. App. P. 24(a)(1). Parties must attach an affidavit to the motion that "(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs; (B) claims an entitlement to redress; and (C) states the issues that the party intends to present on appeal." *Id.* If the district court denies the motion, the petitioner may file a motion in the Court of Appeals. Fed. R. App. P. 24(b).

ANALYSIS

Santos challenges our denial of his habeas petition and seeks a certificate of appealability for his interference with jury deliberations and *Brady* violation claims. (Dkt. No. 198 at 1.) He also seeks redress for *ex parte* communications beyond the dictionary discussion by adding an ineffective assistance of counsel claim. (Dkt. No. 198 at 26.) For all of these claims, Santos argues that we misapplied the law and that reasonable jurists could arrive at different conclusions. Finally, Santos seeks to proceed *in forma pauperis*. We consider these in turn.

A. Certificate of Appealability Claims

1. Interference with Jury Deliberations

Santos first argues that we improperly shifted the burden to him following the evidentiary hearing held by Magistrate Judge Finnegan under *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450 (1954), and that he met the burden. He then argues that reasonable jurists could debate that he met his burden to show prejudice for the *ex parte* communications related to the dictionary. We explore these arguments below.

a. The burden to prove prejudice rests on Santos

Santos maintains that we applied the wrong burden when assessing a *Remmer* hearing in a habeas proceeding. (Dkt. No. 198 at 9.) Under Santos's reading of the law, petitioners facing a violation of their rights under *Remmer* have a different burden than all other petitioners on habeas corpus; that is, the state must prove the violation was harmless rather than the petitioner prove prejudice. *Id.* Rather, the law requires prisoners advancing habeas petitions establish that they were prejudiced by the state's constitutional error. *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S. Ct. 1710, 1722 (1993); *Hall v. Zenk*, 692 F.3d 793, 805 (7th Cir. 2012).

Santos claims that the result in *Hall* indicates otherwise, but the language in the opinion and approach taken by the court clearly disagree. In *Hall*, like here, the state court held a hearing on the potential prejudice of *ex parte* communications. 692 F.3d at 805. In both cases, the state conducted a cursory review of the communications and did not apply the presumption of prejudice at the hearing, contrary to the requirements of *Remmer*. *Id.* at 806. However, that is where their similarities end. *Hall* found that the affidavits submitted supported the petitioner's contention that the *ex parte* communications influenced the verdict and therefore yielded prejudice. *Id.* at 806–07. It then afforded the state the opportunity to rebut this strong showing of prejudice. *Id.* We did not have enough evidence to make such a determination, so we ordered an evidentiary hearing. *Santos I*, 2016 WL 7077104, at *5. However, as *Hall* counsels, a habeas petitioner must still show prejudice resulted from the error, even if it is "counterintuitive given the constitutional error at issue." *Hall*, 692 F.3d at 806 (citing *Brecht*, 507 U.S. at 622, 113 S. Ct. at 1713). *Hall* clearly articulated the rule in this Circuit, and it is by that precedent that we are bound. Accordingly, Santos has not made a substantial "showing of the denial of a constitutional right" regarding burden shifting. 28 U.S.C. § 2253(c)(2).

***3** Nor does Santos make a substantial showing that he was denied a constitutional right regarding the dictionary's use. *See id.* Santos argues that reasonable jurists would debate whether he made a proper showing of prejudice for the use of the dictionary. (Dkt. No. 198 at 13–24.) To support this contention, Santos walks through a litany of arguments that were already addressed in Judge Finnegan's R&R and in our order adopting it. *Id.* Again, as *Hall* counsels, Santos must show that the constitutional error of consulting the dictionary had a "substantial and injurious effect" on the verdict. 692 F.3d at 805 (quoting *Rodriguez v. Montgomery*, 594 F.3d 548, 551 (7th Cir. 2010)).

Looking to the facts elicited from the evidentiary hearing, reasonable jurists would not debate that the jury's use of the dictionary did not adversely impact the verdict. Only two of the eleven jurors recall the use of the dictionary, and only one remembered it in any detail. (Dkt. No. 184 at 16–27.) That juror indicated it had only been used for 3 minutes, and that it "didn't make much difference at that point." *Id.* at 19. Santos attempts to weave together a narrative that shows the

dictionary had an impact by pointing to contemporaneously spoiled verdict forms and the fact that they potentially looked up a word having to do with "collaboration, conspiracy, or collusion." However, the main issue at trial was whether a plan existed; the aiding and abetting issue was largely conceded at trial. (Dkt. No. 184 at 40–43.) Weighing the different facts of this case, reasonable jurists would not disagree with our determination that the jury's use of the dictionary did not impact the verdict.

b. The Cook County judge's *ex parte* communications about the dictionary were not prejudicial

Santos also argues that the verdict may have been prejudiced by the judge's *ex parte* communication when delivering the dictionary. Santos correctly quotes our 2016 decision that "the communications ... had the *potential* to influence the jury's deliberation and render the trial unfair" (emphasis added) but that is not enough. (Dkt. No. 198 at 24.) *Ex parte* communications can be harmless error. *See Rushen v. Spain*, 464 U.S. 114, 117–18, 104 S. Ct. 453, 455 (1983). Because the use of the dictionary itself was not prejudicial, it strains the imagination to see how the conversation accompanying the delivery of the dictionary was prejudicial. Santos has not made a sufficient showing that his constitutional rights were denied, and therefore the certificate of appealability is denied on this issue.

2. New claims related to other *ex parte* communications

Santos argues additional *ex parte* communications relate back to his original petition that alleged prejudice from the judge's communication with the jury regarding the dictionary. (Dkt. No. 198 at 26.) Outside of the dictionary discussions, he cites to *ex parte* communications regarding verdict forms, answering juror questions, and what can best be described as general catch-all *ex parte* communications. (Dkt. No. 198 at 26–28.) Santos argues these communications constituted an impermissible pattern, and that we incorrectly denied his motion to file an amended habeas corpus petition to include additional claims based on these facts. *Id.* A habeas corpus petition does not relate back when the facts in support of the motion "differ in both time and type from those the original pleading set forth." *Mayle v. Felix*, 545 U.S. 644, 650, 125 S. Ct. 2562, 2566 (2005). Simply because the new claim is based on events that occurred during the same trial as the original claim does not warrant invocation of the relation back doctrine. *See id.* at 662, 125 S. Ct. at 2573–74.

*4 Turning specifically to Santos's argument that the *ex parte* communications discussing the verdict forms should be appended to the original petition, reasonable jurists would not debate that Santos should have included them in his original habeas petition. Santos learned about the jury request for new verdicts at the same time that he learned about the dictionary. (Dkt. No. 184 at 57.) He sought a new trial based in part on this communication yet failed to raise it in his direct appeal. *Id.* He also learned about jury's request for clarification of the verdict forms at trial. *Id.* As for the "other contacts" learned about during the evidentiary hearing, it would be antithesis to the finality that the Supreme Court's habeas corpus jurisprudence favors to allow a petitioner to add claims beyond the statute of limitations based on facts gleaned during the habeas corpus proceedings themselves.

Notwithstanding these procedural issues, Santos failed to show how these communications prejudiced him beyond a conclusory statement that they "undermine[ ] confidence in the fairness of the trial." (Dkt. No. 198 at 28.) He cites to a "failure to allow Petitioner to be present for all jury questions" and a "failure to make a proper record regarding all jury requests." (Dkt. No. 198 at 27–28.) He did not give any indication as to the content of these conversations to show how they prejudiced him. We are not convinced that reasonable jurists would come to a different conclusion or that the issues deserve encouragement to proceed further. Accordingly, the certificate of appealability is denied as to this issue.

3. *Brady* Claim

Santos also seeks to appeal our denial of his *Brady* claim. (Dkt. No. 198 at 29.) As we stated in our Order, in addition to showing that the prosecution withheld evidence that could be used to impeach witnesses at trial, a petitioner must also show the evidence was material, meaning the result would likely be different. *Santos I*, 2016 WL 7077104 at *9 (citing *Morgan v. Hardy*, 662 F.3d 790, 800 (7th Cir. 2011) and *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985)). Because only admissible evidence is material, *Jardine v. Dittman*, 658 F.3d 772, 777 (7th Cir. 2011), and the Illinois Appellate Court held that the evidence was inadmissible, it cannot be material. *Santos I*, 2016 WL 7077104 at *9. Even if it were admissible, the petition does not articulate

how it would have changed the verdict considering the other evidence presented at trial. Given the evidence does not meet *Brady*'s materiality requirement, we decline to issue a certificate of appealability for this claim.

B. Motion to Proceed *In Forma Pauperis* is denied with leave to refile

Although Santos filed his motion to proceed *in forma pauperis* in the proper court, he did not include the required information in the motion. The Federal Rules of Appellate Procedure however require certain financial details, a claim of entitlement to redress, and a statement of the issues presented on appeal. Fed. R. App. P. 24(a)(1). Santos only included a cursory statement about his financial situation and did not specific why he is entitled to redress or lay out the claims he intends to appeal. (Dkt. No. 205.) Because his motion lacked the information required by the Federal Rules of Appellate Procedure, it is denied with leave to refile.

CONCLUSION

Accordingly, for the reasons above, Santos's motion with respect to a certificate of appealability is denied and his motion to proceed *in forma pauperis* is denied with leave to refile.

It is so ordered.

All Citations

Slip Copy, 2021 WL 1561920

Footnotes

1 Santos bases his motion to proceed *in forma pauperis* on "the Effective Assistance of Counsel Clause of the Sixth Amendment to the Constitution of the United States, as well as 18 U.S.C. § 3006A." (Dkt. No. 205 at 1.) Motions to proceed *in forma pauperis* are governed by 28 U.S.C. § 1915(a) and Fed. R. App. P. 24, so we construed this motion to be filed under those authorities.

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2021 WL 40343
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

Carlos SANTOS, Petitioner,

v.

Christine BRANNON,[1] Respondent.

Case No. 15 C 5325
|
Signed 01/05/2021

Attorneys and Law Firms

Susan M. Pavlow, Law Offices of Susan M. Pavlow, Chicago, IL, Federal Defender Program, for Petitioner.

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

***1** Presently before us are Santos' objections to Magistrate Judge Finnegan's Report and Recommendation. (Objections (Dkt. No. 186).) Magistrate Judge Finnegan recommends that Santos' request for a writ of habeas corpus be denied. (Report and Recommendation ("R&R") (Dkt. No. 184).) For the reasons set forth below, we overrule Santos' objections, adopt the R&R, and deny Santos' habeas petition.

BACKGROUND

Santos' conviction stems from a May 2002 attempt to collect a drug debt valued at around $75,000 that resulted in a shootout and death of Jeffrey Smith. We assume familiarity with the relevant facts as detailed in our December 2, 2016 Order and our May 5, 2017 Order, and do not fully recount them here. *Santos v. Williams*, No. 15 C 5325, 2017 WL 2189102, at *1 (N.D. Ill. May 18, 2017); *Santos v. Williams*, No. 15 C 5325, 2016 WL 7077104, at *1 (N.D. Ill. Dec. 2, 2016).

Santos filed his § 2254 petition on June 16, 2015, challenging his felony first degree murder and discharge of a firearm convictions in Illinois state court. He asserted two claims. First, that the State violated his Fifth, Sixth, and Fourteenth Amendment rights when the trial judge communicated *ex parte* with the deliberating jury, provided them a dictionary, and failed to ascertain what the jury used it for after it was removed. Second, that the State violated his right to due process by failing to disclose material evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). We denied Santos' second claim, but determined that he was entitled to an evidentiary hearing on his first claim to determine whether and to what extent the *ex parte* communication and jury use of the dictionary prejudiced him. *See Santos I*, 2016 WL 7077104, at *10; *see also Santos II*, 2017 WL 2189102, at *1, *8. We appointed counsel to represent Santos at the hearing and referred the matter to Magistrate Judge Finnegan to conduct the evidentiary hearing and file a report and recommendation.

A. Evidentiary Hearings

At the evidentiary hearings, eleven former jurors testified (the twelfth had since died) and thereafter both parties filed briefs in support of their respective positions. (*See* Dkt. Nos. 145, 154, 162.) Juror David Majer testified that two or three jurors looked up a single word using the dictionary, for no more than two or three minutes. (R&R at 16-22, 38.) He testified that the word they looked up was "collaboration," "conspiracy," or "collusion." (*Id.*) A second juror, Erica Cuneen, testified that the jury requested a dictionary, but that she had only a "slight memory" of the event and that she did not recall how, if at all, the dictionary was used. (*Id.* at 16.) The other jurors had no memory of the dictionary usage. (*Id.*)

B. The Underlying Trial

As the Magistrate Judge observed, the jury was instructed that, to find Santos guilty of first degree murder, it had to find beyond a reasonable doubt that he (or one for whose conduct he was legally responsible) not only caused the death of the decedent but did so when attempting to commit the offense of residential burglary, aggravated kidnapping, or aggravated unlawful restraint. The jury was instructed that a "person is legally responsible for the conduct of another person when, either before or during the commission of an offense and with the intent to promote or facilitate the commission of an offense, he knowingly solicits, aids, abets, agrees to aid or attempts to aid the other person in the planning or commission of an offense." (*Id.* at 172, 83 S. Ct. 1194.) The jury was further instructed that an "attempt" occurs when "with the intent to commit the offense of residential burglary, aggravated kidnapping or aggravated unlawful restraint," a person "does any act which constitutes a substantial step toward the commission of" those offenses. (*Id.* at 174, 83 S.

Ct. 1194). The jury received separate instructions for each of those offenses.

*2 The jury deliberated for over four hours over two days and then signed a unanimous verdict finding Santos guilty of first-degree murder and having been armed with a firearm and personally discharged it during the commission of that offense. (Trial Transcript (Dkt. No. 18-27 at 196).)

About an hour and a half into the jury's deliberations, the trial judge summoned counsel for both sides to the courthouse and informed them that the jury requested a dictionary and that one had been given to the jury, and that the jury requested a new set of verdict forms. (Affidavit of Defense Counsel (Dkt. No. 18-31) at 239-40.) The jury retained possession of the dictionary for about one-and-a-half additional hours until it completed deliberation for the day. (*Id.* at 240, 83 S. Ct. 1194.) At Santos' request, the dictionary was not returned to the jury room the next day. (*Id.*) The spoiled verdict forms were preserved and reflect that four jurors had not signed any form and another juror had signed both guilty and not guilty forms on the first-degree murder charges. (*See* Dkt. Nos. 18-31 at 184-85, 194.)

LEGAL STANDARD

We review Magistrate Judge Finnegan's R&R *de novo*. Fed. R. Civ. P. 72(b)(3). In doing so, we may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the Magistrate Judge with instructions. *See id.* Arguments not made before a Magistrate Judge are waived, and "district courts should not consider arguments not raised initially before the Magistrate Judge, even though their review in cases ... is de novo." *United States v. Melgar*, 227 F.3d 1038, 1040 (7th Cir. 2000).

It "is well established that a habeas petitioner must prove prejudice in order to have his petition granted." *Hall v. Zenk*, 692 F.3d 793, 805-06 (7th Cir. 2012). "More specifically, he must show that the constitutional error had a 'substantial and injurious effect' on the outcome of his case." *Id.* at 805; *see also Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

ANALYSIS

Santos' objects to the R&R on the bases that it wrongly found no prejudice stemming from (1) burden shifting, (2) the jury's use of a dictionary during deliberations, (3) the state trial judge's *ex parte* communications with the jury about the dictionary, among other errors. Our holding mirrors the Magistrate Judge's thorough reasoning as set forth in her R&R. The Magistrate Judge's R&R recounted the evidence produced at Santos' trial, scrutinized the state court record, analyzed testimony at the evidentiary hearing conducted before the Magistrate Judge. She then addressed each of petitioner's arguments from his post-hearing brief.[2] (*See generally* R&R.) In short, she concluded that Santos did not suffer any prejudice as a result of the conduct underlying his objections.

I. Burden Shifting

Santos first asks that we overrule the Magistrate Judge's R&R's holding that he has the burden of establishing prejudice. As the Magistrate Judge correctly stated, a habeas petitioner bears the bears the burden of proving prejudice. *See, e.g.*, *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Hall v. Zenk*, 692 F.3d 793, 798 (7th Cir. 2012); *Santos I*, 2017 WL 2189102, at *8. Therefore, Santos' objection that the R&R applied the wrong burden is overruled.

II. Dictionary

*3 Santos next advances multiple objections relating to the dictionary. We address them in turn.

A. *State v. Aguilar*, 224 Ariz. 299, 301-02, 230 P.3d 358 (App. 2010)

Santos objects to the R&R in part because he claims that it misapplied a six-factor test that an Arizona state appellate court used. *State v. Aguilar*, 224 Ariz. 299, 301-02, 230 P.3d 358 (App. 2010). Arizona's court provided a helpful recitation of commonsense considerations when evaluating prejudice flowing from a jury's use of a dictionary. These are: (1) the importance of the word being defined to the resolution of the case; (2) the difference between the dictionary and legal definitions; (3) how the material was received by the jury, (4) the length of time it was available to the jury; (5) the extent to which the jury discussed and considered it; and (6) the timing of its introduction. *Id.*

Neither we nor Illinois' trial courts are bound to follow an Arizona state court's holding. Nonetheless, *Aguilar* is distinguishable from Santos' situation. Circuits throughout the country have found no prejudicial impact in cases like Santos' that involve a jury that uses a dictionary to define non-essential terms. *See, e.g.*, *United States v. Aguirre*, 108 F.3d 1284, 1289 (10th Cir. 1997); *United States v. Williams-Davis*, 90 F.3d 490, 502-03 (D.C. Cir. 1996); *United States v. Steele*, 785 F.2d 743, 745-47 (9th Cir. 1986). Santos' situation aligns with these circuit holdings. That leads us to the same holding as the Magistrate Judge made in her R&R.

B. Spoiled Verdict Forms

Santos also argues that the use of the dictionary, considering the spoiled verdict forms, results in prejudice. Alternatively stated, Santos objects on the basis that the R&R fails to acknowledge the correlation between the receipt of the dictionary and request for new verdict forms. He argues that before jurors received the dictionary and at around the time that they requested new verdict forms, five jurors were voting guilty, one was voting not guilty, and six were undecided (including the juror who signed both forms). According to Santos, the change in votes from not guilty and undecided to guilty suggests the jury's use of the dictionary swayed their votes. As the R&R explains, Santos failed to raise this issue on direct appeal. (R&R at 57.) As a result, such a claim is procedurally defaulted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 848, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999) (holding that federal habeas claims must first be presented in "one complete round" of state appellate review).

C. Juror Memories

Santos objects to R&R's conclusions as to juror memory. In doing so, Santos argues that the fact that some jurors remembered the dictionary and its consultation during deliberations, even though almost twelve years had elapsed, is enough to demonstrate its impact on the jurors. We disagree. Rather to the contrary of Santos' suggestion that "several jurors" remembered the dictionary, only two or three of the testifying jurors recalled it. We agree with the R&R's logic: If the dictionary definition indeed was the key to resolving a struggle among the jurors and contributed to jurors changing their minds, one would expect more jurors to remember the dictionary and even the definition that brought them to unanimity. (R&R at 37.)

D. Accountability

*4 Santos objects to the R&R's conclusion that "it is unlikely that the definition of the word collaborate, conspire, or collude was ... the key to the jury resolving an alleged struggle over his accountability for others' actions." (R&R at 43.) Indeed, there was an "accountability" jury instruction. (R&R at 45.) We agree with the R&R's holding because the short and general definitions of the words "collaborate," "conspire," or "collude," are fundamentally different that the jury's accountability instruction that defined what it takes to be "legally responsible" for and accountable for another's conduct. There is no evidence whatsoever that the jury used the dictionary to try to define a word like "accountability" or "legally responsible." And even if they did, that would not automatically foreclose the possibility that the jurors nevertheless followed the jury instructions' definitions.

E. Comparing Definitions

Like the preceding objection, Santos objects to the R&R on the basis that the Magistrate Judge compared the dictionary definitions of the words the jury defined to the jury instructions' words and definitions. Santos cites no law whatsoever in support of this objection. Indeed, we opine that no case law exists in support of Santos' position. In fact, we would have been inclined to reverse the R&R in this case had the Magistrate Judge *not* scrutinized the definitions of the words the jury defined alongside the jury instructions.

F. *Moore*, *Wiehart*, and *Hall*

Santos next objects to the Magistrate Judge's finding that three cases do not support Santos' petition with respect to the actual prejudice component. *See Moore v. Knight*, 368 F.3d 936 (7th Cir. 2004); *see also Wisehart v. Davis*, 408 F.3d 321 (7th Cir. 2005); *Hall*, 692 F.3d at 793. We agree with the Magistrate Judge's determination that these three cases do not support Santos' position.

First, as correctly distinguished by the Magistrate Judge, the Seventh Circuit reversed *Moore* for reasons that make it distinguishable from Santos' case. *See Moore*, 368 F.3d at 936. The main reason for *Moore*'s reversal was that the court failed to hear testimony from enough jurors to form

a consensus and applied the wrong standard of law. *Id.* at 937-38. Here, testimony has been heard from all living jurors and the correct standard of law has been applied.

The R&R also rightly found *Wisehart* unhelpful to Santos. *See Wisehart*, 408 F.3d at 326-27. *Wisehart* instructs that a court should conduct a hearing whenever extraneous information reaches the jury to inquire into whether the jury's impartiality is impacted. *Id.* We complied with *Wisehart*'s instructions because the Magistrate Judge conducted an evidentiary hearing to examine whether extraneous communications and information impermissibly reached and influenced the jury.

Last, Santos contends that the R&R misapplied *Hall*. *See Hall*, 692 F.3d at 795. In *Hall*, the jury learned during deliberations that Hall's prison inmates (one whom was the son of a juror) believed he was guilty, even though that information was not adduced at trial. *Id.* The Seventh Circuit held that the District Court should have held proceedings to allow the state to show countervailing facts that could alleviate prejudicial impact to the jury. *Id.* at 807. We agree with the factual distinctions drawn in the R&R the jury contacts at issue in Santos' case are vastly different from those in *Hall*.

For these reasons, Santos' objections to the R&R's application of *Moore*, *Wisehart*, and *Hall* are overruled.

G. Evidentiary Strength

Santos objects with the R&R's factual finding that the evidence on the record fails to establish a likelihood of prejudice. We find, however, that the evidence on the record at trial overwhelmingly supported a guilty verdict. This evidence included a videotaped confession by Santos where he admitted to his participation in the very kidnapping and burglary plot that ultimately led to a shootout and death. Plus, Santos testified at trial that he paid two officers to accompany him to collect the drug debt. These pieces of evidence, among others, are likely enough to support the guilty verdict despite the limited *ex parte* communications and the jury's use of a dictionary to define words not contained in the jury instructions. Objection overruled.

H. Curative Instructions

*5 Santos objects to the R&R's determination that the trial court's lack of a curative instruction regarding the dictionary was not prejudicial. We agree with the R&R's holding that Santos and his counsel failed to request a curative instruction and preserve the record. Even if they had done so, as the R&R explained, that failure to ask for a curative instruction at trial did not alter the result. Like the R&R explained, the "ultimate question is whether Santos has shown from the evidence that the jury's use of the dictionary had 'a substantial and injurious effect' on the outcome of the verdict ... or that there is a 'grave doubt as to the harmlessness of an error that affect substantial rights.' " (R&R at 53-54 (internal citations omitted).) Even had Santos requested a curative instruction, it would not have changed the trial's outcome. Objection overruled.

III. *Ex Parte* Communications About The Dictionary

Santos next objects to the R&R's conclusion that no prejudice resulted from the judge's *ex parte* communication with the jury about the dictionary. "The Supreme Court has made it clear that [t]he defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication." *United States v. Smith*, 31 F.3d 469, 472 (7th Cir. 1994) (internal citations and quotations omitted). "The Court has made it equally clear, however, that a defendant has a right, guaranteed by the Due Process Clause, to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Id.* In other words, the existence of *ex parte* communications does not automatically create a reversible error. *See United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985).

In *Smith*, for example, the Seventh Circuit concluded that certain *ex parte* communications between the judge and jury were prejudicial. *Smith*'s jury expressed concern over the fact that their private addresses had been made available to the criminal defendant's counsel. *Id.* at 472. The Seventh Circuit determined that the expression of concern about the disclosure of where they live may have indicated that the jurors already made up their minds, before the trial concluded, that the criminal defendant was guilty and posed a potential danger to them. *Id.* Accordingly, the Seventh Circuit held that the defendant had a right to be present during that conversation to ensure that the court's actions would not be interpreted as a confirmation of the jury's bias. *Id.*

Smith's *ex parte* communication is distinguishable from the instant case's communication. Here, the only *ex parte* communication that occurred consisted of the jury sending a note to the judge asking for a dictionary, and the judge responding by delivering one. (R&R at 55.) Since the R&R correctly concluded that Santos suffered no prejudice from the jury's use of the dictionary, it logically proceeds to rightfully find no prejudice resulting from communications about that dictionary.

IV. Other Alleged Errors

Santos advances a combined objection in a section to his brief entitled "Prejudice from Other Errors." (Objections at 49.) Those objections allege a pattern of *ex parte* communications between the judge and jury, and focus in on the jury's request for trial transcripts, the jury's request for new verdict forms, and the jury's request for a clarification of the verdict forms. We address these objections in turn.

We agree with the R&R's determination that the record does not support Santos' argument that the trial judge engaged in a pattern of improper prejudicial contacts with jurors. Nevertheless, these are new claims that were not described in the initial habeas petition. And these claims do not relate back to the original petition's filing date because they do not share a common core of operative fact. *See Mayle v. Felix*, 545 U.S. 644, 657-64, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005). Thus, to the extent that these new claims are based on a new set of facts, they are untimely under the one-year statute of limitations for habeas petitions, and we reject them. 28 U.S.C. § 2244(d).

***6** The *ex parte* communication for new verdict forms does not warrant habeas relief. As discussed above, although the judge did not consult with the parties in advance, he informed them as soon as they returned to court and made the spoiled forms part of the record. Santos procedurally defaulted this claim by having failed to preserve an objection to this on the record and failed to raise it on direct appeal. *See O'Sullivan*, 526 U.S. at 848, 119 S.Ct. 1728.

The *ex parte* communication regarding trial transcripts does not warrant habeas relief either. In Illinois, trial courts have discretion to give jurors such transcripts when they are available. *People v. McLaurin*, 235 Ill.2d 478, 337 Ill.Dec. 221, 922 N.E.2d 344, 353 (Ill. 2009). Therefore, the judge did not make a prejudicial error by following Illinois' own civil procedure. Moreover, Santos never complained at trial or on appeal about the transcripts. (R&R at 48.) Indeed, the prosecutor's trial notes indicate that both sides agreed to give transcripts to the jury. (Dkt. No. 154-1 at 3.)

Nor does the jury's communication with the judge for a "clarification" of the verdict forms warrant habeas relief. The record shows that, before responding to the jury's request for clarification, the judge called the parties into court to discuss the matter. (R&R at 57-58.) Then the parties agreed that the jury should be instructed to refer to the jury instructions' description on how to complete the verdict forms. (*Id.*)

For these reasons, we overrule Santos' objections to other alleged errors.

V. Santos' Request for Leave to File an Amended Habeas Petition

Included within Santos' brief is a perfunctory sentence that asks for leave to file an amended habeas petition to include the constitutional claims related to additional contacts between the judge and jury, and claims of ineffective assistance of counsel. (Objections at 54.) We deny that request because new claims based on new facts would be untimely under the one-year limitations period for habeas petitions. *See* 28 U.S.C. § 2244(d). That limitations period began running, at the latest, after the May 2018 hearings concluded. More than a year has since passed, and Santos has not provided any excuse for waiting so long until seeking such leave.

CONCLUSION

For the foregoing reasons, we overrule Santos' objections, adopt Magistrate Judge Finnegan's R&R, and deny Santos' habeas petition. It is so ordered.

All Citations

Slip Copy, 2021 WL 40343

Footnotes

1 Under Fed. R. Civ. P. 25(d), a public officer's successor is automatically substituted as a party. We hereby substitute the named respondent in this case from Randy Pfister to Cristine Brannon, the current warden of Hill Correctional Center. *See id.*

2 Santos does not advance an objection that the Magistrate Judge's R&R failed to consider one of his contentions.

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Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

Carlos SANTOS, Petitioner,

v.

Tarry WILLIAMS, Warden, Stateville Correctional Center, Respondent.

Case No. 15 C 5325
|
Signed 12/02/2016

Attorneys and Law Firms

Carlos Santos, Joliet, IL, pro se.

Matthew Philip Becker, Office of the Attorney General, State of Illinois, Chicago, IL, for Respondent.

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

***1** Presently before us is Carlos Santos' petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, we deny the petition in part and determine an evidentiary hearing and appointment of counsel are necessary to resolve Santos' remaining claim.

BACKGROUND AND PROCEDURAL HISTORY

I. Santos' Trial and Conviction

Following a jury trial in the Circuit Court of Cook County, Illinois, Santos was convicted of felony first degree murder, 720 ILCS 5/9–1(a)(3), and personal discharge of a firearm during the course of the crime. *See People v. Santos*, 2014 IL App (1st) 123129–U, ¶ 14 (1st Dist. Dec. 23, 2014) (Postconviction Order). The felony murder conviction was predicated on charges of attempted aggravating kidnapping, attempted residential burglary, and attempted aggravated unlawful restraint. (Direct Appeal Order, *People v. Santos*, No. 02 CR 15262 (1st Dist. 2009), State Ct. R., Ex. A (Dkt. No. 18–1) at 2.) He was sentenced to 55 years in prison. (*Id.*) Santos' conviction stemmed from a May 3, 2002 attempt to collect a drug debt that resulted in the shooting death of Jeffrey Smith. *Santos*, 2014 IL App (1st) 123129–U, ¶ 4. Santos, along with his brother-in-law Alexander Valencia, sold a kilogram of heroin worth $70,000 to the victim's father, James Smith. *Id.* James Smith took the drugs but never paid Santos and Valencia. *Id.* After several unsuccessful attempts to collect the money Smith owed for the drugs, and after Smith threatened to kill them if they came calling again, they hired two Cook County Sheriff deputies, John Lavelle and Estaban Perkins, to help them collect on the debt. *Id.* On May 3, 2002, Santos, Valencia, Lavelle, and Perkins traveled to the Smith home in two cars. *Id.* Valencia stayed in one car, while Santos, Lavelle, and Perkins approached the home. *Id.* Jeffrey Smith, James' adult son, answered the door armed with a "big gun." (Direct Appeal Order at 5.) Perkins ran back to Valencia's car and drove away, while Santos and Lavelle took cover. *Santos*, 2014 IL App (1st) 123129–U, ¶ 5. A shootout ensued, and Jeffrey Smith died two days later from gunshot wounds. *Id.* Lavelle fired the fatal shots. (Direct Appeal Order at 5.) Santos was also armed, and he told police that although his gun did not work, he pulled the slide and the gun discharged at least once. (*Id.*)

Santos and Valencia were tried jointly before separate juries. Santos' jury began deliberating at 6:35 p.m. on September 26, 2006. (Trial Tr., State Ct. R., Ex. AA (Dkt. No. 18–27) at OOO 196.) At some point during the evening, the jury sent a note to the judge requesting a dictionary. (Direct Appeal Order at 18; Trial Tr., State Ct. R., Ex. BB (Dkt. No. 18–28) at TTT 21.) The trial judge—off the record and without informing either the defense or prosecution—directed that a *Webster's* dictionary be delivered to the jury. (*Id.*) The parties were called into court later that evening, where they were notified, again off the record, that the jury was provided the dictionary. (Direct Appeal Order at 18; *see also* Aff. in Support of Mot. for New Tr., State Ct. R., Ex. EE (Dkt. No. 18-31) at C 238–39.) Defense counsel moved to restrict the jury from further use of the dictionary, and the jury was not given the dictionary the following day as they continued their deliberations on September 27, 2006. (*Id.* at C 239.) At 12:15 p.m. on September 27, 2006, the jury returned a guilty verdict. (Trial Tr., State Ct. R., Ex. BB (Dkt. No. 18–28) at PPP 5.) Santos moved for a new trial on several grounds, including that the judge improperly provided the dictionary. (Am. Mot. for New Tr., State Ct. R., Ex. EE (Dkt. No. 18–31) at C 238–39, 240–43.) The trial judge denied the motion on March 1, 2007. (Trial Tr., State Ct. R., Ex. BB (Dkt. No. 18–28) at TTT 8–22.)

II. Direct Appeal

*2 Santos appealed his conviction to the Illinois Appellate Court. Santos argued, among other things, that the trial judge violated his constitutional right to be present by communicating with the jury outside the presence of Santos or his counsel, and by supplying the jurors with a dictionary without consulting with the defense, inquiring as to why the jury asked for the dictionary, or determining whether it influenced their deliberations. (Direct Appeal Order at 18.) The Illinois Appellate Court rejected Santos' claim and upheld the conviction on July 14, 2009. (*Id.* at 20.) Santos then filed a petition for rehearing, arguing that, under state and federal law, the appellate court erred when it held the trial court did not abuse its discretion in communicating *ex parte* with the jury and in providing the jury a dictionary without defendant being present or having the opportunity to object or otherwise respond. (Direct Appeal Pet. for Reh'g, State Ct. R., Ex. F (Dkt. No. 18–6).) The Illinois Appellate Court summarily denied the petition for rehearing. (Pet. for Reh'g Order, State Ct. R., Ex. G (Dkt. No. 18–7).) Santos renewed his objection to the Illinois Supreme Court by filing a Petition for Leave to Appeal ("PLA"), and his petition was also summarily denied on March 24, 2010. (Direct Appeal PLA Order, State Ct. R., Ex. I (Dkt. No. 18–9).)

III. State Post-Conviction Proceedings

Santos then filed a postconviction petition, claiming that the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) by withholding material, exculpatory evidence consisting of an audio-recorded police interview with his mother, Aidali Oquendo. *Santos*, 2014 IL App (1st) 123129–U, ¶ 16. Oquendo retained a lawyer and went to the police station when she learned of Santos' arrest, and police questioned Oquendo in the presence of her lawyer while she was at the station. *Id.* ¶ 11.

Santos argued that part of the interview was recorded without his knowledge, and the recording documented Detective John Trahanas threatening his mother. *Id.* Specifically, Santos alleged that detectives told Oquendo that "if she did not answer their questions she would be charged with a crime." *Id.* ¶ 16. Santos further contended that the threats to Oquendo corroborated his allegations that detectives threatened him prior to his own video-recorded interrogation. *Id.* Before trial, Santos moved to suppress his video-recorded statement to police. *Id.* ¶¶ 10–13. He claimed that he was coerced into making the statement by detectives, who told him that if he refused to speak with them, "members of his family would be arrested," but if he "cooperate[d]" they would "let [him] go" and would not press charges against his family. *Id.* ¶ 10. Oquendo testified during the suppression hearing, but she did not mention being threatened by detectives. *Id.* ¶ 11. Santos contended that had he known about the audiotape of his mother's interrogation, he could have impeached Detective Trahanas' testimony at the hearing that no officers ever told Santos that "if he didn't help[,] his family would get locked up and that he would go to jail for life" or that "members of his family would be arrested." *Id.* ¶ 12.

The state circuit court dismissed Santos' postconviction petition on December 23, 2014. *Id.* ¶ 17. The Illinois Appellate Court denied Santos' appeal and affirmed the dismissal. *Id.* ¶ 24. Santos filed a Petition for Leave to Appeal to the Illinois Supreme Court, which was summarily denied on May 27, 2015. (Postconviction PLA Order, State Ct. R., Ex. P (Dkt. No. 18–16).)

IV. Federal Habeas Petition

Santos filed the instant federal habeas petition on June 16, 2015, asserting two grounds for relief, both of which were raised in state court and were adjudicated on the merits after a full round of state-court appellate review either on direct appeal or through post-conviction review. First, Santos contends the State violated his Fifth, Sixth, and Fourteenth Amendment rights because he was excluded from being present at a critical stage of his trial when the trial judge communicated *ex parte* with the deliberating jury and provided them with a dictionary. (Pet. at 5, 11–13.) Second, Santos claims the State denied his right to due process by failing to disclose material evidence in the form of an audiotape of the interview between the police and Oquendo in violation of *Brady v. Maryland.* (Pet. at 5, 14–16.) We may consider these claims on the merits as Santos exhausted his state court remedies. 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 1732 (1999); *Farrell v. Lane*, 939 F.2d 409, 411 (7th Cir. 1991).

STANDARD OF REVIEW

*3 To obtain habeas relief, a petitioner must establish that his state conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct. 475, 480 (1991). Our review is guided by the Antiterrorism and Effective Death Penalty Act of 1996, 28

U.S.C. § 2254 ("AEDPA"). *Hall v. Zenk*, 692 F.3d 793, 797 (7th Cir. 2012). Under AEDPA, a habeas petitioner must establish the proceedings in state court resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or that (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 363, 404–05, 120 S. Ct. 1495, 1519 (2000); *Morgan v. Hardy*, 662 F.3d 790, 797 (7th Cir. 2011). Determinations of factual issues made by a state court are presumed correct, and the petitioner bears the burden of rebutting this presumption with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Sumner v. Mata*, 449 U.S. 539, 547, 101 S. Ct. 764, 769–70 (1981).

First, a state court's decision is contrary to clearly established Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [it]." *Williams*, 529 U.S. at 405, 120 S. Ct. at 1519; *see also Morgan*, 662 F.3d at 797; *Woods v. McBride*, 430 F.3d 813, 816–17 (7th Cir. 2005).

Second, a state court's decision is an "unreasonable application" of clearly established Supreme Court precedent "if the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of a particular prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407–08, 120 S. Ct. at 1521; *Morgan*, 662 F.3d at 797. A state court's application of Supreme Court precedent must be more than incorrect or erroneous; it must be "objectively" unreasonable. *Williams*, 529 U.S. at 410, 120 S. Ct. at 1522 ("[A] federal habeas court may not issue the writ simply because that court concludes ... that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."); *see also Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 785 (2011) ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of that decision."). Under this standard, to be unreasonable, the decision of the state court must lie "well outside the boundaries of permissible differences of opinion." *Watson v. Anglin*, 560 F.3d 687, 690 (7th Cir. 2009) (quoting *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002)); *see also Henderson v. Briely*, 354 F.3d 907, 909 (7th Cir. 2004) ("[T]he question before a federal court on collateral review ... is only whether the state court's decision was so far out-of-bounds as to be 'unreasonable.' ").

ANALYSIS

I. CLAIM ONE: INTERFERENCE WITH JURY DELIBERATIONS

Santos first contends the government deprived him of his right to assistance of counsel, the right to be present during all critical stages of his trial, and his right to due process under the Fifth, Sixth, and Fourteenth Amendments. (Pet. at 11–12.) Santos argues that the state trial court erred in answering the jury's note and providing the jury a dictionary without informing Santos or his counsel, without recording the proceedings, and without inquiring as to why the jury requested the dictionary or what words they sought to define. (*Id.* at 5, 11–13.) He claims he was prejudiced by the errors because the dictionary was an extraneous source of information the jury may have relied upon to define legal terms that influenced guilt or innocence, or "to construct [their] own definition of legal terms that do not accurately or fairly reflect applicable law." (*Id.* at 12.) He also argues that he was prejudiced because he was not afforded an opportunity to inquire as to the reason the jury requested the dictionary or to investigate whether it resulted in the jury applying incorrect law. (*Id.* at 12–13.)

***4** On direct appeal, the Illinois Appellate Court applied an abuse of discretion standard and held the trial court "did not err in providing the jury with a dictionary as that decision was well within the judge's discretion." (Direct Appeal Order at 19.) It similarly held that "the trial court did not err in failing to inquire as to what words the jury sought to define ... [because] that decision was well within the discretion of the trial court." (*Id.*) Three issues flow from the appellate court's decision and are raised by Santos' petition: (1) whether the *ex parte* communication between the judge and jury violated Santos' constitutional rights to counsel and to be present at all critical stages of the proceedings; (2) whether his constitutional rights were violated by allowing the jury to consider information outside the evidence presented at trial and apart from their own beliefs and experiences; and (3) whether the alleged errors caused actual prejudice.

A. *Ex Parte* Communication With the Jury

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right ... to be confronted with the witnesses against him," including the right to be present in the courtroom at all critical stages of the criminal proceedings. U.S. Const. amend. VI; *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 1058 (1970); *see also Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 455 (1983) ("Our cases recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant."); *Moore v. Knight*, 368 F.3d 936, 940 (7th Cir. 2004); *Ellsworth v. Levenhagen*, 248 F.3d 634, 640 (7th Cir. 2001). "The Due Process Clause supplements this right by protecting the defendant's right to be present during some stages of the trial where the defendant's ability to confront a witness against him is not in question—*ex parte* communications between the judge and jury fall into this category." *Moore*, 368 F.3d at 940 (citing *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 1484 (1985)).

However, the "mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right," nor does a defendant have "a constitutional right to be present at every interaction between a judge and a juror" or "to have a court reporter transcribe every such communication." *Gagnon*, 470 U.S. at 526, 105 S. Ct. at 1484 (quoting *Rushen*, 464 U.S. at 125–26, 104 S. Ct. at 459 (Stevens, J., concurring in judgment)); *see also Ellsworth*, 248 F.3d at 640 ("But the constitutional right to presence is not implicated per se by a judge's *ex parte* communication with the jury during deliberations."). Rather, a defendant has "a due process right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge,' " but only " 'to the extent that a fair and just hearing would be thwarted by his absence.' " *Gagnon*, 470 U.S. at 526, 105 S. Ct. at 1484 (quoting *Snyder v. Com. of Mass.*, 291 U.S. 97, 108, 54 S. Ct. 330, 333 (1934) (overruled on other grounds)). "Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 2667 (1987).

Accordingly, the question is whether "the *ex parte* communication had a prejudicial effect on the defendant, and so infected the trial process as to make the trial as a whole fundamentally unfair." *Ellsworth*, 248 F.3d at 640 (internal quotations and citations omitted); *see also Snyder*, 291 U.S. at 115, 54 S. Ct. at 336 (explaining that the "justice or injustice of [the defendant's] exclusion must be determined in the light of the whole record"). "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 450 (1954); *accord. Hall*, 692 F.3d at 802 ("[T]he *Remmer* presumption is clearly established federal law as defined by AEDPA."). "The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer*, 347 U.S. at 229, 74 S. Ct. at 450. Generally, "[i]t is well-settled that once the jury has begun to deliberate, counsel must be given an opportunity to be heard before the trial judge responds to any juror inquiry," and any discussion "concerning the jury inquiry and the court's response must take place on the record in the presence of the defendant." *United States v. Smith*, 31 F.3d 469, 471 (7th Cir. 1994) (explaining this requirement is grounded in the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment).

***5** At a minimum, "*Remmer* requires further inquiry if an 'extraneous communication to [a] juror [is] of a character that creates a reasonable suspicion that further inquiry is necessary to determine whether the defendant was deprived of his right to an impartial jury.' " *Hall*, 692 F.3d at 802 (alterations in original) (quoting *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005)). "How much inquiry is necessary (perhaps very little, or even none) depends on how likely was the extraneous communication to contaminate the jury's deliberations." *Wisehart*, 408 F.3d at 326 (holding a defendant was entitled to a hearing, "however abbreviated" to determine the impact of the *ex parte* communication with the jury). Generally, a court should "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Remmer*, 347 U.S. at 229–30, 74 S. Ct. at 451.

Here, the Illinois Appellate Court dispatched Santos' claim in brief fashion, concluding there was no error because it "was well within the judge's discretion" to provide the jury with a dictionary without inquiring as to what words the jury sought to define. (Direct Appeal Order at 19.) The court cited two state court decisions, neither of which addressed any federal

or constitutional issues. *See People v. Zeiger*, 100 Ill. App. 3d 515, 519, 426 N.E. 2d 1229, 1233 (3d Dist. 1981) (finding "[f]urnishing a dictionary is a matter within the discretion of the trial court and should be available as part of the common knowledge of jurors, at least in the absence of any indication of prejudice to defendant"); *People v. Petty*, 160 Ill. App. 3d 207, 213, 513 N.E. 2d 486, 489–490 (3d Dist. 1987) (citing *Zeiger* and finding no error in the court's decision to deny the jury's request for a dictionary without inquiring as to what words the jury sought to define). While framing its judgment in terms of state law, the Illinois Appellate Court's affirmance necessarily rejected the constitutional claims Santos raised, including his argument that the *ex parte* communication with the jury and the judge's decision to deliver a dictionary to the jury violated his Sixth and Fourteenth Amendment rights to due process and to be present at all critical stages of his trial. (*See* Direct Appeal Br., State Ct. R., Ex. D (Dkt. No. 18–3) at 37–42.)

We agree with Santos that the communication between the judge and jury, after deliberations had commenced, occurred during a critical stage of trial. *Gagnon*, 470 U.S. at 526, 105 S. Ct. at 1484. Further, it is uncontroverted that neither Santos nor his counsel were present in court when the judge responded to the jury's note and sent a dictionary to the jury. The decision was made off the record and without the defendant's knowledge or ability to object. This intrusion had the potential to influence the jury's deliberations and render the trial unfair. *Stincer*, 482 U.S. at 745, 107 S. Ct. at 2667 (holding a defendant has a right to be present at any stage of trial that is "critical to its outcome" and if "his presence would contribute to the fairness of the procedure").

Santos raised these constitutional arguments before the state courts, but the state appellate court did not acknowledge, much less address Santos' constitutional right to be present during this critical stage at trial. The court ignored well-established constitutional standards in reaching the cursory conclusion that it was within the trial court's discretion to provide the jury with a dictionary without consulting the defendant or his attorney. More importantly, the state courts failed to make any inquiry into to whether the *ex parte* contact with the jury resulted in prejudice to Santos. For instance, the state courts never addressed the reason prompting the jury's request for the dictionary. Therefore, we cannot know whether and to what extent the dictionary may have influenced the jury's deliberations, and ultimately, their verdict. *See, e.g.*, *Moore*, 368 F.3d at 943 (granting a habeas petition where the state court's "factual findings never actually addressed what the jury was told during the *ex parte* communications —this half of the inquiry is a necessary component of any determination of prejudice"). Suppose, for example, the jury used the dictionary craft an understanding of "reasonable doubt," a term courts have routinely found it is error to define. *See, e.g.*, *United States v. Blackburn*, 992 F.2d 666, 668 (7th Cir. 1993) ("We have reiterated time and again our admonition that district courts should not attempt to define reasonable doubt."); *People v. Evans*, 199 Ill. App. 3d 330, 339, 556 N.E.2d 904, 909 (4th Dist. 1990) ("Neither the court nor counsel should attempt to define the reasonable doubt standard for the jury."). Likewise, if the jury requested the dictionary in order to define a key term used in the jury instructions, Santos could have objected or requested alternate relief, including that a supplemental instruction be given instead. *See, e.g.*, *United States v. He*, 245 0F.3d 954, 958–59 (7th Cir. 2001) (explaining that "when a jury has asked for a definition of a key term after deliberations have begun," a court may "fail[ ] to treat [the] issue fairly or adequately" if it does not issue a supplemental instruction). The definitions and meaning ascribed to words used in jury instructions are of crucial importance to the jury's ultimate determination, and to the extent that a dictionary definition was substituted, it may inaccurately reflect the applicable law set forth in the instructions. Because Santos was excluded from the conversation and not permitted an opportunity to know about, much less suggest a response to the jury's question, these issues were left unexplored.

***6** While trial judges have "broad discretion to respond to questions propounded from the jury during deliberations," this discretion does not outweigh the defendant's right to be present during all critical stages of trial and to have the judge's decisions affecting the defendant's substantial rights decided in open court and on the record. *United States v. Young*, 316 F.3d 649, 661 (7th Cir. 2002) (citing *United States v. Watts*, 29 F.3d 287, 291 (7th Cir. 1994)). Thus, although the trial court may have been afforded substantial discretion, the problem here is the court communicated on its own with the deliberating jury and provided them with an outside source of information without Santos or his attorney present. Moreover, neither the trial court nor the appellate court performed any investigation whatsoever as to whether the communication prejudiced Santos. The Illinois Appellate Court's decision affirming the conviction was accordingly objectively unreasonable and "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for

fairminded disagreement." *Richter*, 562 U.S. at 103, 131 S. Ct. at 786–87.[1]

B. Jury Consideration of Extraneous Information

Santos also contends that if provided the opportunity, he would have objected to the jury's use of the dictionary, because it is an outside source of information that may have tainted the jury's deliberations. "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 549 (1965) (quoting*Sinclair v. United States*, 279 U.S. 749, 765, 49 S. Ct. 471, 476 (1929)). "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Id.* at 472–73 (internal quotation marks omitted); *see also Parker v. Gladden*, 385 U.S. 363, 364–65, 87 S. Ct. 468, 470–71 (1966) (holding a criminal defendant has the right to be tried by twelve "impartial and unprejudiced jurors" without "outside influence"); *Remmer*, 347 U.S. at 229, 74 S. Ct. at 451 ("The integrity of jury proceedings must not be jeopardized by unauthorized invasions."); *Oswald v. Bertrand*, 374 F.3d 475, 477 (7th Cir. 2004) ("The due process clause of the Fourteenth Amendment entitles a state criminal defendant to an impartial jury, which is to say a jury that determines guilt on the basis of the judge's instructions and the evidence introduced at trial, as distinct from preconceptions or other extraneous sources of decision." (internal citations omitted)).

*7 A new trial is not required every time there is in an external influence on a jury. *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 946 (1982) ("[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation."); *see also Hall*, 692 F.3d at 805 (holding a defendant must establish he was actually prejudiced by the state court's constitutional error). However, "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences.... Such determinations may properly be made at a hearing like that ordered in *Remmer.*" *Phillips*, 455 U.S. at 217, 102 S. Ct. at 940; *see also Oswald*, 374 F.3d at 477–78 ("In addition—and this is critical—due process requires the trial judge, if he becomes aware of a possible source of bias, to 'determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial.' " (quoting *Remmer*, 347 U.S. at 230, 74 S. Ct. at 451)). The "ultimate inquiry" as to prejudice is whether "the intrusion affect[ed] the jury's deliberations and thereby its verdict." *United States v. Olano*, 507 U.S. 725, 739, 113 S. Ct. 1770, 1780 (1993). The level of inquiry required must be commensurate with the level of doubts raised about the jury's impartiality. *Oswald*, 374 F.3d at 480–83 (holding the state appellate court's "perfunctory" discussion and "condonation of the lack of a minimally timely, minimally adequate, investigation [into jury bias] was an unreasonable application of *Remmer v. United States* and *Smith v. Phillips*" because the court failed to address the issue of jury prejudice and "said *nothing* beyond the naked conclusion that the judge had done enough").

There is no question Santos' jury was exposed to extraneous information during their deliberations. As with the *ex parte* nature of the judge's decision to provide the jury with the dictionary, the state courts unreasonably and improperly failed to consider whether the jury's use of the dictionary comported with Santos' clearly established constitutional rights. Moreover, the courts failed to conduct any inquiry whatsoever into whether the *ex parte* communications or the extraneous information caused prejudice to Santos—as discussed above, there is no record of the proceedings during which Santos' attorneys learned about the dictionary on the evening of September 26, 2002, and it appears no review, much less a hearing as contemplated by *Remmer*, took place after his attorney learned about the dictionary and objected. (*See, e.g.*, Aff. in Support of Mot. for New Tr., State Ct. R., Ex. EE (Dkt. No. 18–31) at C 238–39.) Likewise, when Santos asked for a new trial, based in part on the *ex parte* decision to provide the jury the dictionary, the trial court confirmed that it conducted no inquiry into why the jury requested the dictionary or what they used it for. (Trial Tr., State Ct. R., Ex. BB (Dkt. No. 18–28) at TTT 21–22) ("I can tell you how [the] Webster's Dictionary was sent back to the jury. It was a note requesting a dictionary. Neither party was present, and I directed a Webster's Dictionary be forwarded to the jury. I did not inquire what word was in question or if they wanted Black's Dictionary. That was not the tenure of the note itself.... The motion is respectfully denied."). The state appellate court also condoned the lack of a hearing, concluding that the trial court acted "well within its discretion" in giving the jury the dictionary. (Direct Appeal Order at 19.)

As Santos observes, and for the reasons discussed above, it is reasonable under these circumstances to infer that the jury requested and used the dictionary to define legal terms that influenced the jury's determination of guilt. *See, e.g., Moore*, 368 F.3d at 943 (failing to inquire about the content of third-party communications with the jury was error as such an inquiry is a "necessary component of any determination of prejudice"). The court's decision was an unreasonable application of clearly established federal law, which requires some inquiry as to whether an outside intrusion on the jury's deliberations caused prejudice—particularly here, where the dictionary potentially contaminated the jury's deliberations. *See, e.g., Parker*, 385 U.S. at 364–65, 78 S. Ct. at 470–71 (finding that a bailiff's statement to jurors that the defendant was a "wicked fellow" and "guilty" constituted an "outside influence" that violated the defendant's Sixth Amendment right to confrontation and a fair trial (internal quotations omitted)); *Turner*, 379 U.S. at 473–74, 85 S. Ct. at 550 (finding a violation of defendant's Sixth Amendment rights where two deputies were assigned to guard the jury and also were witnesses called to testify at trial);*Remmer*, 347 U.S. at 229, 74 S. Ct. at 451 (finding an alleged bribe to a juror in exchange for a favorable verdict was presumptively prejudicial tampering with the jury, requiring a hearing in which all parties may participate); *Oswald*, 374 F.3d at 483 (finding the state appellate court's discussion of the potential jury bias issue was "perfunctory" where it "said nothing beyond the naked conclusion that the judge had done enough" and where the inquiry into bias was "too truncated" to be constitutionally sound). Thus, Santos was entitled to a hearing, "however abbreviated," to determine whether he was prejudiced by the jury's use of the dictionary, but the state court failed to apply *Remmer* or any reasonable version of it. *Wisehart*, 408 F.3d at 326; *accord. Hall*, 692 F.3d at 805. The Illinois Appellate Court's opinion affirming Santos' conviction unreasonably applied clearly established Supreme Court law such that no "fairminded jurists" would agree with its reasoning or its conclusion. *See Richter*, 131 S. Ct. at 786–87.

C. **Prejudice**

***8** Next, we must determine whether the violation of Santos' constitutional rights caused prejudice and affected the jury's verdict. *Rushen*, 464 U.S. at 120, 104 S. Ct. at 456 (holding an *ex parte* communication conducted off the record was a harmless error, but explaining "[t]his is not to say that *ex parte* communications between judge and juror are never of serious concern or that a federal court on habeas may never overturn a conviction for prejudice resulting from such communications"); *Hall*, 692 F.3d at 805 ("The *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."). "For reasons of finality, comity, and federalism, habeas petitioners 'are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' " *Davis v. Ayala*, 135 S. Ct. 2187, 2197, *reh'g denied,* 136 S. Ct. 14 (2015) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 1722 (1993)); *accord. O'Neal v. McAninch*, 513 U.S. 432, 439, 115 S. Ct. 992, 996 (1995); *Hall*, 692 F.3d at 805; *Jones v. Basinger*, 635 F.3d 1030, 1052 (7th Cir. 2011). Habeas relief must be granted if "grave doubt" exists as to whether the trial error had a "substantial and injurious effect or influence in determining the jury's verdict." *O'Neal*, 513 U.S. at 436, 115 S. Ct. at 994; *Jones*, 635 F.3d at 1052. "[W]hen a federal court is in equipoise as to whether an error was actually prejudicial, it must 'treat the error, not as if it were harmless, but as if it affected the verdict.' " *Davis*, 135 S. Ct. at 2211 (quoting *O'Neal*, 513 U.S. at 435, 115 S. Ct. at 992).

Where a state court error resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law, we resolve the prejudice issue "unencumbered by the deference AEDPA normally requires." *Panetti*, 551 U.S. at 948, 127 S. Ct. at 2855; *see also Rompilla v. Beard*, 545 U.S. 374, 390, 125 S. Ct. 2456, 2467 (2005) (reviewing the prejudice requirement for an ineffective assistance of counsel claim de novo after identifying a § 2254(d)(1) error in the state court's evaluation of the performance requirement); *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 2542 (2003) (reviewing the prejudice prong of an ineffective assistance of counsel claim "not circumscribed by a state court conclusion" where the state courts failed to reach the issue). The Illinois Appellate Court failed to consider the prejudicial impact of the outside influences on the jury's deliberations, and we therefore evaluate prejudice without deference to the state court. *Panetti*, 551 U.S. at 948, 127 S. Ct. at 2855. Because the state courts abdicated their duty to hold a hearing or investigate why and how the jury used the dictionary, we cannot make a prejudice determination based on the record before us. *See, e.g., Hall*, 692 F.3d at 806. There is no record reflecting the content of the trial judge's *ex parte* communication with the jury or the circumstances under which the trial judge provided the jury with the dictionary, and we have no facts before us indicating the reason the jury

asked for the dictionary or what they ultimately used it for. (*See, e.g.*, Aff. in Support of Mot. for New Tr., State Ct. R., Ex. EE (Dkt. No. 18–31) at C 238–39; Trial Tr., State Ct. R., Ex. BB (Dkt. No. 18–28) at TTT 21–22.)

Accordingly, an evidentiary hearing must be held to determine whether the jury's communication with the judge and its use of the dictionary had a prejudicial impact on the verdict. *Hall*, 692 F.3d at 805–06; *Jordan v. Hepp*, 831 F.3d 837, 848–50 (7th Cir. 2016). We deem the *ex parte* communication and the introduction of the dictionary into the jury's deliberations presumptively prejudicial, and the government will bear the heavy burden of establishing these outside influences on the jury were harmless. *Remmer*, 347 U.S. at 229, 74 S. Ct. at 451; *Hall*, 692 F.3d at 807. Although our inquiry is circumscribed by Federal Rule of Evidence 606(b)(1), which prohibits certain juror testimony regarding what occurred in a jury room, Rule 606(b)(2)(B) creates an exception permitting jurors to testify about whether "an outside influence was improperly brought to bear on any juror." *See Warger v. Shauers*, —— U.S. ——, 135 S. Ct. 521, 524 (2014). To the extent jurors are questioned about their deliberations, the questions asked must be limited to the content of the outside information and whether it reached the jury. *Hall*, 692 F.3d at 806. We may also "determine—without asking the jurors anything further and emphatically without asking them what role the communication played in their thoughts or discussion—whether there is a reasonable possibility that the [outside information] altered their verdict." *Id.* (quoting *Haugh v. Jones & Laughlin Steel Corp.*, 949 F.2d 914, 917 (7th Cir. 1991)). Along with inquiry into the nature of the outside influence on the jury, we may also consider, among other things, the power of any curative instructions at trial and the strength of the legitimate evidence presented by the State. *Id.* at 807. With these guiding principles in mind, we conclude Santos is entitled to an evidentiary hearing to determine whether and to what extent the *ex parte* communication and outside influence of the dictionary contaminated the jury's deliberations.

II. CLAIM TWO: *BRADY* VIOLATION

***9** Santos also claims the State violated *Brady v. Maryland* in failing to disclose an alleged audiotape of Detectives Trahanas' interview with his mother, Aidali Oquendo, which he argues impeaches Detective Trahanas' suppression hearing testimony, and is therefore material. Detective Trahanas testified during the suppression hearing that he did not threaten Santos or tell him that the police would arrest his family if he failed to cooperate with them. *Santos*, 2014 IL App (1st) at ¶¶ 12, 20. Santos argues that had he known about the audiotape—which he alleges shows detectives threatened Oquendo and told her that if she did not answer their questions, she would be charged with a crime—he could have impeached Detective Trahanas at the suppression hearing when the detective denied that he ever threatened Santos.

Pursuant to *Brady*, the prosecution has an affirmative duty to disclose to a criminal defendant "any evidence favorable to an accused which is material either to guilt or to punishment." 373 U.S. at 87–88, 83 S. Ct. at 1197; *accord. Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001). "The suppression of such evidence deprives the defendant of a fair trial and thus violates due process." *Boss*, 263 F.3d at 740 (citing *Brady*, 373 U.S. at 86–87, 83 S. Ct. at 1196). To establish a *Brady* violation, a petitioner must first prove that the prosecution "failed to give him evidence favorable to his defense, that would tend to show his innocence, or that could be used to impeach witnesses at trial." *Morgan*, 662 F.3d at 800 (citing *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196–97). Second, a petitioner must show that the evidence was material, meaning "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985). "The reasonable probability standard for materiality of suppressed evidence is less rigorous than a preponderance of the evidence standard in that a petitioner need only show that the new evidence undermines confidence in the verdict." *Goudy v. Basinger*, 604 F.3d 394, 399 (7th Cir. 2010) (citing*Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555 (1995)); *accord. Strickler v. Greene*, 527 U.S. 263, 290, 119 S. Ct. 1936, 1952 (1999) ("[T]he question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" (internal quotations omitted)). Only admissible evidence can be material. *Jardine v. Dittman*, 658 F.3d 772, 777 (7th Cir. 2011).

In Santos' postconviction proceedings, the Illinois Appellate Court applied *Brady* and concluded the allegedly withheld evidence was not material. *Santos*, 2014 IL App (1st) at ¶ 22. The state court reasoned that Detective Trahanas' testimony at the suppression hearing was not "materially inconsistent" with the alleged threats to Oquendo, and therefore, would not be admissible impeachment evidence under Illinois law. *Id.* (citing *Schiff v. Friberg*, 331 Ill. App. 3d 643, 656, 771 N.E.2d 517, 529 (1st Dist. 2002)). Generally, "inadmissible evidence

is immaterial," and federal courts in habeas proceedings "defer to state-court descriptions of state law even if they do not agree with those descriptions," unless state rules must yield to federal rights. *Jardine*, 658 F.3d at 777 (citing *Estelle*, 502 U.S. at 67–68, 112 S. Ct. at 480; *Sussman v. Jenkins*, 636 F.3d 329, 352 (7th Cir. 2011); *George v. Smith*, 586 F.3d 479, 484 (7th Cir. 2009), *cert denied*, 130 S. Ct. 3414 (2010)).

The Illinois Appellate Court correctly articulated the law with respect to the disclosure of *Brady* evidence and concluded that the alleged favorable evidence was inadmissible under state law as it would not affect Detective Trahanas' credibility, and we defer to the state court's reasonable determination. *Jardine*, 658 F.3d at 777. Moreover, "[i]t is an unsettled question whether *Brady* applies to pretrial suppression hearings," and therefore, we cannot determine that the state court's decision was contrary to or an unreasonable determination of clearly established federal law. *United States v. Thomas*, 835 F.3d 730, 734 (7th Cir. 2016). In any case, even if the tape was admissible, Santos has failed to show that introducing the tape would have cast "the whole case in such a different light as to undermine confidence in the verdict." *Greene*, 527 U.S. at 290, 119 S. Ct. at 1952. Santos argues that evidence of Detective Trahanas' interrogation of his mother corroborates his allegation that Detective Trehanas improperly interrogated Santos, but this argument fails for several reasons. First, the state court found that the alleged taped interview with Oquendo took place two days after Santos had already made his inculpatory statement to detectives. Further, it is not clear that Detective Trahanas used improper techniques or that his statements to Oquendo after Santos' interrogation had any bearing on the admissibility of Santos' confession. Finally, even if Santos' videotaped confession was excluded, he has not shown it would undermine confidence in the verdict, particularly in light of his other statements to police at the time of his arrest and the weight of the other evidence against him. Accordingly, for the foregoing reasons, we deny Santos' petition as to Claim Two.

CONCLUSION

***10** For the reasons set forth above, we determine Santos is entitled to an evidentiary hearing on Claim One of his petition in order to determine whether he was prejudiced by the state court's *ex parte* communication with the jury and the jury's consideration of a dictionary during their deliberations. Under Rule 8(c) of the Rules Governing § 2254 Cases, we hereby appoint counsel to aid Santos in the evidentiary hearing to be conducted before Magistrate Judge Sheila Finnegan. The Magistrate Judge after conducting the hearing shall file a Report and Recommendation as to Claim One. Santos' petition is denied with respect to the *Brady* claim raised in Claim Two. A status hearing is set before this Court on March 2, 2016. It is so ordered.

All Citations

Not Reported in Fed. Supp., 2016 WL 7077104

Footnotes

1 Respondent argues that Santos' claim must be denied because "the Supreme Court has never held that a trial judge must consult the defense before providing a jury with a dictionary." (Resp't Br. at 6–7.) We think this too narrow a reading of § 2254(d)'s mandate. *See, e.g., Panetti v. Quarterman,* 551 U.S. 930, 953, 127 S. Ct. 2842, 2858 (2007) ("That the standard is stated in general terms does not mean the application was reasonable. AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.' ") (quoting *Carey v. Musladin*, 549 U.S. 70, 81, 127 S. Ct. 649, 656 (2006) (Kennedy, J., concurring)); *see also, e.g., Lockyer v. Andrade,* 538 U.S. 63, 76, 123 S. Ct. 1166, 1175 (2003) ("Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced."); *Williams*, 529 U.S. at 382, 120 S. Ct. 1495 (Stevens, J., concurring) ("[R]ules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule.").

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United States District Court,
N.D. Illinois, Eastern Division.

Carlos SANTOS, Petitioner,

v.

Tarry WILLIAMS, Warden, Stateville Correctional Center, Respondent.

Case No. 15 C 5325
|
Signed 05/18/2017

Attorneys and Law Firms

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Matthew Philip Becker, Office of the Attorney General, Chicago, IL, for Respondent.

MEMORANDUM OPINION AND ORDER

Marvin E. Aspen, United States District Judge

***1** Presently before us is Respondent's motion for reconsideration of our December 2, 2016 Order requiring an evidentiary hearing on Petitioner Carlos Santos' petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Dkt. No. 42.) For the reasons set forth below, we grant in part and deny in part the motion for reconsideration.

BACKGROUND

We assume familiarity with the relevant facts as detailed in our December 2, 2016 Order and thus do not fully recount them here. *Santos v. Williams*, No. 15 C 5325, 2016 WL 7077104 (N.D. Ill. Dec. 2, 2016). Santos filed his § 2254 petition on June 16, 2015 challenging his felony first degree murder and discharge of a firearm convictions in Illinois state court. He asserted two claims: (1) the state violated his Fifth, Sixth, and Fourteenth Amendment rights when the trial judge communicated *ex parte* with the deliberating jury, provided them a dictionary, and failed to ascertain what the jury used it for after it was removed; and (2) the state violated his right to due process by failing to disclose material evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). *Id.* at *2. We denied Santos' second claim, but determined he was entitled to an evidentiary hearing on his first claim to determine whether and to what extent the *ex parte* communication and jury use of the dictionary caused prejudice to Santos. *Id.* at *10. We appointed counsel to represent Santos at the hearing and referred the matter to the Magistrate Judge to conduct the evidentiary hearing and file a Report and Recommendation. *Id.* On February 10, 2017, Respondent filed the instant motion for reconsideration to which Santos, now represented by counsel, responded.

LEGAL STANDARD

Federal Rule of Civil Procedure 54(b) provides that a court may alter or amend an interlocutory order any time before entry of judgment. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12, 103 S. Ct. 927, 935 (1983). ("[E]very order short of a final decree is subject to reopening at the discretion of the district judge."); *Mintz v. Caterpillar Inc.*, 788 F.3d 673, 679 (7th Cir. 2015) (courts have discretion to reconsider an interlocutory order at any time prior to final judgment). Motions to reconsider interlocutory orders "serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996) (quoting *Keene Corp. v. Int'l Fidelity Ins. Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982)). "A manifest error is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (internal citations omitted). We may also "reconsider a prior decision when there has been a significant change in the law or facts since the parties presented the issue to the court, when the court misunderstands a party's arguments, or when the court overreaches by deciding an issue not properly before it." *United States v. Ligas*, 549 F.3d 497, 501 (7th Cir. 2008). While motions to reconsider are permitted, "they are disfavored." *Patrick v. City of Chi.*, 103 F. Supp. 3d 907, 911 (N.D. Ill. 2015) (finding the party bringing a motion for reconsideration "bears a heavy burden, and motions for reconsideration are not at the disposal of parties who want to rehash old arguments"); *see also Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990) (observing motions to reconsider should be rare as the circumstances permitting relief rarely arise).

ANALYSIS

***2** Respondent's motion for reconsideration raises several issues. First, Respondent argues that to the extent our December 2, 2016 Order relied on *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450 (1954) in determining Santos was entitled to an evidentiary hearing, Respondent justifiably "had not discerned a *Remmer* claim in the habeas petition" and consequently did not discuss the issue in answering the petition. (Mot. for Reconsideration ("Mot.") (Dkt. No. 42) at 6). Second, Respondent argues that Santos procedurally defaulted a *Remmer* claim by failing to seek a hearing in state court. (*Id.* at 7–10.) Third, default aside, Respondent contends that Santos' claim is barred and he is not entitled to an evidentiary hearing under 28 U.S.C. § 2254(e) because he failed to adequately build a record in state court. (*Id.* at 10–11.) Fourth, Respondent asserts that to the extent the December 2, 2016 Order establishes a new retroactive rule of procedure on collateral appeal, it is improper under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). (*Id.* at 11–12.) Finally, in the alternative, Respondent contends that to the extent an evidentiary hearing is required, we should clarify the burden of proof to be applied. (*Id.* at 12–13.)

I. PROCEDURAL DEFAULT

Respondent first argues that reconsideration is appropriate here because our liberal interpretation of Santos' petition "brought to the parties' attention an important issue that was not previously apparent to them," namely, a "potential claim under *Remmer v. United States*, 347 U.S. 227 (1954), that respondent understandably did not see in the petition." (Reply Br. (Dkt. No. 55) at 3.) Respondent's answer did not discuss *Remmer*, but he argues we should excuse this potential waiver and now consider an argument that Santos procedurally defaulted "any claim that the state courts failed to afford petitioner a *Remmer* hearing (or apply a *Remmer* presumption at such a hearing)." (Mot. at 7.)

Our December 2, 2016 Order set forth three issues raised by Santos' petition:

> (1) whether the *ex parte* communication between the judge and jury violated Santos' constitutional rights to counsel and to be present at all critical stages of the proceedings; (2) whether his constitutional rights were violated by allowing the jury to consider information outside the evidence presented at trial and apart from their own beliefs and experiences; and (3) whether the alleged errors caused actual prejudice.

Santos, 2016 WL 7077104, at *4. Respondent's motion does not appear to take issue with our decision on either of the first two issues. Rather, he contends we erred in finding an evidentiary hearing was necessary to determine whether the violation of Santos' constitutional rights caused prejudice.

The Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment provide defendants the right to be present at all critical stages of criminal proceedings. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 1058 (1970); *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 1484 (1985); *Moore v. Knight*, 368 F.3d 936, 940 (7th Cir. 2004). Likewise, the Sixth and Fourteenth Amendments protect a defendant's right to an impartial jury, one free of external influences affecting the jury's deliberations. *Parker v. Gladden*, 385 U.S. 363, 364–65, 87 S. Ct. 468, 470–71 (1966); *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 549 (1965); *Oswald v. Bertrand*, 374 F.3d 475, 477 (7th Cir. 2004). The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215, 102 S. Ct. 940, 945 (1982). However, *ex parte* communications or extraneous influences on a jury's deliberations will only violate a defendant's rights where such intrusions caused prejudice to the defendant, meaning the intrusion affected the jury's deliberations and thereby its verdict. *See United States v. Olano*, 507 U.S. 725, 739, 113 S. Ct. 1770, 1780 (1993); *Phillips*, 455 U.S. at 217, 102 S. Ct. at 946; *Gagnon*, 470 U.S. at 526, 105 S. Ct. at 1484. Thus, due process requires the trial judge "to determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial." *Remmer*, 347 U.S. at 230, 74 S. Ct. at 451; *see also Phillips*, 455 U.S. at 217, 102 S. Ct. at 946 ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer*.").

***3** Santos' petition adequately stated his claim and was sufficient to alert Respondent of the relevant issues. Santos' petition stated:

> Under the Fifth, Sixth and Fourteenth Amendment Right of the United States Constitution as well as Rule 43 of the Federal Rules of Criminal Procedure and/or the State of Illinois Constitution 1970 Article I Sec. 8, all criminal

> defendants have the right to due process, the right to assistance of counsel as well as the right to be present in the courtroom during trial.
>
> An ex parte communication between the judge and the jury after the jury has retired to deliberate, except one held in open court and in the Petitioner's presence, violates Petitioner's constitutional right to be present. Petitioner was further prejudiced by the abuse of discretion from the trial judge['s] ex parte communication with the jury when he failed to determine what word(s) or legal term(s) the jury sought to define, and failed to clarify what the exact question or questions the jury had. It is reasonable to assume that the jury sought clarification on legal terms that influenced its guilt or innocence determination. It is also reasonable to assume that the jury may have used the Webster's Dictionary to construct its own definition of legal terms that do not accurately or fairly reflect applicable law.

(Pet. at 11–12.) Santos' petition further asserted:

> Had Petitioner been allow[ed] the opportunity to participate and be present at this critical stage of his trial, he would had [sic] objected to the introduction of the Webster's Dictionary and ask[ed] the trial judge to clarif[y] the nature of the jury's specific question or questions, but since [sic] the judge did not allow Petitioner this opportunity until after the introduction of the dictionary on the next day, when Petitioner's defense Attorney requested that the dictionary not be given to the jury when it resumed its deliberations. And since the trial judge failed to clarify the jury's confusion and potentially allowed the jury to apply the law incorrectly, therefore Petitioner's Constitutional Rights were violated and was prejudiced by the abuse of discretion of the trial judge's error.

(*Id.* at 12–13.) In his reply brief in support of his petition, Santos also argued "it is a fundamental principle that the trial court has an obligation to seek clarification of the jury's confusion if their question is unclear, and to then attempt to clarify the matter of law in which the jury has become confused" and that he "was prejudiced by the trial court when [the court] failed to ascertain what word or words the jury sought to define, which resulted in the reasonable possibility that the jurors used the dictionary to construct its own definition of legal terms that do not accurately or fairly reflect the applicable law." (Reply Br. (Dkt. No. 33) at 2–3.) Santos specifically argued in reply that the trial judge had a duty to determine "whether the jury actually substituted the dictionary definition of a legal term for that given in the [jury] instructions" and if so, whether such use of the dictionary resulted in prejudice Santos. (*Id.* at 7.) Likewise, Santos again set forth the constitutional rights he argued the state court ignored:

> ***4** (A) his right to a public trial, (B) his right to counsel at "a critical stage of the proceedings," (C) his right to appear and participate in person and by counsel at all proceedings that involve his substantial rights, (D) the trial court's duty to clarify the jury's confusion, (E) and whether the use of the Webster's Dictionary, the trial court's ex parte communication and/or the petitioner's absence at "a critical stage of the trial" resulted in prejudice to the petitioner.

(*Id.* at 4.)

"In determining whether a claim has been fairly presented, we liberally construe pro se petitions." *Ward v. Jenkins*, 613 F.3d 692, 697 (7th Cir. 2010) (citing *Johnson v. Hulett*, 574 F.3d 428, 433 (7th Cir. 2009)). Read liberally, Santos' pro se petition set forth a claim that the *ex parte* communication with the jury and the jury's consideration of extraneous information violated his rights under the Fifth, Sixth, and Fourteenth Amendments, and he was prejudiced by the state courts' failure to inquire as to why and how the jury used the dictionary. Moreover, insofar as Respondent suggests Santos did not make clear until his reply brief his contention that the state courts failed to inquire as to whether the intrusion on the jury's deliberations caused prejudice, (Mot. at 6), Respondent could have moved at that time to strike or to file a surreply.

Respondent has accordingly forfeited the procedural default defense he now raises for the first time on reconsideration. *Trest v. Cain,* 522 U.S. 87, 89, 118 S. Ct. 478, 480 (1997) ("[P]rocedural default is normally a defense that the State is obligated to raise and preserv[e] if it is not to lose the right to assert the defense thereafter." (internal quotations omitted)). Respondent has not raised a manifest error of law or presented newly discovered evidence excusing his failure to raise the defense before we issued a decision on Santos' motion. *See, e.g., Caisse Nationale de Credit Agricole*, 90 F.3d at 1269. In any event, we are unconvinced the defense would be successful on the merits.

To avoid procedural default, a state prisoner must "exhaust the remedies available in the courts of the State ... by giving the state courts an opportunity to act on his claims." *Thomas v. Williams*, 822 F.3d 378, 384 (7th Cir. 2016) (internal citations and quotations omitted). In doing so, a petitioner must "fairly present[ ] ... in concrete, practical terms" the federal claim such that "the state court was sufficiently alerted to the federal constitutional nature of the issue to permit it to resolve that

issue on a federal basis." *Ellsworth v. Levenhagen*, 248 F.3d 634, 639 (7th Cir. 2001) (quoting *Kurzawa v. Jordan*, 146 F.3d 435, 442 (7th Cir. 1998)); *accord. Perruquet v. Briley*, 390 F.3d 505, 519 (7th Cir. 2004) ("[H]e must, in some manner, alert the state courts to the federal underpinnings of his claim."). To determine whether a constitutional issue has been fairly presented, we consider four factors: 1) whether the petitioner relied on federal cases that engage in a constitutional analysis; 2) whether the petitioner relied on state cases that apply a constitutional analysis to similar facts; 3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and 4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation. *Ward*, 613 F.3d at 696 (quoting *Ellsworth*, 248 F.3d at 639); *see also Sweeney v. Carter*, 361 F.3d 327, 332 (7th Cir. 2004); *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001).

***5** At each level of state court review, Santos raised his claim that his Sixth and Fourteenth Amendment rights were violated when the judge provided a dictionary to the jury without the defense's knowledge or consultation, without providing him an opportunity to respond, and by failing to "clarify the reason why the jury wanted a dictionary in the first place" or what words they may have looked up. (Direct App. Br. (Dkt. No. 18–3) at 37–42; Direct App. Reply (Dkt. No. 18–5) at 6–9; Pet. for Rehrg. (Dkt. No. 18–6) at 1–5; PLA (Dkt. No. 18–8) at 3–4, 7–11.) He consistently asserted the state failed to meet its burden of establishing the interference with the jury's deliberations caused no prejudice to him, because the trial court "failed to ascertain what word or words the jury sought to define, which resulted in the reasonable possibility that the jurors used the dictionary to construct its own definitions of legal terms that might not accurately or fairly reflect the applicable law." (*See* Direct App. Br. at 37 (citing *People v. Mitchell*, 152 Ill. 2d 274, 341, 604 N.E.2d 877, 910 (1992)).) Santos relied on state cases that apply a constitutional analysis, including *Mitchell*, which set forth "well settled" principles governing "extra-record communication with jurors," including that "any communication with a juror during trial about a matter pending before the jury is deemed presumptively prejudicial to a defendant's right to a fair trial. Although this presumption of prejudice is not conclusive, the burden rests upon the State to establish that such contact with the jurors was harmless to defendant." 152 Ill. 2d at 341, 604 N.E.2d at 910 (citing *Remmer*, 347 U.S. at 229, 74 S. Ct. at 451). Santos also relied on *People v. Bryant*, 176 Ill. App. 3d 809, 815, 531 N.E.2d 849, 853 (1st Dist. 1988). (Direct App. Br. at 40–41; Pet. for Rehrg. at 3–5; PLA 9–10.) *Bryant* likewise affirmed that the state must show beyond a reasonable doubt that the defendant was not prejudiced by an *ex parte* communication between the judge and jury. *Id.* (finding the defendant was prejudiced because, in answering the deliberating jury's request for transcripts without informing the defense, the court failed to "inquire[ ] further to determine whether the jury desired specific testimony, and what specific testimony they wanted," making it "impossible to determine whether substantial rights were affected: we therefore acknowledge the possibility that they were, and proceed from that assumption").

Further, Santos framed the issues in terms so particular as to call to mind a specific constitutional right, and he alleged a pattern of facts that is well within the mainstream of constitutional litigation. *See Verdin v. O'Leary*, 972 F.2d 1467, 1480 (7th Cir. 1992) (asserting claims based on a defendant's rights to "be present at critical stages of his trial" and to "a fair trial" are "terms ... particular enough to call to mind a defendant's right—stemming from the Sixth Amendment and Fourteenth Amendment—to be present at his trial"); *Ellsworth*, 248 F.3d at 639 (asserting a petitioner has a "right to be present" is enough to alert the state courts that he "potentially pressed a federal constitutional claim" and avoid procedural default on his habeas claim). Santos has fairly presented his claim before the state courts, and the fact that he did not directly cite *Remmer* does not now foreclose any reliance on the constitutional principles stated therein. *See Ellsworth*, 248 F.3d at 639 (a petitioner is "not required to cite the Constitution 'book and verse' to preserve his federal claim.") (citing *Picard v. Connor*, 404 U.S. 270, 278, 92 S. Ct. 509, 513 (1971)); *Perruquet*, 390 F.3d at 512 ("Whatever gaps there may be in [defendant's] petition and supporting memorandum, the basic rationale of [defendant's] due process argument is readily discernible"). Santos raised his claims "with enough detail to have sufficiently alerted the state court to his federal constitutional claim" and the substance of his argument has remained the same. *Ward*, 613 F.3d at 697. We therefore find that Respondent cannot sustain a procedural default defense even if it had been timely raised.

Relying on *People v. Cart*, 102 Ill. App. 3d 173, 186–87, 429 N.E.2d 553, 564–65 (2d Dist. 1981), Respondent also asserts Santos' claim is defaulted because "Illinois procedural rules require a defendant who seeks a *Remmer* hearing to ask for one; trial judges need not conduct such a hearing sua sponte." (Mot. at 7; *see also* Reply Br. at 7 (citing *Cart* for the proposition that a defendant who fails to request a *Remmer* hearing "has no legal entitlement on appeal to receive

a remand for such a hearing").) Respondent overstates *Cart*'s holding. In *Cart*, defendants learned that a juror received a telephone call from the bailiff, who inquired as to the outcome of the case, and the juror responded that they would be back in court the next morning. 102 Ill. App. 3d at 186, 429 N.E.2d at 563–64. Defendants argued on appeal that they were prejudiced by the communication and by the court's failure to hold a hearing to determine if the communication "may have tainted the jury." *Id.* The court considered the communication and found no prejudice resulted. *Id.* ("It is difficult to imagine how this single question, without any showing it was coupled with an attempt to influence the juror's decision, could deny defendants their right to an impartial jury.") The court considered the prejudice inquiry in light of the fact that the defense failed to make any response when they learned about the communication and given the record clearly showed defense counsel did not request a hearing at the time. *Id.* at 187, 429 N.E.2d at 564. The court found that although "the better practice" would have been to interview the juror in the presence of counsel, the trial judge did not abuse its discretion in failing to do so. *Id.* at 187, 429 N.E.2d at 564–65. While the *Cart* court found persuasive the clear record showing a lack of a request for a hearing, we see nothing in *Cart* establishing a "procedural rule" requiring such a request.

***6** Nor are we persuaded, as Respondent urges, that *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016) forecloses Santos' claim. (Mot. at 8.) While *Cardena* found its "review is made particularly difficult in light of the fact that Defendants did not request a hearing," it did not bar the claim outright. 842 F.3d at 976. Moreover, *Cardena* relied on the fact that the defendants failed to object, and contrary to Respondent's assertion that Santos' state-court counsel "did not ask for a chance to question the jurors," (Mot. at 10), there was in fact no record of the proceedings during which the trial court informed the attorneys about the dictionary and at which the attorneys objected to its use. Accordingly, it is not clear from the record whether Santos' attorneys requested a hearing, a chance to question the jurors, or other relief. However, Santos plainly raised the alleged constitutional violation at the time it occurred, in a request for a new trial, and on appeal, but his claims were rebuffed without further inquiry at every step.

II. SECTION 2254(e)(2)

Respondent further asserts that § 2254(e) prohibits an evidentiary hearing on Santos' claim. (Mot. at 10–11.) Section 2254(e)(2) "bars a district court from conducting an evidentiary hearing or otherwise permitting an expansion of the evidentiary record in support of a habeas claim if the petitioner failed to develop the factual basis for his claim in state court." *U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219, 239 (7th Cir. 2003). Under § 2254(e)(2), "a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432, 120 S. Ct. 1479, 1488 (2000). A prisoner exercises diligence where he "made a reasonable attempt, in light of the information available at the time, to investigate and pursue his claims in state court." *Id.* at 435, 120 S. Ct. at 1490. Here, the defense was informed the trial judge provided the jury with a dictionary in an exchange that took place off the record. (Direct App. Order, *People v. Santos*, No. 02 CR 1562 (1st Dist. 2009), State Ct. R., Ex. A (Dkt. No. 18–1) at 18; Am. Mot. for New Trial, State Ct. R., Ex. EE (Dkt. No. 18–31 at C 238–39.)) The state appellate court noted the lack of a record, but found it irrelevant to its decision. (Direct App. Order at 18.) In any case, the dictionary was not returned to the jury the following day. (Am. Mot. for New Trial at C 239.) Santos again raised the issue before the trial judge in a motion for a new trial immediately after the verdict. (*Id.* at C 240–43; Trial Tr. (Dkt. No. 18–28) at TTT 12–15, 21–22.) He likewise raised his claim and set forth the factual basis for it before the appellate courts. Accordingly, we do not find Santos lacked diligence in pursuing his claim in state court.[1] *Williams*, 529 U.S. at 435, 120 S. Ct. at 1490. He is now relying on the same claim and factual basis in his § 2254 petition. Because Santos was reasonable in his efforts to litigate his claim in state court and did not contribute to the absence of a full and fair adjudication in state court, § 2254(e)(2) does not prohibit an evidentiary hearing on his claim in federal court. *Id.* at 437, 120 S. Ct. 1491.

III. NON-RETROACTIVITY DOCTRINE

***7** Respondent next argues that "[i]f this Court were somehow persuaded to recast petitioner's *Remmer* claim as involving a new procedural rule," then under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), the "non-retroactivity doctrine would bar retroactive enforcement of any such rule here." (Mot. at 11–12.) Respondent contends the *Teague* bar would apply if we find "for instance, that *Remmer* extends to interactions between judge and jurors, as opposed to interactions between jurors and third parties; that trial judges must hold a *Remmer* hearing sua sponte if the defendant does not request one; or that jurors' receipt of a dictionary always warrants a *Remmer* hearing or presumption." (*Id.* at 11.) "Under the *Teague* framework, an old rule applies both

on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S. Ct. 1173, 1180 (2007). As this is a habeas case, and our review is constrained by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, we are not creating any new rule, nor are we applying any Supreme Court precedent decided after Santos' direct appeal became final. Accordingly, there is no basis for denying Santos' claim on this ground, and to the extent Respondent has suggested otherwise, he construes Santos' claim too narrowly.

IV. BURDEN OF PROOF

In the alternative, Respondent argues that if an evidentiary hearing is necessary, the burdens of proof at the hearing must shift between the parties. Respondent asserts the prejudice inquiry should entail three steps, the first of which requires a determination as to "what extraneous information actually reached the jurors, and whether that kind of information is 'egregious' or highly likely to cause prejudice." (*Id.* at 12.) Respondent argues "because the burden at this stage is petitioner's, his claim must fail if none of the available former jurors can remember what words, if any, were looked up" and similarly, his claim may fail "even if there is no conclusive evidence in the State's favor." (*Id.* at 12–13.) Next, Respondent contends "Stage 2" requires the court to "decide whether petitioner was prejudiced under *Remmer*" and the burden of proof "depends upon what word was looked up and how 'egregious' or facially prejudicial it appears." (*Id.* at 13.) Finally, Respondent argues "if petitioner's claim survives the first two stages, then he must shoulder the burden at Stage 3 of establishing 'actual prejudice' under *Brecht*." (*Id.*)

We believe clarification as to the parties' burdens of proof is necessary. In cases involving a potential intrusion upon a jury's deliberations, a presumption of prejudice may be appropriate in some, but not all cases. *Hall v. Zenk*, 692 F.3d 793, 801 (7th Cir. 2012) (such a presumption "is, in fact, vital, though its use should not be automatic regardless of the level of prejudicial impact that is likely to flow from a given intrusion"). Regardless of whether a presumption of prejudice applies "as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" *Olano*, 507 U.S. at 739, 113 S. Ct. at 1780. "[T]he extraneous communication to the juror must be of a character that creates a reasonable suspicion that further inquiry is necessary to determine whether the defendant was deprived of his right to an impartial jury. How much inquiry is necessary (perhaps very little, or even none) depends on how likely was the extraneous communication to contaminate the jury's deliberations." *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005). In Santos' case, the state court "failed to apply this test or any reasonable variant of it," finding only that the trial judge acted "well within the discretion of the court" in summarily denying Santos' claim. *Id.* Thus, there was no inquiry at all into whether the dictionary contaminated the jury's deliberations. As we have previously explained, and as Santos has argued, it is reasonable to infer the jury may have used the dictionary for an improper purpose, including constructing their own definitions of legal terms that do not accurately or fairly reflect applicable law. Thus, some inquiry, "however abbreviated" was necessary to determine what impact the dictionary had on the jury's verdict. *Id.* We reiterate that an evidentiary hearing is now necessary to make this determination.

*8 However, to obtain habeas relief, Santos bears the burden of establishing that the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 1714 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)); *Hall*, 692 F.3d at 798. "The *Brecht* standard reflects the view that a 'State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error.' " *Davis v. Ayala*, —— U.S. ——, 135 S. Ct. 2187, 2198 (2015) (quoting *Calderon v. Coleman*, 525 U.S. 141, 146, 119 S. Ct. 500, 503 (1998)). But, "when a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief." *O'Neal v. McAninch*, 513 U.S. 432, 445, 115 S. Ct. 992, 999 (1995). Thus, Santos must show that he was actually prejudiced by the *ex parte* communication with the jury or the introduction of the dictionary into the jury's deliberations. Insofar as our December 2, 2016 Order suggested otherwise, we hereby correct our previous instructions to reiterate that Santos must prove actual prejudice in order to have his petition granted. *Brecht*, 507 U.S. at 622, 113 S. Ct at 1714; *Hall*, 692 F.3d at 806–07.

CONCLUSION

As set forth above, Respondent's motion to reconsider our December 2, 2016 Order is granted in part and denied in part. This matter remains referred to Magistrate Judge Sheila

M. Finnegan to conduct a hearing and file a Report and Recommendation as to Claim One. A status hearing is set before this Court on August 24, 2017. It is so ordered.

All Citations

Not Reported in Fed. Supp., 2017 WL 2189102

Footnotes

1 Respondent also implies that Santos should have raised a *Remmer* claim via a postconviction motion pursuant to 725 ILCS 5/122–2. (Mot. at 10; Reply Br. at 9.) However, Respondent provides no authority showing Santos was required to do so. "Rather, a postconviction proceeding is a collateral attack upon the prior conviction and affords only limited review of constitutional claims not presented at trial. The scope of the proceeding is limited to constitutional matters that have not been, nor could have been, previously adjudicated. Any issues that could have been raised on direct appeal, but were not, are procedurally defaulted, and any issues that have previously been decided by a reviewing court are barred by res judicata." *People v. Harris*, 224 Ill. 2d 115, 124–25, 862 N.E.2d 960, 966 (Ill. 2007). Because Santos raised his Sixth and Fourteenth Amendment claims on direct appeal, it is not clear that he could have done so in a postconviction motion, though parallel appeals may be permitted. *Id.* at 128, 862 N.E.2d at 968–69.

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