

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 2021

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No.

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CARLOS SANTOS,  
Petitioner,

v.

CHRISTINE BRANNON-DORTCH, Warden,  
Respondent.

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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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## **QUESTION PRESENTED FOR REVIEW**

In *Remmer v. United States*, 347 U.S. 227 (1954), the United States Supreme Court held that when extraneous information enters into a jury's deliberations, the state is required to establish a defendant was not prejudiced. This petition presents the question of whether the state is still required to bear the burden at a *Remmer* hearing when the issue is litigated in the context of a habeas corpus petition, where a petitioner must establish prejudice, and is necessary to resolve a split in the circuits.

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Petitioner, Carlos Santos, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on August 20, 2021, as an order denying the application for a certificate of appealability finding no substantial denial of a constitutional right. *Santos v. Brannon-Dortch*, No. 21-1227.

## **OPINIONS BELOW**

The order of the Court of Appeals is reported at 901 F.3d 785. That opinion is attached as Appendix A-1 to this petition. The opinion of the district court denying the certificate of appealability is not reported, and is attached as Appendix A-2 to this petition. *Santos v. Brannon*, 2021 WL 1561920. The district court's ruling denying the habeas petition is not reported, and is attached as Appendix A-3 to this petition. *Santos v. Brannon*, 2021 WL 40343. The district court's order granting a hearing to determine the effect of the dictionary on the jury's deliberations is not reported and is attached as Appendix A-4 to this opinion. *Santos v. Williams*, 2016 WL 7077104. The district court's order reversing its decision and requiring Petitioner to bear the burden at the *Remmer* hearing is not reported and attached as Appendix A-5 to this petition. *Santos v. Williams*, 2017 WL 2189102.

## **JURISDICTIONAL STATEMENT**

The Court of Appeals for the Seventh Circuit entered its judgment on August 20, 2021, and petitioner did not seek rehearing. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1).

## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

The Sixth Amendment to the United States Constitution guarantees a citizen's right to a fair trial by an impartial jury. U.S. Const. amend. VI.

## STATEMENT OF THE CASE

In *Remmer v. United States*, 347 U.S. 227 (1954), the United States Supreme Court established that 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.” *Id.* at 228. Once discovered, “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.” *Id.*

Here, extraneous information entered the jury’s deliberations when the trial court communicated with the jury and provided a dictionary during deliberations without making a record or notifying the parties. As a result, Petitioner was entitled to a *Remmer* hearing where the state bore the burden to show he was not prejudiced by the outside influence. Neither the trial court nor state appellate court granted a *Remmer* hearing and Petitioner was required to raise the issue in a writ of habeas corpus. The district court granted a hearing finding the state court unreasonably applied clearly established federal law. However, because the issue was raised in a habeas petition, where Petitioner bears the burden to show prejudice, the *Remmer* burden was erroneously placed on Petitioner at the hearing.

This decision directly contradicts the law of the Ninth Circuit Court of Appeals which holds the state to its burden of proof in a *Remmer* hearing before deciding whether a petitioner has proven prejudice sufficient to grant a habeas petition. The district court’s opinion also misinterprets existing Seventh Circuit law, which

upholds *Remmer* in a habeas context. However, the Seventh Circuit declined to grant a certificate of appealability. By approving the district court’s procedure, it contradicted its own precedent and established a split in the circuits. While this is a limited procedural circumstance, it is an important issue of constitutional significance that requires this Court to resolve the split in the circuits, and to apply its holding in *Remmer* when assessing an error in a habeas petition to ensure that a criminal defendant receives a fair trial without impermissible outside influences infecting the verdict.

## **I. Proceedings in the District Court**

Petitioner Carlos Santos (“Santos”) filed a Petition for a Writ of Habeas Corpus (“Petition”) pursuant to 28 U.S.C. §2254 challenging his conviction and fifty-five (55) year sentence for murder in the Illinois state court. The Petition raised several issues, including the trial court’s error of communicating *ex parte* with the jury and introducing a dictionary into the jury’s deliberations. The trial judge received a note from the jurors requesting a dictionary, and failed to inform the parties, preserve the note, or record the proceeding. It made no inquiry about why the jury requested the dictionary or what words they sought to define. In the habeas petition, Santos asserted that the dictionary was an extraneous source of information the jury may have relied upon to define legal terms that influenced the verdict. 2016 WL 7077104 at \*3.

At trial, defense counsel was summoned back to the courtroom after an hour and a half of deliberations believing the jury had reached a verdict. Instead, he

learned the court had provided additional verdict forms to the jury without consulting defense counsel and outside of Santos's presence. No note was retained or made part of the record, but the first set of verdict forms, which were preserved, reflected a clear split between a guilty and not guilty verdict. Two jurors signed the not guilty form for first-degree murder; six jurors signed the guilty form; four jurors were undecided. An additional verdict form to determine whether Santos was armed with a firearm, and thus should receive the twenty-year consecutive sentence, was signed by only five jurors. Four jurors, did not sign any of the spoiled verdict forms.

Additionally, defense counsel learned that a dictionary had been sent back to the jury. Without consulting attorneys or making a record, the trial court unilaterally provided a dictionary in response to the jury's note. Like the verdict forms correspondence, it was not preserved in the record. The dictionary remained with the jurors until they were sequestered at 9:35 p.m. The following day, the jury found Santos guilty of first-degree murder, and determined that he personally discharged a firearm, which mandated a consecutive twenty-five year sentencing enhancement to the murder charge.

The issue only came to light in the motion for new trial as defense counsel submitted an affidavit detailing what occurred. At a post-trial hearing, the judge admitted he provided a Webster's Dictionary to the jury at their request without consulting the parties. He did not inquire about what word was in question or if they wanted a Black's Law Dictionary. He acknowledged the jury sent a written note, but

the transcripts, as well as the common law record, contain no reference to a dictionary.

Santos further raised the issue in a direct appeal but the verdict was upheld, citing no error. *Id.* at \*4. If relief been granted at that stage, the state would have held the burden to disprove the prejudicial impact of the extraneous information pursuant to *Remmer*. Santos subsequently filed a petition for writ of habeas corpus in the Northern District of Illinois.

On December 2, 2016, after review of the habeas petition, the District Court determined that the Illinois Appellate Court unreasonably applied clearly established federal law and ordered a hearing pursuant to *Remmer* to determine whether there was a prejudicial impact on the verdict against Santos as a result of: (1) the jury's communication with the judge; and (2) the jury's use of the dictionary. In doing so, it "deem[ed] the *ex parte* communication and the introduction of the dictionary into the jury's deliberations presumptively prejudicial" and ordered that "the government will bear the heavy burden of establishing these outside influences on the jury were harmless." *Id.* at \*8. While the district court initially adhered to *Remmer* by ordering the government to bear the burden of showing the *ex parte* communication and the jury's receipt of the dictionary were harmless, upon the state's motion to reconsider, it reversed its decision. It noted that "a presumption of prejudice may be appropriate in some, but not all cases" such as the instant case where a habeas petition required the petitioner to establish prejudice pursuant to *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Santos v. Williams*, 2017 WL 2189102 at \*7. As a result, Santos was required

to “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” because the case was before the court on a writ of habeas corpus *Id.* at \*8. The district court erroneously conflated the two standards of proof, as both may exist in the same proceeding.

Eleven former jurors testified at the hearing which established that a dictionary was introduced and utilized during deliberations. Despite the lengthy passage of time, two to three jurors specifically recalled utilizing the dictionary to look up a word. One juror testified:

I think it was something to do with collaboration because it involved this person and someone else might have shot the person regarding this felony murder. We wanted to find a definition of what I think - conspiracy, maybe it was conspiracy, or collusion or something like that. That was the definition we were looking for. And I might be wrong, it just shot into my mind but that might have been it.

*Id.* at 19- 20. According to the juror, the definition was likely read aloud and that the jury spent time discussing what he had seen in the dictionary. The dictionary remained in the jury room the rest of the day, for approximately two hours. Another juror also recalled that jurors looked up words in the dictionary during deliberations and recalled requesting the dictionary while a third juror testified that the jury had a question “about what [that] means, first degree. But -- that’s all. This is just the only thing I remember.” Hearing Transcript 12/12/17 at 87-88. Any further inquiry on this comment was barred by Federal Rule of Evidence 606(b). Fed. R. Evid. 606(b)(1); *United States v. Lawson*, 677 F.3d 629, 647 (4th Cir. 2012) (the juror can testify whether the outside influence was consulted and related to the panel, but not

about any effect it may have had on the verdict of deliberations). Several other jurors recalled seeking clarification of terms, one of which may have been “collusions,” and believed that if the jury requested clarification, they received it. *Id.* at 16-17. The jurors’ recollections clearly established that it utilized the dictionary to consider fundamental terms outside the instructions in reaching a verdict.

Multiple jurors recalled communicating with the judge, although there is no record of the interactions. For example, one juror testified that the judge either cleared the courtroom or took the jury into his chambers to provide the clarification. According to that juror, “it didn’t take long after the clarification that we did come back with a verdict.” *Id.* at 29, 33-34. Another juror confirmed the trial judge’s in-person communication with the jury, despite the fact that no record was made or the parties consulted. Multiple jurors recalled several requests, both written and verbal, to the court, although the common law record contained no notes and the transcripts referenced a single note requesting clarification of the verdict forms.

The magistrate judge issued a Report and Recommendation denying the Petition for Writ of Habeas Corpus. Petitioner filed objections to the magistrate’s report, but on January 5, 2021, the district court adopted the report and denied the habeas petition. The district court subsequently denied a certificate of appealability.

## **II. The Seventh Circuit’s Opinion**

The Seventh Circuit also denied the request for a certificate of appealability in an order dated August 20, 2021, finding there was no substantial showing of the denial of a constitutional right. *Santos v. Brannon-Dortch*, No. 21-1227.

## REASONS FOR GRANTING THE WRIT

The Seventh Circuit decision creates a split in the circuits on an important federal procedural question and is contradictory to its own precedent. The United States Supreme Court has held that extraneous information introduced into a jury's deliberations is presumptively prejudicial. *Remmer*, 347 U.S. at 228. In such cases, the state bears the heavy burden to demonstrate that the additional information was harmless. *Id.* Here, the district court, and by extension the Seventh Circuit in failing to grant the certificate of appealability, misapplied *Remmer* by requiring Santos to bear the burden that the extraneous information prejudiced the verdict because the posture of the case was a habeas proceeding. To succeed on a habeas petition, Santos must establish the error had a substantial and injurious effect in determining the verdict. *Brecht*, 507 U.S. at 631. However, the nature of the error first required a *Remmer* hearing where the state bore the burden to establish that the extraneous information did not affect the jury deliberations. Once that issue was decided, then Santos would then have to meet his burden under a habeas context. To hold otherwise would compound a defendant's denial of constitutional rights by granting him relief only at a point in time when he was shouldered with a burden that he would not have had to bear earlier, and thus would exacerbate the violation of his constitutional rights to a fair and impartial jury.

**I. The Seventh Circuit’s decision creates a split in the circuits by deciding an important federal question in a way that directly conflicts with another circuit court.**

In *Godoy v. Spearman*, 861 F.3d 956, 958 (9th Cir. 2017), the Ninth Circuit analyzed a *Remmer* issue in the context of a habeas proceeding and correctly separated the burden of proof necessitated by *Remmer* from the burden to prove prejudice in a habeas petition. In *Godoy*, the defendant was convicted of second-degree murder by a jury. *Id.* at 958. During deliberations, whenever “the jury was not sure what was going on or what procedurally would happen next, juror number 10 would communicate with her [judge] friend and disclose to the jury what he said...” *Id.* at 960. Despite the error, the trial court refused to hear live testimony from any of the jurors and denied the motion for new trial. *Id.* at 960-61. The California Court of Appeals and the California Supreme Court upheld the jury’s verdict. *Id.* The defendant raised the same argument in a federal habeas petition, which was denied. *Id.*

On appeal, the Ninth Circuit confirmed the state court’s adjudication of the claim “resulted in a decision that was contrary to or involved an unreasonable application of, clearly established Federal law” based on the following errors: (1) after finding that the juror’s declaration raised a presumption of prejudice, the trial court never required the state to rebut that presumption; (2) the trial court errored in relying on the same statement from the declaration to both raise the presumption of prejudice and rebut it; and (3) the Court of Appeals denied the defendant a hearing on prejudice under the wrong legal rule. *Id.* at 964-66. The Ninth Circuit went on to

apply “the correct legal standard to determine whether the applicant is entitled to relief.” *Id.* at 966. It conducted a *Remmer* analysis as if it were being conducted at the trial level and affirmed the California Court of Appeal’s finding that Godoy had offered evidence of possibly prejudicial communications that triggered the prejudice presumption. *Id.* at 969. The court then turned to the second step and found that on the existing record, the state had not made any showing that the communications were harmless. *Id.* at 970. Therefore, the Ninth Circuit remanded the case to the district court for an evidentiary hearing and stated that “if the *state* does not present contrary evidence that rebuts the presumption of prejudice by showing ‘there is no reasonable possibility that [Juror 10’s] communication[s]...influence[d] the verdict’...the district court should grant Godoy’s petition for a writ of habeas corpus.” *Id.* (emphasis added). On remand to the district court, the parties conducted a *Remmer* hearing, where the state bore the burden of demonstrating harmlessness. *Godoy v. Urbibe*, 10 CV 07927, Doc. 69 (C.D.Cal. June 30, 2017).

Since the Ninth Circuit’s ruling, its lower district courts have implemented this burden shifting procedure of placing the burden on the government to show that the external communications were harmless, before requiring the petitioner to show actual prejudice. *See Ellis v. Biter*, 2020 WL 1503450, at \*5 (E.D.Cal. March 30, 2020).

The present case is factually similar to *Godoy*. In both instances, the state court failed to conduct a *Remmer* hearing and the defendants sought habeas review. In remanding the case back to the district court for an evidentiary hearing, the Ninth Circuit did not require Godoy to show actual prejudice before a proper *Remmer*

hearing was conducted. Rather the burden was placed on the state to show that the jury contact was harmless. *Godoy*, 861 F.3d at 970. Godoy's burden to demonstrate a substantial and injurious effect on the verdict to succeed on the habeas petition would be addressed following the *Remmer* hearing. If the state failed to rebut the harmlessness of the extraneous information, then Godoy would be able to establish actual prejudice and habeas should be granted.

Here, the district court conflated the two hearings. The original ruling correctly outlined the proper burden shifting procedures under *Remmer*, requiring the state to prove Santos was not prejudiced by the introduction of the dictionary. However, it reversed its position upon the state's motion to reconsider citing Santos' obligations under *Brecht* to prove the prejudice prong under a habeas analysis. As Santos argued, misapplying this burden did establish prejudice because at any other level of court proceeding, the burdens would be reversed. Jurors used the dictionary to define critical terms that related to Santos's culpability. This was significant as "collusion" was not defined or included in the jury instructions and "conspiracy" was not charged in the indictment. If Santos raised the issue in the Ninth Circuit, he would have received a much different procedure and outcome with the state holding the burden to disprove prejudice. A procedural rule applied arbitrarily offends the principles of fundamental fairness and is unconstitutional. Justice should not be administered based on the location of the case.

## **II. The decisions by the district court and Seventh Circuit contradicted its own precedent.**

The district court's decision contravened prior Seventh Circuit precedent. By denying the certificate of appealability, the Seventh Circuit endorsed the district court's error, contradicted its own prior case law, and created a split with the Ninth Circuit Court of Appeals.

Prior to the district court's erroneous interpretation of *Hall v. Zenk*, the Seventh Circuit allowed bifurcated hearings when *Remmer* issues were addressed in a habeas petition. In *Wisehart v. Davis*, 408 F.3d 321, 326-28 (7th Cir. 2005), the defendant's habeas petition raised a similar issue. During post-conviction proceedings, the defendant submitted a juror's affidavit confirming he learned the defendant had taken a polygraph during the trial. However, a *Remmer* hearing was never conducted. Despite almost 20 years since the trial, the Seventh Circuit held "it was the state's burden, given the affidavit, to present evidence that the jury's deliberations had not been poisoned by the reference to Wisehart's having been given a polygraph test." *Id.* at 327-28. The Court remanded the case to the district court with the option for the state to "...conduct a further [*Remmer*] hearing" where it would bear the burden of showing harmlessness. No hearing was conducted and Wisehart's habeas petition was granted.

In *Moore v. Knight*, 368 F.3d 936, 940-44 (7th Cir. 2004), the Seventh Circuit also reversed and remanded the case for the district court to issue the writ. *Id.* at 944. In *Moore*, a *Remmer* hearing was conducted at the state level, but the burden was improperly shifted to the defendant and the record was too sparse to support finding

that the error was harmless. *Id.* at 940-44. The fact that the burden was improperly shifted at the state level did not require the petitioner to take on that burden in his habeas petition. In these cases, the *Remmer* hearing was conducted with the burden on the state, separate and apart from the burden to demonstrate prejudice under a habeas standard.

Finally, in *Hall v. Zenk*, 692 F.3d 793 (7th Cir. 2012), the Seventh Circuit determined that *Remmer* was “clearly established federal law” and that the state appellate court’s decision was contrary to *Remmer*. *Hall*, 692 F.3d at 805. In line with *Wisehart*, *Moore*, and *Godoy*, the court recognized that “in a post-AEDPA habeas case...the state must carry the burden of showing harmlessness in a *Remmer* hearing.” *Id.* at 801 (citing *Wisehart*, 408 F.3d at 326-28). The court then turned to an “actual prejudice” discussion, stating the defendant needed to prove “that he was likely prejudiced by the intrusion upon his jury” to succeed in his habeas petition. *Hall*, 692 F.3d at 805. However, the Seventh Circuit could not make the ultimate determination of whether the defendant was actually prejudiced even though the defendant had provided evidence that highly prejudicial information reached jurors. *Id.* at 806-07. Rather, the State needed to be afforded an opportunity to present countervailing evidence to overcome the presumption. *Id.* Therefore, the Seventh Circuit remanded the case to the district court to provide the State with the “opportunity to show, despite the strong evidence of prejudice already presented by [the petitioner], that countervailing facts would have alleviated concerns of a prejudiced jury.” *Id.* On remand, the state conceded that in light of the Seventh

Circuit's findings regarding its burden to overcome prejudice, it would not present further evidence. *Hall v. Butts*, 09 CV 00506, Dkt. 48 at 2 (N.D. Ind. July 8, 2013). When the state decline to conduct a hearing, the habeas petition was granted. *Id.* at Dkt. 49.

Like *Hall*, Santos had presented sufficient evidence that he was likely prejudiced. *See*, 2016 WL 7077104 at \*3 (the jury may have used the dictionary “to construct [their] own definition of legal terms that do not accurately or fairly reflect applicable law”); *Id.* at 7. (“it is reasonable under the circumstances to infer that the jury requested and used a dictionary to define legal terms that influenced the jury’s determination of guilty”). As a result, the district court should have adhered to the procedure in *Hall*, *Wisehart*, *Moore*, and *Godoy*, which allowed Santos to show that the constitutional error actually prejudiced him after a *Remmer* hearing was conducted with the parties bearing the burden they would at the trial court level. *Godoy*, 861 F.3d at 970; *Hall*, 692 F.3d at 806-07; *Wisehart*, 408 F.3d at 326-28.

The district court misapplied *Hall* by focusing on the factual distinctions, namely its opinion that the intrusion into deliberations was much more egregious. In doing so, it confused the procedural requirements clearly outlined. It consolidated both the hearing for the habeas petition with the *Remmer* hearing, instead of addressing each issue separately. No Seventh Circuit case law allows a *Remmer* hearing, even in a habeas context, where the petitioner carries the burden of proof. By denying the certificate of appealability, the Seventh Circuit approved this

procedure, effectively overruling its prior precedent and creating a clear split with the Ninth Circuit.

A defendant is “entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors.” *Parker v. Gladden*, 385 U.S. 363 (1966). In this case, the fact that jurors used a dictionary to looked up words that related to culpability tainted the verdict and Santos’s constitutional right to a fair and impartial jury. The error was compounded by the arbitrary procedure employed by the court that directly conflicted with prior Seventh Circuit law. The Seventh Circuit acquiesced in this interpretation by denying the certificate of appealability. In doing so, it created a split in the circuits as the court employed a procedure in direct conflict with the *Remmer* decision and the Ninth Circuit Court of Appeals. For the foregoing reasons, the petition for a writ of certiorari should be granted.

## **CONCLUSION**

The effect of clarifying this highly particularized issue is profound. It is necessary to not only resolve a split in the circuits, but to uphold *Remmer*. To allow the state to carry the burden in a *Remmer* hearing in every procedural posture except a habeas petition punishes a defendant who was denied his constitutional rights.

Dated this 16<sup>th</sup> day of November, 2021, at Chicago, Illinois.

Respectfully submitted,

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## APPENDIX

Order of the Seventh Circuit, <i>Santos v. Brannon-Dortch</i> .....	A-1
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