In the

Supreme Court of the United States

October Term, 2022

No.

Maurice Morrison,

Petitioner,

v.

Commonwealth of Massachusetts,

Respondent.

On Petition for a Writ of Certiorari to the Massachusetts Appeals Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A person accused of a crime is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial. *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence against a defendant shall come from the witness stand where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (internal quotations and citations omitted).

The lower court in this case offended these fundamental principles by ruling that a juror may properly inject into a jury's deliberations prejudicial information based on that juror's specialized training and experience that was not part of the evidence introduced at trial.

The question presented is whether a juror's communication to the jury during deliberations of highly prejudicial specialized factual information that was based on his professional knowledge and experience, but which was not part of the evidence introduced at trial, violated petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

RELATED CASES

- *Commonwealth v. Morrison*, 491 Mass. 1103 (Table) (Mass. Supreme Judicial Court 2023)

- *Commonwealth v. Morrison*, 195 N.E.3d 949 (Table) (Mass. App. Ct. 2022)

- *Commonwealth v. Morrison*, 150 N.E.3d 826 (Mass. App. Ct. 2020)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

In the

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October Term, 2022

_____

Maurice Morrison,
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PETITION FOR WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT

Petitioner prays that a writ of certiorari issue to review the judgment of the Massachusetts Appeals Court entered on September 29, 2022. Further appellate review was denied by the Supreme Judicial Court on February 16, 2023.

OPINIONS BELOW

The opinion of the Massachusetts Appeals Court is reported at 195 N.E.3d 949 and reproduced in Appendix A at 1a-7a. The order of the Massachusetts Supreme Judicial Court denying further appellate review is reproduced in Appendix B at 8a. The trial court's Findings and Rulings as to Post-Verdict Inquiry of Juror is reproduced in Appendix C at 9a-17a. The opinion of the Massachusetts Appeals Court at an earlier stage of this proceeding is reported at 150 N.E.3d 826 and reproduced in Appendix D at 18a-40a.

JURISIDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a). The Massachusetts Appeals Court entered judgment on September 29, 2022. The Massachusetts Supreme Judicial Court denied a petition for further appellate review on February 16, 2023.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The Fourteenth Amendment provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

On October 19, 2016, after six days of deliberations, a Suffolk Superior Court jury found petitioner guilty of second-degree murder in the shooting deaths of Zouaoui Dani-Elkebir and Karima El-Hakim. Shortly thereafter, petitioner became aware that one of the jurors ("Juror A") had posted comments to his Facebook page during the trial and after the verdicts in violation of the trial judge's explicit daily instructions. Before sentencing, petitioner moved for a post-verdict inquiry of Juror A to determine whether

he and other jurors had been exposed to extraneous influences which violated petitioner's Sixth Amendment right to confront the evidence against him. (Motion for Post-Verdict Juror Inquiry, p.10) After a hearing at which the trial judge reviewed only the Facebook posts, the motion was denied and petitioner was sentenced to concurrent life sentences with parole eligibility in fifteen years.

On appeal, petitioner argued that he had been denied his Sixth Amendment right to be tried by an impartial jury whose deliberations are unaffected by extraneous matter. (Appellant's Brief, pp. 34-35) The Appeals Court affirmed defendant's convictions but held that the trial judge had erred in denying defendant's motion for a post-verdict inquiry of Juror A and remanded for further proceedings. (Appendix D at 39a-40a) After a hearing at which Juror A testified, the trial judge ruled that Juror A "did not receive any extraneous communication, did not learn any extraneous information, was not subject to any extraneous influence during the trial of this case or during the jury's deliberations, and did not expose any other juror to extraneous information or influence[.]" (Appendix C at 17a) On petitioner's further appeal where he again raised his Sixth Amendment rights (Appellant's Brief, pp. 24-25), the Appeals Court affirmed (Appendix A at 5a)

STATEMENT OF FACTS

After the jury returned its guilty verdicts on November 14, 2016, Juror A made ten Facebook posts about the trial which "discussed the jury's deliberations and described Juror A's understanding of the basis for the verdict, including the jury's evaluation of certain surveillance videos and simultaneous cell phone records." (Appendix C at 12a) Juror A explained how the jury, which had been deadlocked, was able to reach a verdict:

> The ah-ha moment. The case of the mysterious man in black. 1 minute and 45 seconds after the murder of two people we see a man running down the

> opposite side of the street on a security camera. Black hoodie and black pants. Our suspect [the defendant] was seen getting into the victims car wearing a white hoodie. State police once again said it was not the suspect and the defense asked why this person was not identified. The ah-ha moment came when we the jury viewing the video saw two people enter the camera view with white jackets but the further they moved away they became black. The man in black was the suspect. We collaborated [sic] this with an eight second phone call that he made that we synced with the man in black, he was on his phone at this time for 8 seconds. Once again sloppy police work. We would have been a hung jury without this evidence. A jury working together for the truth.

(Remand Hrg, Ex. O) In a subsequent post, Juror A further explained how the jury had resolved its deadlock:

> We were hung up after two days at 7-5 not guilty. It took another three days of us jurors uncovering mistakes in times and security cameras capture of colors at night to get to the truth.

(*Id*., Ex. P)

At the hearing pursuant to the remand by the Appeals Court, Juror A testified that he had experience with surveillance video because he worked for a security company, and that:

> I just brought in what my experience was at work where … we have over 500 cameras, and I said … sometimes night vision cameras could change color of clothing, et cetera. But this was after … this was during the discussion.

(Remand Hrg Tr. 21-22; *see also* Appendix A at 4a) As a result of this testimony, the trial judge found that "during deliberations [Juror A] relied upon their work experience and told other jurors that, in their experience, night-vision cameras can make the colors of clothing appear different than they really are." (Appendix C at 16a)

REASONS FOR GRANTING THE WRIT

This case presents a critically important issue of federal law that has not been, but should be, settled by this Court. This Court has long held that information that exposes

jurors to specific facts that are not part of the trial record is an extraneous matter which violates the Sixth Amendment and due process. *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). "The requirement that a jury's verdict 'must be based on the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Id*. at 472. It is deeply rooted in our Nation's tradition, dating to the English common law. *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "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 … deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954). Thus, this Court has explained that defendants can "challenge jury verdicts based on improper extraneous influences such as prejudicial information not admitted into evidence, comments from a court employee about the defendant, or bribes offered to a juror." *Dietz v. Bouldin*, 579 U.S. 40, 48-49 (2016); *see Turner v. Louisiana*, 379 U.S. at 474 (close association of deputy sheriffs who were key witnesses at trial with jury who was in their custody); *Parker v. Gladden*, 385 U.S. 363, 366 (1966) (*per curiam*) (bailiff made prejudicial comments about the defendant to the jury); *Remmer v. United States*, 347 U.S. at 228-230 (bribe offered to juror); *Mattox v. United States*, 146 U.S. 140, 149-150 (1892) (bailiff exposed jury to prejudicial newspaper story about defendant).[1]

[1] The Federal Rules of Evidence permit a juror to testify about whether "extraneous prejudicial information was improperly brought to the jury's attention" or "an outside influence was improperly brought to bear on any juror." Fed. R. Evid. 606(b)(2). "Generally speaking, information is deemed 'extraneous' if it derives from a source 'external' to the jury … [and] include[s] publicity and information related specifically to the case the jurors are meant to decide …" *Warger v. Shauers*, 574 U.S. 40, 51 (2014).

However, the Court has not decided if the information to which the jury is exposed is an extraneous matter where its source is, as in the present case, the specialized knowledge, training, and experience of one of the jurors. State courts are divided on this issue. In *People v. Maragh*, 729 N.E.2d 701, 704-705 (2000), the New York Court of Appeals concluded that:

> [G]rave potential for prejudice is also present here when a juror who is a professional in everyday life shares expertise to evaluate and draw an expert conclusion about a material issue in the case that is distinct from and additional to the medical proofs adduced at trial. Other jurors are likely to defer to the gratuitous injection of expertise and evaluations by fellow professional jurors, over and above their own everyday experiences, judgment and the additional proofs at trial. Overall, a reversible error can materialize from (1) jurors conducting personal specialized assessments not within the common ken of juror experience and knowledge, (2) concerning a material issue in the case, and (3) communicating that expert opinion to the rest of the jury panel with the force of private, untested truth as though it were in evidence.

See also In re Malone, 911 P.2d 468, 486 (Cal. 1990) ("A juror … should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim of expertise or specialized knowledge of a matter at issue is misconduct."). Other state courts have held that specialized knowledge possessed by a juror and discussed during deliberations is not extrinsic or extraneous information and does not violate the defendant's right to a fair trial. *See State v. Mann*, 39 P.3d 124 (N.M. Sup. Ct. 2002) ("[W]e take this opportunity to clarify that jurors may properly rely on their background, including professional and educational experience, in order to inform their deliberations."); *Meyer v. State*, 80 P.3d

447, 459 (Nev. Sup. Ct. 2003) ("A juror who has specialized knowledge or expertise may convey their opinion based on such knowledge to fellow jurors.")[2]

In the present case, the jury was exposed to extraneous information when, as the trial judge found, Juror A "relied upon their work experience and told other jurors that, in their experience, night-vision cameras can make colors of clothing appear different than they really are." (Appendix C at 16a) As a result, the jury determined that the petitioner, who was seen getting into the victims' car wearing a white hoodie, was the same person who was observed on a security camera only minutes later running away from the scene of the shooting wearing a black hoodie and black pants. (Remand Hrg, Ex O) There was, however, no evidence introduced at trial that this security camera or any other camera used infra-red, night-vision, or any technology that would make white clothing look black or otherwise change the colors of clothing. It is likely, therefore, that petitioner was convicted on the basis of extraneous information communicated by a juror during deliberations, the reliability of which was untested and which petitioner had no opportunity to rebut.

The Appeals Court determined that no substantial issue was presented by the appeal and affirmed the order of the Superior Court, stating:

> It is axiomatic that jurors are entitled to evaluate the evidence adduced at trial in light of their own life experiences. That principle continues to apply where the relevant life experiences impart specialized knowledge. . . There was no impropriety in juror A's applying knowledge he had gained from

[2] *See* Note, *Experts in the Jury Room*, 69 Stan.L.Rev 911, 926-928 (2017) for a national overview of the case law. For other scholarly commentary on issues presented by "expert" jurors: *see* Diamond, Rose & Murphy, *Embedded Experts on Real Juries: A Delicate Balance*, 55 Wm & Mary L.Rev. 885 (2014); Mushkin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors,* 25 Yale L.& Pol. Rev. 239 (2007); Kirgis, *The Problem of the Expert Juror*, 75 Temp.L.Rev. 493 (2002).

> previously working with surveillance cameras, or in sharing his perspective with other jurors.

(Appendix A at 5a) (internal citations omitted). Thus, the court authorized the exposure of jurors to material extraneous information in violation of petitioner's Sixth Amendment rights of confrontation, of cross-examination, and of counsel. *Turner v. Louisiana*, 379 U.S. 466, 472 (1965).

It is hard to imagine a more destructive influence on the right to a jury trial than allowing an "expert" juror to introduce their expertise into jury deliberations where there has been no determination of the extent or reliability of their knowledge and no opportunity for the parties to rebut the extraneous matter. Not only does such a practice violate a defendant's Sixth Amendment and due process rights but it completely undermines the trial judge's gatekeeper responsibility for ensuring that any expert opinion is relevant and sufficiently reliable to go before the jury. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) ("Under the Rules [of Evidence] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable.") It almost goes without saying that a physician-juror should not be permitted to contradict the testimony of the medical examiner with respect to the cause of death or for a lawyer-juror to contradict the court's instructions on the law on the basis of their education and experience. Yet, the Appeals Court's decision would permit jurors to share their life experiences with other jurors, even "where the relevant life experiences impart specialized knowledge." (Appendix A at 5a) To allow jurors to rely on their specialized education, training and experience as part of their "life experiences" would render meaningless the fundamental principle that all evidence must come from the witness stand. *Turner v. Louisiana*, 379 U.S. at 472.

CONCLUSION

Petitioner prays that his petition for writ of certiorari be granted.

Respectfully submitted,

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