

23-6472

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

KEITH L. ALLEN,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

Supreme Court, U.S.
FILED

DEC 13 2023

OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEBRASKA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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PRO SE PETITIONER

QUESTION PRESENTED

Whether a no-impeachment rule constitutionally bars evidence of credible threats of violence against the jurors influencing their verdict offered to prove a violation of the Sixth Amendment right to an impartial jury?

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IN THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and decision of the Nebraska Supreme Court.

OPINIONS BELOW

The opinion and judgment on appeal from the Nebraska Supreme Court appears at Appendix A to the petition and is reported at *State v. Allen*, 314 Neb. 663 (Neb. 2023). The supplemental opinion and judgment on appeal from the Nebraska Supreme Court appears at Appendix B to the petition and is reported at *State v. Allen*, 315 Neb. 255 (Neb. 2023).

JURISDICTION

The supplemental opinion of the Nebraska Supreme Court denying a timely motion for rehearing was issued September 15, 2023, and appears at Appendix B to the petition. There was no extension of time to file this petition and it is timely filed by not later than December 14, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that: "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the State and district wherein the crime shall have been committed...."

The Fourteenth Amendment to the United States Constitution provides, in

pertinent part, that: "No state shall make or enforce any law which will abridge the privileges or immunities of the 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."

Neb.Rev.Stat. § 27-606(2) (Reissue 2016), provides, in pertinent part, that: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury deliberations ... except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

STATEMENT OF THE CASE

A. Procedural History

In October 2021, a Lincoln County, Nebraska jury convicted Petitioner Keith L. Allen of First Degree Murder and Use of a Firearm to Commit a Felony (T90). The trial court on February 28, 2022, sentenced Petitioner on Count I to life imprisonment and on Count II to a term of not less than 20 years nor more than 30 years imprisonment, to run consecutive to the sentence in Count I (T107). On direct review, the Nebraska Supreme Court affirmed Petitioner's convictions and sentences in *State v. Allen*, 314 Neb. 663 (2023), rehearing denied 315 Neb. 255 (2023).

B. Statement of Facts

The Petitioner, Keith L. Allen, was born in 1976. Allen was a life long resident of North Platte, Nebraska, other than when he did a short stint in

the United States Army (1346:3). Allen suffers from a disability and medical condition of Fibromyalgia and Sciatica which periodically requires him to use crutches to walk (1346:18-1350:7). He was employed at C.N.C.A.P. where he worked assisting veterans with social service needs (1351:1). Allen was a gunsmith working on his own part time in this vocation (1352:19). Allen lived alone at 101 North Chestnut Street in North Platte, Nebraska (1346:21).

Prior to May 22, 2020, Allen had befriended a woman named Amanda Beall who he met while working at his place of employment (1354:9). Ms. Beall and Allen developed an intimate relationship for a short time, but that had ended before May 22, 2020 (1356:22). The two remained friends and Ms. Beall has often spent nights at Allen's home.

Ms. Beall was also involved with a North Platte man named Brett Torres. Their on-again, off-again relationship was a stormy one and involved Ms. Beall using Methamphetamine, and also with threats and occasions of domestic violence with Torres assaulting her (1113:75; 1360:1-1367:12; E28). The relationship with Torres was ended by Ms. Beall a few days prior to May 22, 2020.

On May 22, 2020, shortly before 2:00 p.m., Allen was a passenger in his blue Ford Focus with Ms. Beall driving the car (1376:5). Near Allen's home, Brett Torres was driving his green Chevy Tahoe with a passenger named Devan Hovden. Torres spotted Allen's blue Ford Focus, and maneuvered his Tahoe to give chase to Allen's car (1378:11). The two vehicles ended up in the alley of 101 North Chestnut Street (Allen's home) and stopped close together, side by side in the alley (E130-31; 1380:1). Allen's side of the Focus was directly next to Torres' Tahoe driver's door, with Torres' window and Allen's window

down (1382:10). Allen and Torres were shouting at each other, with Allen telling him to "go away" (1384:14). Torres yelled a threat about killing Allen and Beall (1385:9). Allen was displaying a .45 caliber Glock pistol outside his car window (1383:3). Torres began to lunge from his vehicle, and after getting partially out of the Tahoe, Allen fired his pistol at Torres causing gunshot wounds to Torres (1385:9). Keith was able, with difficulty, to exit the Focus and went into his residence where he put the pistol away and called 911. From Allen's residence, he obtained a medical kit and brought it outside to try to render first aid to Torres, who was slumped back inside of the Tahoe (1390:14-1404:13).

North Platte Police quickly arrived at the scene and observed Allen leaning over Torres trying to render aid to him. Sgt. Matusczak of the North Platte Police Department immediately took Allen into custody (1406:9).

Mr. Torres was a very large man and emergency unit crew members had difficulty getting him out of the Tahoe so that they could start emergency treatment (585:22). Torres was eventually transported to the North Platte Hospital emergency room and was pronounced dead at that facility (656:17). Emergency room and police personnel observed several gunshot wounds to various parts of Torres' body (657:14-661:20).

Law enforcement officers entered Allen's home and located the Glock pistol and ammunition where Allen told them it would be (821:6-828:18). At the scene, officers located and took into evidence nine spent .45 caliber shell casings at the location where the shooting occurred (793:18-807:13). An autopsy was arranged for Mr. Torres' body to be conducted by Mathias Okoye, M.D. (1049:24). Later it was determined that the autopsy procedure and evidence gathered by

Okoye was botched (1110:16-1117:21). At trial, Erin Linde, M.D. testified concerning Mr. Torres' cause of death, and his various wounds based on Dr. Okoye's records of his autopsy (1041:19-1129:12) (E113).

Allen was charged by Information with First Degree Murder and Use of a Firearm to Commit a Felony (T1). During Allen's trial, evidence was adduced to the jury concerning Torres' violent character (1219:7-1262:18; 1279:17-1320:21), and also threats of violence that had been made towards Allen by Torres through communications with Ms. Beall (914:1-928:6). The record shows that several members of Mr. Torres' family attended the jury trial of Allen and were cautioned by the trial court about outbursts (663:1-25; 1054:1-22).

During trial, Allen's trial counsel did not call Ms. Beall as a witness to the shooting, and also to the various threats made by Torres towards Allen prior to May 22, 2020. Counsel for the parties stipulated to hearsay testimony from Investigator Erickson who interviewed Ms. Beall (894:15). Ms. Beall was also a victim of Mr. Torres' violent behavior (925:21-926:11).

Allen's trial counsel also failed at trial to object to evidence offered by the State that came from Dr. Okoye's autopsy records and the opinions of Dr. Linde regarding Brett Torres' cause of death and other matters from the autopsy. This is despite the fact that she was testifying solely from the records of Dr. Okoye who had botched the autopsy (1097:10).

The trial court instructed the jury on Allen's claim of self-defense (T69). The jury returned a verdict of Guilty on both of the counts charged in the Information (T1; T90).

Prior to sentencing, Allen's trial counsel had obtained an affidavit from one of the jurors from the trial that stated that the jury considered the

possibility of the Torres family seeking revenge if Allen was acquitted. This affidavit was offered to the trial court in support of a Motion for New Trial due to jury misconduct, but the trial court refused to receive Exhibit 300, and denied Allen's Motion for New Trial based on his claim of juror misconduct (T91; T109). The exhibit was made part of the record as an offer of proof (E300). The present petition for writ of certiorari is now before this Court for its consideration.

REASONS FOR GRANTING THE WRIT

This case violates the decision of this Court declaring that animus can play no part in a jury's deliberations. Traditional rules forbidding impeachment of jury verdicts must give way where jurors clearly relied on threats against their safety, animus, and extraneous prejudicial information in reaching his or her verdict. Because Mr. Allen's guilty verdicts were impermissibly influenced by threats of violence on the jurors, this case presents an appropriate vehicle for this Court to consider whether the holding in *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017), applies here.

I. Where Jurors relied on threats against their safety and extraneous prejudicial information to convict a criminal Defendant, *Pena-Rodriguez* should Govern.

After the jury's verdict finding Allen guilty on both counts charged in the State's Information, Allen's trial counsel timely filed a Motion for New Trial (T91). In subsection 2 of the Motion was an allegation of "misconduct of the jury."

On February 28, 2022, the trial court held a hearing regarding Allen's motion for new trial and considered Allen's allegation that there was misconduct by the jury during their deliberations. In support of this

allegation, Allen's trial counsel offered a sworn affidavit to the trial court executed by one of the jurors. This exhibit was marked as Exhibit 300, and was reviewed by the trial court. The prosecutor for the State objected to Exhibits 300 and 301, and the trial court declined to receive 300 as an exhibit. Allen's trial counsel offered Exhibit 300 in an offer of proof. The trial court ordered that the exhibit be sealed (T109; 1567:1-1582:8).

In the trial court's order of February 28, 2022 regarding Exhibits 300 and 301, and Allen's Motion for New Trial, the trial court held that the statements made in the affidavit regarding the victim's family seeking revenge during the deliberations were not "extraneous prejudicial evidence." The trial court went on to find that even if these statements were "extraneous," Allen did not meet his burden of proving jury misconduct.

A criminal defendant in Nebraska claiming jury misconduct bears the burden of proving, by a preponderance of the evidence: (1) the existence of jury misconduct, and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial. When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If jury misconduct occurred, the trial court must then determine whether such misconduct was prejudicial to the extent that the defendant was denied a fair trial. If the trial court determines that the jury misconduct did not occur, or that it was not prejudicial, adequate findings are to be made so that the determination may be reviewed. *State v. Hairston*, 298 Neb. 257 (2017).

Jury deliberations are most often a mystery to lawyers, judges, plaintiffs,

and defendants. Juries deliberate in closed rooms without any active oversight by the court. Despite being physically isolated, jury rooms and jurors are not always closed to outside influences.

As human beings, each juror brings life experiences, judgments, and generalized prejudices to their consideration of a case. However, jurors who are deliberating on a case are supposed to be pure, unbiased, and uninfluenced by anything other than the evidence that they have heard during the course of the trial and the court's instructions. It does not always work that way. Sometimes loss of purity results from unconscious thought or from seemingly innocuous acts done with the best of motives. The general name for both is juror misconduct. This sort of thing does not happen very often, and few lawyers have much experience with it. When the misconduct becomes so prejudicial and inflammatory, then this conduct should warrant a reversal of a defendant's conviction.

The operative Nebraska statute concerning how jury misconduct is determined is § 27-606(2) (Reissue 2016). Subsection (2) of this statute states as follows:

Upon an inquiry in the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to ascent to or descent from the verdict or indictment or concerning his mental process in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention, or whether any outside influence was improperly brought to bear upon any juror. Nor admitting his affidavit or evidence of any statement by him indicating in effect of this kind be received for these purposes.

According to this statute, an inquiry into the validity of the jury's verdict may not involve a juror testifying about any matter or statement

occurring during the course of the jury's deliberations. There is, however, and exception to this rule in the event that there is extraneous prejudicial information that was improperly brought to the jury's attention. The fact of the matter is that this certainly was the case during the jury's deliberations concerning Allen's guilt or innocence of the crimes charged.

The trial court should have received Exhibit 300 when offered by Allen's trial counsel at the hearing on Allen's Motion for New Trial and then found that this affidavit contained extraneous prejudicial information that was improperly brought to the jury's attention. The trial court should have gone forward to inquire of the jurors if this extraneous information influenced their verdict. The trial court failed to do this in Allen's case (1579:22-1582:8; T91).

Was the information about revenge by the victim's family against the jurors in the event of an acquittal extraneous information? Obviously. There was no evidence during the trial that the victim's family had anything to do with the facts of the case that were presented to the jury. This information contained in the affidavit identified as Exhibit 300 was totally outside the scope of the evidence offered at Allen's trial and had nothing to do with the elements of the charges filed or Allen's defenses.

The jurors in Allen's trial may have had good reason to worry about Brett Torres' family. The trial judge had to twice admonish members of the Torres family during the trial. The jurors saw this and the behavior of the family. Fear could quite easily have been felt by the jurors (663:7).

Was the extraneous information concerning vengeance toward the jurors by a victim's family prejudicial? Yes. If a juror deliberating in a criminal case

is worried about the safety of his or her family or themselves if an acquittal is found, then this is an outside influence that is obviously extremely prejudicial towards the defendant standing trial. Such a circumstance requires a finding of jury misconduct that is prejudicial towards the defendant and warrants a reversal of the defendant's conviction.

Further, the jurors violated their oath to give Allen a fair trial and also to adhere to the trial court's instructions concerning their duties as jurors and the task of deliberating on the issue of Allen's guilt or innocence. The trial court specifically instructed the jury in Instruction No. (12) as follows:

It is your duty to decide what the facts are and to apply the law to those facts. In determining what the facts are, you must rely solely upon the evidence in this trial and the general knowledge that everyone has. You must disregard your personal knowledge of any other specific facts.

Subsection 3 of Instruction No. 1 states:

The law demands of you a just verdict. You must not indulge in speculation, guess or conjecture. You must not allow sympathy or prejudice to influence your verdict.

Instruction No. 7 that was given to the jury states:

The evidence from which you are to find consists of the following:

1. The testimony of the witnesses;
2. The exhibits received into evidence.

The following things are not evidence:

1. Statements, arguments, and questions of the lawyers for the State and the defendant;
2. Objections to questions;
3. Any testimony I told you to disregard and anything you may have seen or heard about this case outside of the courtroom. (T69).

The fact that the jury considered outside information during the course of their deliberations regarding the revenge of the victim's family if there

was an acquittal of Mr. Allen is a clear indication that the trial court's orders and directives concerning jury deliberations were not followed, and the jury committed misconduct by virtue of not performing their duties as directed by the trial court.

The Nebraska Supreme Court held in *State v. Stricklin*, 290 Neb. 542 (2015) and in *State v. Cardelihac*, 293 Neb. 200 (2016) that a criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, that jury misconduct existed and that such misconduct was prejudicial to the extent that the defendant was denied a fair trial. The Nebraska Supreme Court further held that upon appeal, the trial court's determination whether the defendant was prejudiced by juror misconduct is reviewed de novo.

The Nebraska Supreme Court's holdings went on to say that when an allegation of jury misconduct is made, and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If the misconduct occurred, the trial court then must determine whether it was prejudicial to the extent that the defendant was denied a fair trial. In the event that the trial court determines that either the misconduct did not occur or that it was not prejudicial, adequate findings must be made so that the trial court's determination may be reviewed.

In this case, the trial court did not conduct an evidentiary hearing or an investigation to determine if Mr. Allen's claim of jury misconduct was valid. The trial court's finding in its order denying Allen's Motion for New Trial was quite sparse, and left little for appellate direct review (1578:6-1581:12;

T109). These errors by the trial court are significant enough to warrant a reversal of Mr. Allen's convictions and sentences.

In *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017), this Court reviewed a case involving a Colorado defendant convicted of Harrassment and Unlawful Sexual Conduct. The issue of jury misconduct was before this Court due to the Colorado trial court declining to review allegations of discussions concerning racial stereotypes or animus included in the jury's deliberations. This Court held that the Colorado trial court erred when it failed to consider these allegations of jury misconduct.

The *Pena-Rodriguez* court issued a long and detailed opinion regarding the history of juries in American jurisprudence and the necessity for holding jury impeachment hearings when the facts require it. In the *Pena-Rodriguez* case, one of the jurors independently approached the defendant's trial counsel to report the discussions of racial bias and animosity towards the defendant during the deliberations. *Id.*, at 227. This is very similar to Mr. Allen's case where the foreman of the jury approached trial counsel to report his concerns about the extraneous information concerning revenge by the Torres family in the event of an acquittal (1563:5). From the trial record, it is clear that several of the family members of the victim Brett Torres were in attendance at the trial. The trial court found it necessary to instruct these family members on how they should behave during the trial (663:7).


The concept of jurors fearing revenge for a verdict that would not meet approval of a victim's family is extremely animus and prejudicial. In order to return a fair and just verdict in a criminal trial, jurors must never have any thoughts of revenge or retribution on their minds when deciding a case.

The circumstances such as in Mr. Allen's case is certainly as important as the racial bias and bigotry on the minds of jurors during deliberations as addressed by this Court in the Pena-Rodriguez case. Fourteenth Amendment imposes on states the standards necessary to ensure that judicial proceedings are fundamentally fair. *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 33 (1981). In this case, the state courts' decision in rejecting Allen's meritorious jury misconduct claim is fundamentally unfair and is inconsistent with traditional principles of justice, in violation of Allen's federal constitutional rights to an impartial jury, to a fair trial, and to due process of the law. Because the new evidence demonstrates that threats, animus, and extraneous prejudicial information were a substantial motivating factor in the jury's verdict, this Court should grant certiorari to decide whether Pena-Rodriguez applies in Allen's case.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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December 13, 2023