24-5100 NO.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Elmer Dean Baker

Petitioner,

v.

Ron Neal

Warden of the Indiana State Prison

Respondent,

On Petition for Writ of Certiorari to

The Court of Appeals of Indiana

PETITION FOR WRIT OF CERTIORARI

Elmer Dean Baker

Indiana State Prison

One Park Row

Michigan City, Indiana 46360

Petitioner - pro se

QUESTIONS PRESENTED FOR REVIEW

Questions One Preface:

Prior to Petitioner's trial, defense counsel requested the court to investigate the possibility the jury would be bias because of prejudicial pre-trial publicity with a Motion for a Test Jury to Determine Prejudice Due To Pre-Trial Publicity, the court denied the motion holding it would address the issue at the upcoming trial voir dire. The potential jurors were never questioned on this issue.

Question One:

Does a State Court violate a criminal defendant his Sixth Amendment rights to a fair trial and his Fifth and Fourteenth Amendments rights to Due Process of law when a trial court denies his defense counsel's pre-trial motion to investigate potential jury bias due to prejudicial pre-trial publicity and completely fails do any investigation and questioning of the jurors concerning whether or not they had read the prejudicial pre-trial publicity and if so could they ignore it and render a verdict solely on the evidence, inaction which was completely contrary to clearly established Indiana and Federal Law?

Questions Two Preface:

On the fifth day of trial is was brought to the courts attention that a juror had withheld on initial voir dire that he was a friend and sports teammate of the trial prosecutor's husband and that they had met at a local restaurant during a trial juror lunch break. The court never investigated the issue by questioning the juror or the prosecutor's husband and declared: "this may be one of those times ignorance is bliss".

Question Two:

Does a State Court violate a criminal defendants Sixth Amendment rights to a fair trial and his Fifth and Fourteenth Amendments rights to Due Process of law when a trial court learns during the trial that a sitting juror was a friend and sports teammate of the trial prosecutor's husband and fails

to investigate the possibility the friendship would bias the jury in favor of the state, and the Court fails to investigate why the juror failed to reveal this friendship during pre-trial voir dire which denied the defendant an opportunity to make an intelligent decision whether or not to strike the juror from the panel of jurors, inaction which was completely contrary to clearly established Indiana and Federal Law?

Question Three Preface:

In his pro se collateral attack (Post-Conviction Proceedings) of his convictions, Petitioner attempted to establish a record of evidence by questioning witness prior to and at his evidentiary hearing. However, the Post-Conviction judge denied all his repeated request to question his jurors by affidavits and then by interrogatories and then by subpoenaing them to his hearing. The court also denied his request to subpoena other relevant witness to his hearing.

Question Three:

When a State Post-Conviction Court of Review denies a defendant discovery by denying the defendant his right to subpoena relevant witnesses which denied him a full and fair evidentiary hearing contrary to their Rules and Procedures and existing State and Federal opinions and rules of law, does it violate rights afforded by the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution?

LIST OF THE PARTIES

✔ All Parties appear in the caption of the case on the front page.

RELATED CASES

Baker v State, 922 N.E.2d 723, Indiana Court of Appeals, (Direct Appeal) (Judgment entered March 11, 2010).

Baker v State, 928 N.E.2d 890, Indiana Court of Appeals, (Direct Appeal) (Judgment entered June 28, 2010)

Baker v State, 948 N.E.2d 1169, Indiana Supreme Court, (Direct Appeal) (Judgment entered June 23, 2011)

Baker v State, 119 N.E.3d 230 Indiana Court of Appeals, Unpub. (PC-Appeal) (Judgment entered December 12, 2018)

Baker v State, Indiana Supreme Court, (PC-Appeal-18A-PC-354), Transfer Denied. (Judgment entered May 9, 2019)

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Indiana Court of Appeals: The unpublished order of the Indiana Court of Appeals denying Petitioner permission to file a successive post-conviction petition appears at **Appendix B** to this petition.

Indiana Court of Appeals: The unpublished order of the Indiana Court of Appeals denying Petitioner's Post-Conviction Appeal appears at **Appendix- C** to this petition.

Indiana Supreme Court: The unpublished order of the Indiana Supreme Courts denying Petitioner's Petition to Transfer appears at **Appendix- D** to this petition.

Petitioner's Post-Conviction Courts: Findings of Facts and Conclusions of Law appears at **Appendix- E** to this petition.

STATEMENT OF JURISDICTION

The Indiana Court of Appeals issued its final Order denying Petitioner's Motion to Reconsider its denial of Petitioner's Request for Permission to file a Successive Petition for Post-Conviction Relief on the 07 day of February, 2024. This Writ has to be filed on or before May 7, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) and Rule 13(1)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION:

Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause 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 defense.

Amendment 14:

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or 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.

INDIANA CONSTITUTION:

Article 1, § 13(a) provides: In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed;...).

STATEMENT OF THE CASE

On July 3, 2006, the State of Indiana charged Petitioner with two Class A Felony Counts of Criminal conduct. On June the 5th, 6th, 7th, and 8th , 2007 Petitioner was tried by jury on those charges and after nineteen hours of deliberations the jurors could not reach agreement and the court declared a mistrial.

The State was allowed to amend Petitioner's charges by adding a Class C Felony charge. Petitioner was now facing a trial with two Class A Felonies and One Class C Felony. On May 13, 2008 trial counsel[1] filed a Motion for a Test Jury to Determine Prejudice Due to Prejudicial Media Coverage of Petitioner's first trial and upcoming trial. [App. - F, p.p. 1, 2; 18-24] The trial court denied counsels motion and promised to address the issue at the upcoming trials voir dire of the trial jurors. [App. - F, p. 6] On August 18th-22nd, 2008, Petitioner's second trial was held and on the fifth day of trial the court was informed that one of Petitioner's jurors[2] had met and conversed with the trial prosecutor's[3] husband[4] at a local restaurant during a juror lunch break in the trial. [App. - F, p.p. 167-170]

During the course of the colloquy about this unauthorized meeting and out-of-court conversation the court also learned the juror was a friend and sports teammate of the trial prosecutor's husband, an important fact the juror had withheld during trial voir dire. Despite the implications of this "prima facie prejudicial" conduct of Baker's juror, [*not one*] relevant person was questioned to determine why the juror withheld his friendship during

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[1] Public Defender Daniel Pappas.
[2] Juror # 12, Mr. Timmerman.
[3] Clara Winebrenner.
[4] Denny Winebrenner.

voir dire and the content of the unauthorized out-of-court communication and whether bias existed, [not] the juror or the prosecutor's husband.

The only one questioned by the court was the prosecutor who gave hearsay testimony and was only able to give the court her opinion and speculation of her husband's opinion of juror #12's opinion concerning the scope of her husband's friendship with the juror and of the content of the conversation that was held between the two. [App. - F, p.p. 167-69]

The trial court took no action to investigate the issue to determine if this friendship would affect the jurors verdict decisions and simply declared, "this may be one of those times ignorance is bliss". [App. - F, p. 170] The trial resumed and the jury found Petitioner guilty on all Counts. On, February 6, 2009 the court imposed an aggregate sentence of 106 years. Petitioner filed an unsuccessful direct appeal and his convictions were affirmed. Baker v State, 922 N.E.2d 723; 928 N.E.2d 890; (948 N.E.2d 1169, June 23, 2011).

Petitioner sought Post-Conviction Relief and the Port-Conviction Court denied all his requests to question or subpoena important relevant witness[5] to his evidentiary hearing and then after misquoting the record, denied his claims because he could not prove them. Petitioner appealed to the Indiana Court of Appeals and as to the possible juror prejudice from the pre-trial media coverage, titled "B-Alleged Juror Prejudice", the court held: "this claim is unsupported by evidence and therefore groundless" [App. - C, p. 10] and as to Juror # 12's misconduct titled "C-Alleged Juror Taint" the court denied the claim. [App. - C, p.p. 10-11]. Petitioner sought transfer to the Indiana Supreme Court that

[5] Juror Mr. Timmerman, All Jurors, Clara and Denny Winebrenner, Trial Attorney Pappas: Trial Judge Carpenter.

was denied. [App. - D] Petitioner filed in the Indiana Court of Appeals for permission to file a Successive Petition for Post-Conviction Relief[6] on the issues herein but was denied permission. [App. - B]; then Petitioner filed a Petition for Rehearing which was denied. [App. - A] This Writ ensues.

[REASONS FOR GRANTING THIS PETITION]

The Indiana state court's adjudication of this claim was contrary to, and an unreasonable application of established federal law as determined by the Supreme Court of the United States, [and] the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented.

[T]his is a case where Petitioner possessed a "parent substantive right" to a fair trial guaranteed him by the Sixth Amendment of the United States Constitution. [A] case where the trial court was informed of the possibility the jury could be influenced by prejudicial media coverage but the court failed to investigate and ask one single potential juror during voir dire if they had read any of the prejudicial newspaper articles and if so could they still render a bias free verdict based on the admissible evidence alone. [A] case where on the fifth of trial the court was informed one of the sitting jurors had a disqualifying relationship with the trial prosecutor's husband which the juror failed to reveal during voir dire and the trial court took no action to investigate declaring "ignorance

[6] Indiana Post-Conviction Rule 1(12) provides that, before a petitioner may file a successive post-conviction relief petition, a petitioner must request and receive leave to pursue a successive petition from either this Court or the Indiana Supreme Court.

is bliss".[7] [A] case where Petitioner was heavily impeded from any chance of proving he was denied due process and a fair trial by a State Post-Conviction Court of review impeded his discover by denying his repeated requests to question or subpoena needed relevant witness. [A] case in which the trial court and subsequent State court of review made decisions on Petitioner's claims that were brazenly contrary to and in conflict with existing State and Federal rules of law and relevant decisions of this Court and the record of the case.

QUESTION ONE:

> Does a State Court violate a criminal defendant his Sixth Amendment rights to a fair trial and his Fifth and Fourteenth Amendments rights to Due Process of law when a trial court denies his defense counsel's pre-trial motion to investigate potential jury bias due to prejudicial pre-trial publicity and completely fails do any investigation and questioning of the jurors concerning whether or not they had read the prejudicial pre-trial publicity and if so could they ignore it and render a verdict solely on the evidence, inaction which was completely contrary to clearly established Indiana and Federal Law?

Petitioner was denied due process of law, effective counsel and a trial court acting within the bounds of the laws and opinions of their State and the Federal Courts. On May 13, 2008 Petitioner's trial counsel had filed a Motion for a Test Jury to Determine Prejudice Due to Prejudicial Media Coverage because Petitioner's case had generated substantial media coverage in the small towns only newspaper. Newspaper articles about Petitioner's first trial and upcoming second trial. Front page articles that showed Petitioner's booking

[7] [App. - F, p.p. 167-170]

photo, information about his prior criminal history and the penal consequences he was facing and that the State was seeking to have him convicted of being a habitual offender. [App. - F, p.p. 18-24]

On August 18th, 2008 Petitioner's second trial began and he was ultimately convicted on all charges and adjudicated a Habitual Offender after which he received an aggregate sentence of 106 years in prison.

Indiana is in the Seventh Circuit which subscribes to a federal "presumption" that a prospective juror who learns that the defendant has a criminal record should be excused. *Britz v Thieret*, 940 F.2d 226, 231 (7th Cir. 1991). Reversal is limited to cases where defendants' prior criminal record is not admissible at trial. Cf. *Moore*, 936 F.2d at 1515. Not only does case law support that a jury is not to learn about a defendant's prior criminal history, Petitioner's trial counsel had filed a Motion in Limine asking the court to not allow this evidence in, which the court Granted.

See: *Cline v State*, 726 NE2d 1249 (Ind.2000) ("Even oblique or apparently innocuous references to prior convictions are impermissible"). To inform the jury of prior crimes of a defendant is, in the view of the Supreme Court, so improper and so prejudicial that a mistrial must be declared, *Marshall v. United States,* 1959, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250; See*: United States v. Riley*, 621 F.3d 312, 336 (3d Cir. 2010), reversing because a witness twice mentioned that he had met the defendant in a work release program, which impermissibly informed the jury that the defendant had been convicted of a previous crime.

Moreover, punishment is not an element of the crime charged, and when punishment is not to be imposed by the jury, it is not a matter to be placed before the jury,

by the State. *Rowe* v. *State* (1968), 250 Ind. 547, 237 N.E.2d 576. In Petitioner's case it was the State who had filed a Motion in Limine asking the court to not allow the Jury to hear about Petitioner's possible sentence. which the court Granted. The trial court had Granted two separate motions which related to the content that was covered in the Newspaper articles and then failed to even question the potential jurors as to whether they had read about any of these prejudicial subjects, which was an abuse of discretion and a dereliction of the court affirmative duty. *Lindsey* and counting cases.

The trial court denied counsels motion and promised to address the issue at the upcoming trial voir dire. However, the Court did not keep its promise and do its mandatory duty to question the jurors as to whether or not they had seen any of the prejudicial articles to assure Petitioner was going to receive a fair trial as was his right. The court had the affirmative duty and the heightened obligation to oversee the selecting of an unbiased jury free from the outside influences of the prejudicial newspaper content, because the trial judge knew the trial was being held in, and the jury was being selected from, a small Indiana County of only 45,000 with only one newspaper.

The Sixth Amendment right to an impartial jury guarantees an adequate *voir dire* to identify unqualified jurors... *See Morgan v. Illinois,* 504 U.S. 719, 729,112 S.Ct. 2222, 119 L. Ed. 2d 492 (1992); *US v. Lewin,* 467 F.2d 1132 (7th Cir.1972). The requirement of jury impartiality is embodied in the Due Process Clause of the Fourteenth Amendment. *State v Dye*, 784 NE2d 469 (Ind. 2003).

In Indiana, the standard a trial court must follow when the possibility of bias is brought to the courts attention was set out in *Lindsey v State*, (1973), 260 Ind.351, 295 NE2d 819. ("As our Supreme Court in Lindsey held that if a trial court is made aware of

suspected jury taint, the defendant is entitled to, **"as a matter of law"**, to have the jury polled and if the trial court fails to do so, it commits an abuse of discretion"). *Id.* The *Lindsey* Court adopted their standards by following the standards prescribed by the Seventh Circuit Court of Appeals in the following cases: *Margoles v United States*,(1969),407 F.2d 727; *United States v Largo*,(1965),346 F.2d 253 and U.S. v Accardo,(1962) 298 F.2d 133.("In essence these cases hold that whenever prejudicial publicity is brought to the attention of the Court, **"at a minimum it must"**[8], at that time, interrogate the jury to determine its exposure, and that jurors acknowledging exposure should be examined individually to determine the extent of such exposure and the likelihood of prejudice resulting there from") *Lindsey, supra*. Although *Lindsey* dealt with a prejudicial newspaper article, Indiana appellate courts have determined that the procedure is equally applicable whenever a jury has been exposed to *any* potentially influential event". *Threats v. State*, 582 N.E.2d 396,400(Ind.Ct.App.1991), trans.denied.

In Indiana, Lindsey is still good law as it was during Petitioner's trial. See: *Ramirez v State*, 7 N.E.3d 933 (2014 Ind.); *Caruthers v State*, 926 N.E.2d 1016 (2010 Ind.) (*both*) citing *Lindsey* as controlling Indiana precedent. Recently, in *Ramirez* at ft. note. 2, the Indiana Supreme Court held that the procedures prescribed in *Lindsey* are Indiana's analogue to the hearings required under *Remmer v. United States*, 347 U.S. 227 (1957), and operate as the procedural protection against the possibility of biased jurors.

It is clear from a complete and correct reading of Petitioner's voir dire transcripts that the trial court and trial counsel failed to ask one single potential juror if they read any

[8] Hammons v Jenkins-Griffin,764 NE2d 303((nd.App.Ct.2002)("the term "must" is mandatory language")

of the highly prejudicial newspaper articles and if so could they still render bias free verdicts. [App.- G and H]. The trial court committed an abuse of discretion when choosing not to follow the mandatory commands of *Lindsey* and its prodigy to ensure Petitioner was going to get a fair trial with an impartial jury; and Petitioner's trial counsel was not providing him with effective assistance in this regard. However, you assign the error, Petitioner was denied Due Process of Law and his Sixth Amendments fair trial guarantees and he deserves to have this Writ Granted and a new trial.

QUESTION TWO:

> Does a State Court violate a criminal defendants Sixth Amendment rights to a fair trial and his Fifth and Fourteenth Amendments rights to Due Process of law when a trial court learns during the trial that a sitting juror was a friend and sports teammate of the trial prosecutor's husband and fails to investigate the possibility the friendship would bias the jury in favor of the state, and the Court fails to investigate why the juror failed to reveal this friendship during pre-trial voir dire which denied the defendant an opportunity to make an intelligent decision whether or not to strike the juror from the panel of jurors, inaction which was completely contrary to clearly established Indiana and Federal Law? ?

On the fifth day of Baker's trial, it was brought to the court's and defense counsels attention that, Juror # 12, Mr. Timmerman, was a friend and sports teammate of the trial prosecutor's husband and that they had an unauthorized out-of-court conversation at a local restaurant during a juror lunch break in the trial.

(1.) Juror # 12 never revealed his friendship with the prosecutor's husband during trial voir dire even though the voir dire record reveals all the jurors were repeatedly asked if they knew the prosecutor or her husband.

(2.) The record also reveals that Petitioner had struck from the panel numerous potential jurors who admitted they knew the prosecutor or her husband.

(3.) Baker raised the issue in post-conviction that Juror # 12's failing to reveal his friendship with the prosecutor's husband denied him an adequate voir to allow him to intelligently exercise his for-cause and peremptory challenges based on this friendship and to question juror # 12 to discover if bias existed.

(4.) Petitioner argues that the trial court's perfunctory investigation into the newly discovered fact of the friendship between Juror # 12 and the prosecutor's husband, coupled with the fact the Court now knew Juror # 12 failed to reveal this friendship during voir dire failed to meet the commands of Indiana and Federal Court opinion and laws.

(5.) Petitioner argues that the Post-Conviction Court impeded all his efforts to investigate this issue.

When the Court became aware of the unrevealed friendship between Juror # 12 and the prosecutor's husband the Court did not question Juror # 12 or the prosecutor's husband but merely asked the prosecutor her opinion of her husband's opinion of juror # 12's opinion as to the scope of their friendship and whether or not it would affect Juror # 12's verdicts. Then the Court declared: "this may be one of those times ignorance is bliss, then continued with the trial. [App. - F, p.p. 167-170].

The following case law foreclosed Baker's trial Court the discretion to declare ignorance was bliss. See: the Indiana Supreme Court decision in Lindsey v State,(1973),260 Ind.351,295 NE2d 819, that is still the law in Indiana concerning both the pre-trial publicity issue and the juror misconduct issue above. See *Ramirez v State,* 7 N.E.3d 933, 936 (Ind. 2014), ("As our Supreme Court in Lindsey held that if a trial court is made aware of suspected jury taint, the defendant is entitled to, "as a matter of law", to have the jury polled and if the trial court fails to do so, it commits an abuse of discretion"), citing Joyner v State, 736 NE2d 232,239(Ind.2000).

Despite this "prima facie prejudicial" conduct [not one] person was questioned to determine why the juror withheld his friendship and the unauthorized communication and whether bias existed. The only one questioned by the court was the prosecutor who gave her opinion and speculation of her husband's opinion of juror #12's opinion. Moreover, the prosecutor had a three-fold personal reason to debase the incident and her husband's friendship with Baker's juror, (1) because her husband had created the situation and (2) because she wanted to draw attention away from the fact she had been talking Baker's case over with her husband which surly has to be a violation of the Rules of Professional Conduct and (3) because she did not want a mistrial. This alone makes her representations suspect and creates a presumption of prejudice.

Baker argues Juror #12's withholding his friendship with the prosecutor's husband during voir dire denied him the prospects of detecting bias if it existed. Baker's argues that if he had known about this friendship he would have struck Mr. Timmerman, Juror# 12, from his jury. There were other prospective juror who admitted they knew the

prosecutor and or her husband and who after further questioning, they were struck from the jury.

A Ms. Swift was crossed off the list for unknown reasons and prospective Juror # 1 was Ms. Comfort. [App.-G, p. 16]. Ms. Comfort stated her younger sister was one of Prosecutor Winebrenner's friends from school and that she herself had known the Prosecutor since school. [App.-G, p. 25 & 58]. Struck by defense Peremptory [App.-F, p. 172]. Ms. Comfort was excused. [App.-G, p. 79]. Prospective Juror # 2 was a Mr. Jutt. [App.-G, p. 16] Mr. Jutt held up his hand when the Prosecutor asked the pool if any one knew her husband Denny. [App.-G, p. 34] Struck for Cause by defense. [App.-F, p. 172] Jutt was excused. [App.-G, p. 79]. Ms. Kummer was Juror # 12 in the second round. [App.-G, p. 79]. Ms. Kummer stated she knew Prosecutor Winebrenner well and her and her family attended church with her. [App.-G, p. 85]. Struck by defense for Cause. [App.-F, p. 183]. Excused [App.-G, p. 99]. Ms. Warstler is placed in the # 2 spot. [App.-H, p. 164].Mr. Warstler stated Prosecutor Winebrenner had represented her husband in a divorce matter and an estate matter. [App.-H, p. 164-65] Struck by defense for Cause. [App.-F, p. 180] Mr. Warstler was excused. [App.-H, p. 169] Ms. Mumford was placed in # 6 spot and stated she had previous dealings with Mr. Winebrenner's office but specifically with the Prosecutor. [App.-H, p. 171] Ms. Mumford did not show up on strike sheets but was excused. [App.-H, p. 174].

There is know way of knowing but, it would be more likely than not had Juror # 12, Mr. Timmerman testified during voir dire that, "yes I know Denny Winebrenner because we have been friends and sports teammates for years", [App. - F, p. 168]. that defense counsel would have struck him for either cause or peremptory. We have no way of

knowing because the post-conviction court would not allow Petitioner to subpoena his defense counsel to the evidentiary hearing so he could be questioned and the post-conviction court also would not allow Petitioner to subpoena his trial judge so he could be asked if he would have allowed Mr. Timmerman to be struck from the jury.

See: *United States v. Guy*, 924 F.2d 702,707(7th Cir.1991) ("When the court in conducting voir dire does not ask questions sufficient to discover bias if it existed defendants do not have to show the jurors were in fact prejudiced, instead, "we focus exclusively on "whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present." *Id.* cited with approval by United States v Hill, 552 F.3d 541at 546-47(7th Cir. 2008). See also, *Government of Virgin Islands v. Weatherwax*, 20 F.3d 572, 579-80 (3d Cir. 1994) ("Prejudice should not be presumed; but when juror misconduct is coupled with the trial court's failure to hold a voir dire to determine the outcome of the misconduct on the jury function, proof of actual prejudice is excused and a new trial is warranted.") See also, *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993); *Waldorf v. Shuta*, 3 F.3d 705 (3d Cir. 1993) (because trial court did not conduct adequate voir dire and we cannot know what the outcome of searching inquiry based on objective criteria would have been, matter must be remanded for new trial).

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.'" *Oswald v. Bertrand*, 374 F.3d 475, 477-78 (7th Cir. 2004) *(quoting Remmer v. United States*, 347 U.S. 227, 230, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954)). The record clearly demonstrates that Petitioner's trial court failed to investigate the relevant circumstances and their impact on the jurors.

Oswald explained that if a judge performs a "bobtailed inquiry" into juror bias it "flunk[s] the constitutional test that 'the investigation be reasonably calculated to resolve the doubts raised about the juror's impartiality.'" {374 F.3d at 481}. (internal quotation marks omitted) (quoting *Dyer v. Calderon*, 151 F.3d 970, 974-75 (9th Cir. 1998) (en banc)) (collecting cases); *see, e.g., Smith v. Nagy*, 962 F.3d 192, 200 (6th Cir. 2020); Ewing v Horton, 914 F.3d 1027 (6th Cir. 2019) at 1030; U.S. v Herndon, 156 F.3d 629, 636-37 (6th Cir.1998) ; *United States v. Walker*, 1 F.3d 423, 431 (6th Cir. 1993).

Certainly, Petitioner's trial judges complete lack of inquiry "flunk[s] the constitutional test that 'the investigation be reasonably calculated to resolve the doubts raised about the juror's impartiality.'" {374 F.3d at 481}. To be sure, Baker's trial court's acts of omission were undoubtedly in tension with the rule of law, which enshrines impartiality as a *sine qua non* for "fair and just" legal outcomes.

The Sixth Amendment right to an impartial jury guarantees an adequate *voir dire* to identify unqualified jurors... *See Morgan v. Illinois,* 504 U.S. 719, 729,112 S.Ct. 2222, 119 L. Ed. 2d 492 (1992); *US v. Lewin,* 467 F.2d 1132 (7th Cir.1972); *Chandler v Florida,* 449 US 560,575(1981); An appellate court looks to the court's questions to determine whether the court's method of testing impartiality created a reasonable assurance that prejudice would be discovered if present. If an inadequate voir dire [9]was conducted the defendant does not have to prove that a jury member was, in fact, biased. *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972). The requirement of jury impartiality is embodied

[9] Certainly, no voir dire is considered inadequate.

in the Due Process Clause of the Fourteenth Amendment. *State v Dye*, 784 NE2d 469 (Ind. 2003)

In *Barnes v State*, 330 NE2d 743(Ind.1975), the Indiana Supreme Court held that when a juror withholds a disqualifying relationship the key questions are (1) whether, during voir dire the juror was aware of the relationship to the member of the prosecutor's staff, and (2) if the juror became aware of the relationship before the verdict. The Court stated, if either were true, grounds for challenge for cause will have been shown to have existed, and a new trial should be ordered. Also, whether it was an honest mistake by the juror has no bearing on the issue. *Dye, supra.*, citing *Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132, 1141-42 (7th Cir. 1992); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984). A successful challenge to the jurors' allegedly false testimony requires the petitioner to "show that a juror failed to answer honestly a material question on voir dire, and, . . . that a correct response would have provided a valid basis for a challenge for cause." *Arreola v. Choudry*, 533 F.3d 601, 607 (7th Cir. 2008) (citation and quotation marks omitted).

Because he was denied an adequate voir dire into possible juror bias and a fair opportunity to intelligently strike for cause a possible bias juror; Due Process of law Petitioner deserves this Writ to be Granted and a new trial ordered.

QUESTION THREE:

> When a State Post-Conviction Court of Review denies a defendant discovery by denying the defendant his right to subpoena relevant witnesses which denied him a full and fair evidentiary hearing contrary to their Rules and Procedures and existing State and Federal opinions and rules of law, does it violate rights afforded by the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution?

In 2012, when Petitioner was forced to pick up his case on appeal and proceed pro se in a post-conviction relief collateral attack of his convictions his investigations revealed important issues previously overlooked by direct appeal counsel. The issue herein is one of great importance and a blatant violation of his right to a fair trial. After his investigation revealed these violations Petitioner first tried to obtain a copy of his juror questionnaires. [App.-F, p.p. 9-10] The trial court responded that the court did not have a copy of them and suggested Petitioner contact his trial public defender. [App.-F, p.p. 11-12]. Petitioner requested from trial counsel his records but it did not contain the questionnaires.

On April 27, 2015, Petitioner then proceeded by requesting his post-conviction court to allow him to question his jurors by affidavits. [App.-F, p.p. 13-24]

On June 8, 2015 Petitioner filed Requests for issuance of subpoenas to all his jurors. [App.-F, p.p.37-78]. And his trial attorney D. Pappas which was denied. [App.-F, p. 28 (D)(1).

On December 30, 2015 the court denied subpoenas to jurors [App.-F, p.27(B)(4)] and the court did not specifically address the requested affidavits in this motion but ended

its Pre-Trial Provisional Order on Motions filed by stating, "all other motions not otherwise resolved are hereby denied". [App.-F, P. 28]

On January 23, 2017, Petitioner filed Request to question jurors by interrogatories with supporting affidavit. [App.-F, 82-87].

On February 10, 2017, Petitioner filed Request to issue subpoenas to trial counsel Pappas and trial Judge Carpenter. {App.-F, p.p. 88-90]. Judge Carpenter subpoena denied. & Pappas denied as well as request to subpoena first trial counsel F. Stewart, denied. [App.-F, p. 96-97]

On February 24, 2017, Petitioner filed Affidavit in Support of Motion to Question Jurors by Interrogatories. [App.-F, p. 98-100]; Proposed Questions for Juror # 12 (Friend of trial prosecutor's husband), [App.-F, p.p. 101-109]; Proposed Questions for all jurors and Alternates. [App.-F, p.p. 110-116].

On June 22, 2017 the post-conviction court issued Order holding defense counsel waived right for Petitioner to question Juror # 12. [App.-F, p.p. 117-118(5.)(a); denied request to subpoena trial counsel Pappas at (5.)(b); denied subpoena to trial judge Carpenter at (5.)(e); denied subpoena to first trial counsel F. Stewart at (5.)(f). Petitioner files Motion to Reconsider and Objections to June 22, 2017 Order. [App.-F, p.p.120-123]

On July 24, 2017 Petitioner files Request to Subpoena Trial Prosecutor and her Husband (Friend of Juror) to PC Evidentiary Hearing. [App.-F, p.p. 124-127; 128-130]; Motion for Special Prosecutor. [at 131-136].

On December 7, 2017 Courts enters Pre-Trial Order denying request to file Interrogatories to all jurors. [App.-F, p. 145(5.); and specifically Juror # 12 denied at (6.)

and Court cites Laches and Ind.R.Evid.606. Court states all evidence is to be presented by affidavits. [App.-F, p. 146(7(b)]. Court holds Petitioner in Contempt for filing Interrogatory on trial Judge Carpenter. [at (9.); denied Motion for Special Prosecutor at (11.).

On December 12, 2017 Petitioner's Post-Conviction Evidentiary Hearing is held at which Petitioner Objects to not being allowed to Subpoena all his witnesses and Petitioner Objected to not being allowed to question his jurors by Affidavits or Interrogatories and Subpoenas. [App.-F, p. 152].

On January 16, 2018 Court enters Findings of Fact and Conclusions of Law and denies all Petitioner Issues. Court addressed Petitioner's claim the trial court had failed in its affirmative duty to adequately investigate juror misconduct by failing to reveal on voir dire that he was a friend and sports teammate of the trial prosecutor's husband by claiming trial counsel had waived the right to question the juror. Court admits Petitioner had filed numerous requests to question his jurors and to subpoena witness which Court had denied. {App.-F, p.p. 161-62] Post-Conviction Court misquoted the record of the trial voir dire when it stated all jurors were questioned about the pre-trial publicity, [App.-F, p. 163 at Argument VIII] A correct review of the transcripts reveals not one single juror was ever asked if they had read any of the prejudicial media coverage and if so would they still be able to render a bias free verdict. [App. - G and H].

The record shows that the post-conviction court did everything in its power to prevent Petitioner from questioning his witness to prove his claims. Petition should not now be denied a proper review of his claims because the record shows he was diligent in his efforts to discover the evidence to prove his claims but was impeded at every turn by

his Post-Conviction Judge, See: *Williams v Jackson*, 964 F.3d 621 (7th Cir. 2020) citing *Williams v. Taylor*, 529 U.S. 420, 432, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000). Diligence requires that a prisoner "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court," even if those efforts are unsuccessful, *id.* at 435, and "at a minimum, [sought] an evidentiary hearing in state court," *id.* at 437.

The Indiana Rules Of Trial Procedure apply to "all suits of a civil nature whether cognizable as cases at law, in equity, or of statutory origin." Ind. Tr. R. 1. This includes post-conviction proceedings. *Bunch v. State*, 778 N.E.2d 1285, 1288 (Ind. 2002) ("[T]he Trial Rules apply to post-conviction relief proceedings."). Indiana Trial Rule 26(B); 45(A)(2); Indiana Trial rule 30, governing discovery and depositions; and Indiana Post-Conviction Rule 1(5) which states: ("All rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are available to the parties") still has force, Petitioner is entitled to post-conviction relief.

The State does not contest that the post-conviction court had denied Petitioner a full and fair post-conviction hearing in violation of the Indiana rules in (10.) above; *Roberts v State*, 203 N.E.3d 1087 (Ind. App. 2023). Petitioner is entitled to post-conviction relief. Petitioner was denied due process of law by the trial court when he was denied an adequate voir dire to determine potential jury bias and juror misconduct on two separate occasions; Petitioner was denied due process of law by the post-conviction court when he was denied a meaningful opportunity to litigate his trial court due process violation claim. The post-conviction court denied Petitioner a full and fair post-conviction evidentiary hearing when it denied Petitioner permission to subpoena his relevant witness

to his evidentiary hearing in violation of Trial Rule 26(B); 45(A) (2); Indiana Trial rule 30. The post-conviction court misstated the record when it stated the jurors were all questioned concerning the pre-trial publicity when none had.

Denying Baker his discovery rights to his witnesses violates his rights under the Fourteenth Amendment's Due Process Clause, which prohibits states from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, this is especially true in the post-conviction process where the State has placed the burden on the Petitioner to prove his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1§ (5); demands that Indiana's discovery rules apply to every Petitioner. Moreover, Indiana chose to go above this constitutional floor and encourage "liberal discovery" through their Trial and Post-Conviction Rules so that trials are "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Whitaker v. Becker*, 960 N.E.2d 111, 115 (Ind. 2012).

Indiana imparted upon Petitioner Baker certain due process rights based on their Trial and Post-Conviction Rules above.[10] The phrase due process embodies a requirement of fundamental fairness. *Mathews v Eldridge*, 424 U.S. 319, 335 (1976) ("We must keep in mind the general principle that "if the State imparts a due process right, then it must give that right"). *A.P. Porter County*, 734 NE2d 1107, 1112 (Ind.Ct.App.2000), trans.denied, citing *City of Mitchell v. Graves*, 612 N.E.2d 149, 152 (Ind. Ct. App. 1993).

In every available way, Petitioner sought to subpoena his needed, relevant witnesses, to give testimony by affidavits, by interrogatories or to be subpoenaed to his evidentiary hearing to give live testimony but the post-conviction court denied all his

[10] No Appellate Court of review has ever addressed the due process violations raised by Baker.

repeated requests. The recent Indiana case of *Roberts v State*, 203 N.E.3d 1087 (Ind. App. 2023), dictates that denying Petitioner permission to subpoena his relevant witness to his hearing was an abuse of discretion and it demands his case be remanded for a full and fair hearing, allowing Petitioner to subpoena his witness and failure to allow relevant witnesses to be subpoenaed is not harmless. *Roberts* citing *Medlock v State*, 547 N.E.2d 884 (Ind. 1989).

No reviewing court, to date, has addressed Baker's claims here and commented on any of the above controlling case law in their denials. Moreover, whether or not there was sufficient evidence to convict Baker is of no moment and does not diminish the trial judge's responsibility to afford due process by performing an adequate voir dire to investigate possible bias. In *Oswald* the court held that the fact that he seemed so obviously guilty as to make the necessity for a trial questionable to a layperson, the judges duty to conduct an adequate voir dire was not diminished. {374 F.3d 481} Even a clearly guilty criminal is entitled to be tried before an impartial tribunal. *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991); *Irvin v. Dowd*, *supra*, 366 U.S. at 722; It is one of the handful of rights of a criminal defendant that is not subject to the doctrine of harmless error. {499 U.S. 309-10}

The lynchpin questions in this case then are first, whether the trial court was made aware of the potential for juror bias and whether or not the trial court took the appropriate remedial actions. The answer to the former is *unequivocally yes* and to the later is *absolutely not*. Baker's trial court's procedures did not create [any] assurance that prejudice would be discovered if present and this an unacceptable denial of due process. *Dellinger* {472 F.2d 367}

In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co Litt 155b. His verdict must be based upon the evidence developed at the trial. Cf. Thompson v City of Louisville, 362 US 199 [4 L Ed 2d 654, 80 S Ct 624, 80 ALR2d 1355 (1960)]. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807).

Because of all the constitutional violations above, Petitioner deserves to have this Writ Granted and all other relief just in the premises.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Petitioner pro se, Elmer Dean Baker - Elmer Dean Baker

Date: 26th day of April, 2024.