

NO: 24-5100

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
Indiana Supreme Court

PETITION FOR REHEARING

Elmer Dean Baker
Indiana State Prison
One Park Row
Michigan City, Indiana 46360
Petitioner - pro se

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ISSUES PRESENTED FOR REHEARING:

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 a defendant an adequate voir dire of jurors to identify unqualified jurors?

TWO: Does it violate a defendants rights under the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution when a state post-conviction court denies him a full and fair hearing by denying his requests to subpoena and question relevant witnesses?

COMES NOW, Petitioner, pro se and respectfully submits:

1. On April 26, 2024 Petitioner filed Writ of Certiorari to Indiana Supreme Court;
2. Writ was docketed under No. 24-5100 on July 18, 2024;
3. On October 07, 2024 this Court denied Petitioner's Writ of Certiorari.

Petitioner now, timely and in good faith, files this Petition for a Rehearing pursuant to Rule 44 and submits that Petitioner was denied due process of law under the 14th Amendment to the United States Constitution and his Sixth Amendment fair trial rights.

Rehearing is necessary because as argued below, Petitioner's trial court and subsequent post-conviction court improperly disregarded their own state Supreme Court's mandates¹ and the Seventh Circuit Court of Appeals mandates² as well as this

¹ *Lindsey v State*, (1973), 260 Ind.351, 295 NE2d 819; *Ramirez v State*, 7 N.E.3d 933 (2014 Ind.); *Caruthers v State*, 926 N.E.2d 1016 (2010 Ind.)

² *US v. Lewin*, 467 F.2d 1132 (7th Cir.1972); *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; *U. S. v Dellinger* (CA7 Ill) 472 F.2d 159, 22 ALR Fed 159, cert den 410 US 970, 35 L Ed 2d 706, 93 S Ct 1443; *United States v. Guy*, 924 F.2d 702, 707 (7th Cir.1991); *United States v Hill*, 552 F.3d 541 at 546-47 (7th Cir. 2008); *Oswald v. Bertrand*, 374 F.3d 475, 477-78 (7th Cir. 2004)

Courts mandates³ when it comes to measures required to assure defendants receive a fair trial with an impartial jury when the trial court is informed of the following below.

The Indiana state court's adjudication of this claim was contrary to, and an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, and the Seventh Circuit [and] the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented. The Indiana Courts have so far departed from the accepted and usual course of judicial proceedings that calls for an exercise of this Courts supervisory power.

1. The State does not contest that Petitioner's trial court was informed prior to trial of the possibility the jury had been exposed to prejudicial media coverage⁴;
2. The State does not contest that on the fifth day of trial, the trial court was made aware one of the sitting jurors had a disqualifying relationship with the trial prosecutor's husband and this juror had withheld this relationship during initial trial voir dire and this information became known after learning said juror and the prosecutor's husband had met at a local restaurant during a juror lunch break and they had an out-of-court communication.[App. - F, p.p. 167-170]
3. The State does not contest that the trial court took absolutely no measures to assure the jury had not been exposed to prejudicial media coverage and if so could they render a bias free verdict on the evidence alone;
4. The record clearly shows that on the fifth day of trial, the trial court - after learning about a juror having an improper friendship with the trial prosecutor's

³ *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L. Ed. 2d 492 (1992); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984).

⁴ [App. - F, p.p. 18-24]

husband and that they had met and had an out-of-court conversation during a juror lunch break, coupled with the fact the juror had failed to reveal this friendship during initial trial voir dire so Petitioner could make an informed decision whether or not to strike him from the jury as he had done with other potential jurors who had truthfully revealed a friendship or business relationship with the prosecutor or her husband -- the trial court did not adequately investigate the issue and only questioned the trial prosecutor who was only able to give her opinion of her husband's opinion of the jurors opinion about their friendship and out-of-court communication and then the court declared this may be one of those times ignorance is bliss.

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). Indiana is in the Seventh Circuit which holds that, ("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." *United States v. Guy*, 924 F.2d 702,707(7th Cir.1991) cited with approval by *United States v Hill*, 552 F.3d 541at 546-47(7th Cir. 2008).

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"**, 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*.

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.)

Where pretrial publicity is of character and extent to raise real probability that veniremen had heard and formed opinions about events relevant to case, and at least where, as here, defense has brought pretrial publicity to court's attention and requested voir dire inquiry, court must make inquiry adequate to determine whether anyone has read or heard about facts, and, if so, what impact has been on his ability to serve as impartial juror. *U. S. v Dellinger* (CA7 Ill) 472 F.2d 159, 22 ALR Fed 159, cert den 410 US 970, 35 L Ed 2d 706, 93 S Ct 1443.

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.")

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)). 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}.

A clear reading of the record in Petitioner's case shows explicitly that the trial court in conducting voir dire failed to use procedures for testing impartiality that created a reasonable assurance that prejudice would be discovered if present. Petitioner Baker was denied Due Process of law and deserves to have this Writ Granted and all other relief proper in the premises.

This Petition including footnotes contains 1613 words.

Respectfully re-submitted this 6th day of November, 2024.

Elmer Dean Baker
Elmer Dean Baker, pro se
DOC# 913003
Indiana State Prison
One Park Row
Michigan City, Indiana 46360

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Respondent,

CERTIFICATE OF PRO SE PETITIONER

I, Elmer Dean Baker, Petitioner pro se, does hereby swear under the penalties for perjury that the grounds in this Petition for Rehearing are limited to intervening circumstances of substantial or controlling effect and it is presented in good faith and not for delay.

Petitioner, certifies that this Petition for Rehearing was originally filed on October 17, 2024 and received by this Court on October 28, 2024 and was returned to Petitioner on October 30, 2024 and received by Petitioner on November 06, 2024 for correction of defect in Certificate and that Petitioner has corrected the defect and Petitioner re-submits this Petition for Rehearing on this 6th day of November, 2024.

Elmer Dean Baker

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PROOF OF SERVICE

I, Elmer Dean Baker, Petitioner, pro se, DOC # 913003 do hereby certify that I have, this 6th day of November 2024, corrected defects assigned by the Clerk on October 30, 2024 and served copies of the corrected Petition for Rehearing, on the clerk of the United States Supreme Court at 1 First Street N.E., Washington DC 20543-0001 and the Attorney General of Indiana, Ind. Gov. Center S., 5th Floor, 302 West Washington St., Indianapolis, IN 46204-2770, pursuant to Supreme Court Rule 29, by submitting same to a designated employee of the Indiana State Prison for prompt processing and mailing by authorized prison personnel within the facility mailroom, with sufficient first class postage affixed. Petitioner also declares/verifies under penalties of perjury that the foregoing is true and correct.

Respectfully Submitted, this 6th day of November, 2024.

Elmer Dean Baker

Elmer Dean Baker, Petitioner, *pro se*
DOC # 913003, Indiana State Prison
One Park Row, Michigan City, IN. 46360-6597