

No. _____

In the Supreme Court of the United States

MATTHEW WARMUS

Petitioner,

v.

CHRISTOPHER LaROSE, Warden,

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- I. If, after the seating of a jury in a criminal trial, the judge conducting the trial engages in improper contact with a juror, must an evidentiary hearing be conducted pursuant to Remmer v. United States, 347 U.S. 227 (1954) to determine whether such contact constituted harmless error?
- II. Is it the burden of defense counsel to request an evidentiary hearing pursuant to Remmer v. United States, 347 U.S. 227 (1954) upon his learning of a judge's improper contact with a juror outside of the courtroom or is the hearing mandated to be held regardless of whether a request is made?

**LIST OF PARTIES TO THE PROCEEDINGS IN
THE COURT BELOW AND RULE 29.6
STATEMENT**

All parties appear in the caption of the case on the cover page. None of the parties included thereon have a corporate interest in the outcome of this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Matthew Warmus, respectfully prays that a writ of certiorari issue to review the judgment below of the Federal Sixth Circuit Court of Appeals.

OPINIONS BELOW

The order of the Sixth Circuit Court of Appeals of September 28, 2017, No. 17-3196, refusing to grant a petition to grant a Certificate of Appealability appears at Appendix A to the Petition.

This opinion of the Northern District of Ohio, Case No. 4:14 CV 01925, January 30, 2017, appears at Appendix B to the petition.

The opinion of the Ohio Eighth District Court of Appeals, State of Ohio v. Warmus, 967 N.E.2d 1223 (Ohio Ct.App. 2010), the highest state court to review the merits, appears at Appendix C to the petition.

JURISDICTION

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. §§ 1257 and 1651 as a judgment of the federal court of appeals was entered on September 28, 2017.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

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.

28 U.S.C. § 2254(d)(1)-(2)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A jury convicted Petitioner Matthew Warmus of the Murder under Ohio law. During the trial, the judge drove a sitting juror to court in his car after the juror had been unable to find transportation. The judge informed the parties that he had provided a ride to the juror and indicated he would answer questions about the incident after trial if requested to do so. Defense counsel did not follow up and request an evidentiary hearing. Neither the juror nor the judge was ever questioned about the improper contact. Thus, it is not known what the two discussed in the judge's car or whether the juror was influenced by the judge in any manner by this contact.

In Remmer v. United States, 347 U.S. 227, 228 (1954), this Court set the standard of review for improper juror contact situations.

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. Mattox v. United States, 146 U.S. 140, 148-150; Wheaton v. United States, 133 F.2d 522, 527.

The question to be resolved is whether a defendant is required to request an evidentiary hearing if the improper contact is unequivocally established and the judge conducting the trial is aware of the improper contact or communication with the jury. Remmer does not require an objection or request. In fact, once the improper communication is established, Remmer places the burden on the prosecutor to establish the harmless nature of the contact. This would seem to establish that a hearing is mandated once the improper contact has been established.

Reviewing courts, both state and federal, found that Warmus failed to establish the prejudice of the contact. This is in obvious conflict with the established purpose of Remmer, which requires a hearing to determine whether the contact was harmless. As presently interpreted by the courts below, the duty to request a hearing is placed upon the defendant. The judge has no obligation to explore the misconduct.

All reviewing courts below, both state and federal, found Warmus had waived his right to an evidentiary hearing by not making the specific request. Assuming that it was defense counsel's obligation to specifically request a hearing to inquire about the specific nature of the discussions or influence that the judge may have had over the juror, defense counsel failed in his duty to his client. The problem is, Strickland v. Washington, 466 U.S. 668 (1984) requires establishment of the prejudice along with the failure to perform a duty by counsel to warrant a new trial. Without an evidentiary hearing, Warmus nor any other defendant is able to establish Strickland's prejudice prong.

Warmus raised the deprivation of his right to effective assistance of counsel on this basis. His claim failed in state court and in his 28 U.S.C. § 2254 petition because of his failure to establish prejudice. It is a circular argument, as the act for very which defense counsel fails to perform insulates counsel from being deemed ineffective.

REASONS FOR GRANTING THE WRIT

I. If, after the seating of a jury in a criminal trial, the judge conducting the trial engages in improper contact with a juror, an evidentiary hearing must be conducted pursuant to Remmer v. United States, 347 U.S. 227 (1954) to determine whether such contact constituted harmless error.

This Court in Remmer v. United States, 347 U.S. 227 (1954) established that the burden of establishing that an improper communication received by a sitting juror was harmless is on the prosecution. However, Remmer is not being interpreted by the lower courts in this manner. In fact, the Sixth Circuit has found that Remmer does not include a presumption of prejudice. The prejudice must be established in the hearing. U.S. v. Orlando, 281 F.3d 586, 596–98 (6th Cir. 2002). Therefore, if a hearing is not granted, the judge may inoculate the verdict from the discovery of the prejudice that resulted from the questioned communication or contact with a juror.

Based on precedent of this Court, the trial court has an affirmative duty to conduct a hearing into the possible prejudice which may have resulted from any improper contact between the court and a juror.

Because the state bears the burden of proving no prejudice resulted from the contact, the failure to conduct a hearing must result in a new trial.

During Petitioner Warmus' criminal trial here, the judge announced to the parties that he had provided a ride to court for a seated juror. The juror in question found himself without a ride to court and did not have bus fare. The juror contacted the judge's chambers. The judge's bailiff, in turn, contacted the judge, who was on his way to court. The judge provided the juror a ride to court. Although the court informed the parties of the ride after taking the testimony of two witnesses, the court failed to hold the required hearing pursuant to Remmer v. United States (1954), 347 U.S. 227. Without the hearing, it is impossible to establish whether prejudice occurred. Because the burden to prove lack of prejudice is on the state, the failure to hold a hearing should require a new trial.

The Ohio Eighth District Court of Appeals did not rely solely upon waiver to determine that a Remmer hearing was not required. Instead, the court found that a Remmer hearing was unnecessary because "the judge made it clear that he did not discuss anything about the case with the juror. The judge explained that he studiously avoided any conversation relating to the case. Defense counsel had no reason to doubt the court's recapitulation of the conversation and offered no objection to the way the court handled the matter. Defense counsel thus exercised his judgment that no impropriety occurred. Even were we of a mind to second-guess this decision, nothing on the record suggests to us that the court's explanation was so lacking in veracity that a full Remmer hearing was

necessary.” State v. Warmus, 197 Ohio App.3d 383; 2011 Ohio 5827, ¶76.

Thus, the Court improperly substituted a self-serving statement by the trial judge, not made under oath, to be an adequate substitute for a hearing, negating this Court’s Remmer mandate.

Unreasonable State Determination of the Facts

The state court decision violates both 28 U.S.C. § 2254(d)(1) and (2). In particular, the determination of harmlessness was based upon an unreasonable determination of the facts. The state court opinion argued that any error from the improper contact constituted harmless because the juror in question was an alternate and did not deliberate. This factual determination is patently inaccurate. The juror in question was a sitting juror. Although starting out as an alternate, the juror was seated when one of the original twelve jurors was dismissed during the trial. The juror in question replaced the dismissed juror and deliberated. The juror signed the verdict form.

The juror provided the ride by the judge was an actual juror and not an alternate. Thus, the federal court, in adopting the state finding of fact, based its finding on an unreasonable determination of those facts.

Hearing Requirement

When a trial court learns of an improper outside communication with a juror, it must hold a hearing to determine whether the communication biased the juror. Smith v. Phillips (1982), 455 U.S. 209, 215-216; Remmer v. United States, 347 U.S. at 229-230. “In a

criminal case, any private communication * * * with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial * * * . The burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.” *Id.* Here, no hearing was conducted. The judge did not meet his burden.

The district judge rejected this claim because Warmus could not show the prejudice. The court misunderstood the holding of Remmer. The hearing must be held to determine if there was prejudice. No one knows what was said to the juror in the car ride. No one knows what influence the judge’s cadence or mannerisms might have had on the juror or how the juror may have interpreted them. It is not known what was discussed in the car or the amount of time the two spent in the car. It is not even known if the juror discussed his ride with other sitting jurors. Without a hearing, the matter cannot be fully examined as required by Remmer.

II. It is not the burden of defense counsel to request an evidentiary hearing upon learning of improper communication with the juror during the course of a trial. Once the judge is informed of the improper communication or contact, the holding of a hearing pursuant to Remmer v. United States (1954), 347 U.S. 227 is mandated.

Once an improper communication occurs between the judge and a sitting juror, does Remmer v. United States (1954), 347 U.S. 227 mandates the conducting of an evidentiary hearing to determine the possible

prejudice of the communication, or must a defendant specifically request an evidentiary hearing pursuant to avoid waiver of that hearing?

The Sixth Circuit Court of Appeals and the district court found that the issue of whether a Remmer hearing should have been held was defaulted because counsel failed to specifically request a hearing after the trial judge had brought it to the attention of counsel during the hearing. The trial court has a duty to investigate and cure potential taint. Because the problem here was pre-verdict, there are no statutory or policy considerations that prohibit post-verdict investigations. Tanner v. United States, 483 U.S. 107, 117–128 (1987). As addressed in Tanner, post-verdict considerations are in place to protect the jurors, and the jury system, from “the chaos and oppression that would arise if jury verdicts were subject to wide open, post verdict examination.” Id. at 119.

If the trial court refuses to hold a hearing on a pre-verdict issue, the remedy is for reviewing courts to remand the matter for the purposes of conducting a post-trial hearing. This Court in Smith v. Phillips, 455 U.S. 209, 215 (1982), held that a post-trial hearing “in which the defendant has the opportunity to prove actual bias” is sufficient to decide the prejudice issue. Warmus was never allowed this opportunity, contrary to this Court’s firmly established precedent.

Neither Remmer nor Phillips requires that a defendant request the hearing once it has been brought to the attention of the judge. The federal courts below ignored this aspect of the legal argument. The failure to hold a hearing violated a firmly established precedent of this Court. 28 U.S.C. 2254(d)(1).

CONCLUSION

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

Respectfully submitted,

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