No. _____

In the Supreme Court of the United States

STACEY IAN HUMPHREYS,

Petitioner,

v.

ERIC SELLERS, Warden, Georgia Diagnostic and Classification Prison,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Georgia

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*J. DAVID DANTZLER, JR.
Georgia Bar No. 205125

TROUTMAN SANDERS LLP
600 Peachtree Street NE Suite 5200
Atlanta, Georgia 30308-2216
Telephone: 404-885-3000
David.Dantzler@troutmansanders.com

JOHN P. HUTCHINS
Georgia Bar No. 380692

LECLAIRRYAN
1170 Peachtree Street NE Suite 2350
Atlanta, Georgia 30309
Telephone: 404-267-2733
John.Hutchins@leclairryan.com

COUNSEL FOR PETITIONER

*counsel of record

CAPITAL CASE

QUESTION PRESENTED

The "no-impeachment rule," codified in O.C.G.A. § 24-6-606(b) (Georgia's correlate to Federal Rule of Evidence 606(b)), bars juror testimony that impeaches a verdict. This Court has made exceptions to the rule in "cases…in which it would be impossible to refuse" to consider juror testimony "without violating the plainest principles of justice." *United States v. Reid*, How. 361, 366 (1852); *see also Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 863 (2017).

Must the no-impeachment rule yield so as to preserve a death-sentenced defendant's constitutional rights when post-verdict juror testimony establishes that a single juror secured a death sentence by providing false testimony during *voir dire*, deliberately misleading the trial court regarding a deadlock in order to avoid a mistrial, refusing to consider any sentence other than death, and threatening and harassing her fellow jurors?

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STACEY IAN HUMPHREYS respectfully petitions this Court for a writ of *certiorari* to review the Supreme Court of Georgia's denial of a certificate of probable cause to appeal the decision of the state habeas court.

OPINIONS BELOW AND JURISDICTION

The opinion of the Superior Court of Butts County, the state habeas court, is attached as Appendix[1] B. The opinion of the Supreme Court of Georgia denying a certificate of probable cause is attached as Appendix C.

On October 26, 2017, Justice Thomas extended the time to file a petition for *certiorari* until December 22, 2017. That order appears as Appendix A.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime…nor be deprived of life, liberty, or property without due process of law…" U.S. Const. amend. V.
>
> "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…" U.S. Const. amend. VI.
>
> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.
>
> "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…" U.S. Const. amend. XIV § 1.

[1] Hereinafter "App."

STATUTORY PROVISIONS INVOLVED

At the time of Mr. Humphreys's trial, motion for new trial, and direct appeal, Official Code of Georgia Annotated § 17-9-41 stated: "The affidavits of jurors may be taken to sustain but not to impeach their verdict." O.C.G.A. § 17-9-41 (repealed by Ga. L. 2011, Act 52, § 33) (West 2013).

STATEMENT OF THE CASE

Petitioner seeks a writ of *certiorari* to review the Supreme Court of Georgia's denial of a certificate of probable cause to appeal the habeas court's denial of relief.

A. Mr. Humphreys's Murder Trial

1. *Voir Dire*

Mr. Humphreys was arrested for the murders of Cynthia Brown and Lori Williams in November 2003. The trial court appointed Jimmy Berry, an experienced Georgia criminal defense attorney, and the Georgia Capital Defender Office (GCD), a newly-formed capital defense organization, to represent him. His case proceeded to trial in September 2007.

Jury selection in the highly-publicized trial lasted for approximately 12 days, with Berry handling *voir dire* entirely alone.[2] While his co-counsel and other GCD

[2] It was not until Berry arrived for the trial that he learned that he alone would bear responsibility for trying the entire case because the GCD attorney assigned to the case, Deborah Czuba, was uncomfortable with trial practice. Berry had expected Czuba to shoulder part of the substantial undertaking of conducting a weeks-long *voir dire*, but Czuba was unable and unwilling to fulfill that responsibility. As he explained during state habeas proceedings: "…doing two weeks of *voir dire*, where you're standing up every day asking people, it's tiring and it wears you out. [But she] didn't feel comfortable doing any of it…" App. G at 34.

staff sat silently taking notes, Berry collectively and individually questioned all 150 venire members. Across the aisle, the state had four attorneys conducting *voir dire*.

At four o'clock in the afternoon on September 15th, the 11th day of jury selection, the parties questioned Linda Chancey. On her juror questionnaire, Chancey had indicated that she had been the victim of an armed robbery and attempted rape by a convicted murderer and rapist who had escaped from a mental institution. App. H at 9. Chancey said that her assailant "didn't do [her] any physical bodily harm" and she "was able to escape before he ever actually physically entered [her residence]." App. I at 273. According to Chancey, her assailant was recaptured and returned to the institution. *Id.*

Berry failed to question Chancey regarding her experience. He asked Chancey only about her prior employment and her ties to real estate agents. *Id.* at 289-290. Chancey revealed that a close friend worked as a real estate agent – the same occupation as the victims, who were killed while at work. Despite Berry's view that selecting the right jury is key to successfully defending a capital case, and despite his impression that Chancey was "crazy," App. G at 45, he failed to move to challenge her for cause or bias. She did not escape the scrutiny of the other defense team members so easily, however; the GCD staffers observing *voir dire* rated her as a poor choice. *See* App. J (noting that Chancey was "very bad b/c of histor[y]").

By that point, Berry was exhausted from conducting *voir dire* for 12 days without assistance, and he was no longer thinking clearly. App. G at 45. On the 12th day of jury selection, the parties silently struck the jury. The defense failed to

strike Chancey, even though they had a strike remaining when her name surfaced. Berry testified: "[I questioned Chancey] after doing all of the voir dire myself for two weeks. I was tired. If I had thought through it a little bit more clearly… I would not have put her on… ." *Id.* Berry's error would prove fatal for Mr. Humphreys.

2. *Jury Deliberations*

The guilt phase of the trial lasted for eight days. The jurors "readily agreed that Mr. Humphreys was guilty of the crimes with which he had been charged" "without any dissension or much discussion." App. K at 13979. After approximately eight hours of deliberations, Mr. Humphreys was convicted of all counts on September 25, 2007.

During the penalty phase, the defense presented an anemic mitigation case, the focus of which was Mr. Humphreys's tragic early life and its implications for his current functioning.[3] The penalty phase concluded on September 28, 2007.

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[3] As forewoman Susan Barber described the defense's penalty-phase presentation: "By the end of the sentencing phase of trial, I found myself thinking, 'that's all? You don't have anything more to give us?" *Id.*

There was, in fact, plenty more mitigation evidence that the Humphreys team could have provided for the jurors. The jurors did not hear, for example, that Mr. Humphreys's great-grandmother subjected him to ritualistic and sadistic acts of sexual abuse beginning when he was five years old, and that the abuse was so severe that he suffered from bowel incontinence; that he was neglected and severely abused by his mother, a cruel, sadistic, opioid-addicted, and mentally ill woman who forced her stepchildren to beat each other in the nude; and that, as a result of his trauma, he developed severe obsessive-compulsive disorder.

The jury struggled to reach a sentencing verdict. Deliberations began at 4:30 p.m. on September 28th. The jury continued until 10:30 p.m., breaking only briefly to have dinner brought in to the jury room. While the guilt-phase deliberations had gone smoothly, the penalty-phase deliberations were another matter: "from the outset, there was much dissension among the jurors." *Id.*

Linda Chancey was the source of the "dissension" and "hostil[ity]" in the jury room. She was a renegade. According to the jury forewoman, Susan Barber, Chancey "had her mind made up" "[f]rom day one": "early in the trial – before the end of the first phase – she said something along the lines of he's guilty and he deserves to die." *Id.* at 13978-79.

Chancey segregated herself from the group during social occasions in the evenings, refusing to even speak with her fellow jurors. *Id.* at 13978. Later, she recounted that she did so because she "was the smartest member of the jury." App. L at 13882. The forewoman recalled that Chancey "made it clear that she believed that she knew more and understood more about what was going on than the rest of us did: she told us that she had been on a jury[4] before and that she had some kind of background in DNA analysis." *Id.* at 13978. The jurors were led to believe that Chancey "had significant experience with court proceedings." *Id.*

At some point during the first evening of deliberations, the jury took an initial vote. Susan Barber, Alma Pogue, and Tara Newsome expressed their view

[4] According to Chancey's jury questionnaire, she had served as "Madam Foreperson" of a jury in a check fraud case in spring 2007. App. H.

that life imprisonment without parole was the correct sentence, while the remaining jurors cast their votes for death. *See, e.g.,* App K at 13980. The jury had originally intended to deliberate late into the night, but as deliberations became increasingly heated and contentious, they changed their minds, "asking the judge [to] stop deliberations as soon as possible." *Id.* The court dismissed the jury.

Sentencing deliberations resumed at 8:30 a.m. Chancey was insistent on a death sentence. Instead of engaging in deliberations, she isolated herself or did yoga in the corner. *Id.* She engaged with the group only to harass or intimidate other jurors. *See generally* Apps. K, M, N, and O. When the group voted again, ten jurors opted for death, and two voted for life without parole. App. N at 13868-69.

None of the jurors felt that life *with* parole was appropriate, but Pogue and Barber adamantly insisted that life without parole was the proper sentence. Because they remained steadfast in their beliefs, the group reached an agreement: they would unanimously vote for life without parole, a result they "could all be comfortable with." App. K at 13980. When they tallied the votes, it was 11 to 1 in favor of life without parole. Chancey alone had again cast her vote for death, insisting that it was the only acceptable outcome. *Id.*; App. M at 14038-39.

At that point, Chancey "snapped." App. M at 13875. Juror Darrell Parker recalled: "it was as if an evil force took over Linda Chancey." App. O at 2. She began yelling and swearing, and she threw photos of the victims' bodies across the table at the other jurors. App. M at 14034. She went through the crime scene images before the other jurors, demanding, "do you want this to happen to someone

you know?" App. O at 3. Chancey later explained that she used the crime scene photos to "reaffirm what would happen to [the other jurors] if he got parole." App. P at 3. She screamed that she intended to "stay here till forever if it takes it for him to get death." App. O at 3. Chancey told the jurors that "they had to reach a unanimous decision or [Mr. Humphreys] would be paroled." App. P at 3. She "put her feet up on the table and said that she…would not change her vote." *Id.* at 2.

"At that point, it was obvious [we were] going to be deadlocked." App. K at 13980; *see also* App. F at 166. Barber wrote a note to the court describing the impasse. *Id*. In its original form, the note read:

> We, the jury, have agreed on statutory aggravating circumstances on both counts, but not on the penalty. While we agreed that life imprisonment with parole is not an option, we are unable to come to a unanimous decision on either death or life imprisonment without parole as a sentence. Please advise.

Id. at 3-4; *ibid.* at 10-11.

Chancey edited Barber's note, adding the word "currently" in order to suggest that the jury was struggling as part of the normal course of deliberations, but they were *not* at an impasse. App. F at 167. Thus, the court received the following note:

> We, the jury, have agreed on statutory aggravating circumstances on both counts, but not on the penalty. *Currently* we agreed that life imprisonment with parole is not an acceptable option, we are *currently* unable to form a unanimous decision on either death or life imprisonment without parole as a sentence. Please advise.

App. K at 13986 (emphases supplied). Chancey later revealed that she had altered the note because she believed that the note in its raw form "would cause a mistrial and they would have to do it over again." App. P at 3.

After receiving the note, the court informed counsel:

> The jury sent a question to the Court, basically summing it up rather than all the details contained in it, they've indicated that they have reached a verdict in regard to some of the issues that have been submitted to them, but have not yet reached a decision on other issues that were submitted to them, so I'm going to ask that the jury be brought in, and I'll simply instruct them that they are to continue with their deliberations.

App. Q at 443.

Later, the Supreme Court of Georgia found that the word "currently" was dispositive of the issue of whether or not the jurors were deadlocked: "the language twice used in the note that the jurors 'currently' were not able to agree **indicated that deliberations were ongoing**." App. D at 79 (emphasis supplied)

The court placed the note in the record, but refused to reveal its contents to the parties. App. Q at 445. Instead, the court informed counsel that "[i]f the Court receives a further note from the jury and it indicates that they are unable to continue further, then the Court will certainly consider an *Allen* charge." *Id.* Defense counsel objected again, distressed that they were being left in the dark as to the content of the note, and concerned about the implications of the trial judge's threat to provide an *Allen* charge. *Id*.

To Barber's surprise, the court instructed the jury to continue deliberating. App. K at 13981. They filed back into the jury room, where the deliberations degenerated, with the jurors engaging in "angry debates about what would happen if [they] continued to be deadlocked." *Id*. Some jurors erroneously believed that if they could not reach a unanimous verdict, "Humphreys would walk and the entire

trial would have been in vain." *Id.* Others believed that if they did not arrive at a unanimous decision, he would be sentenced to life *with* parole. App. N at 14032.

Chancey yelled at and "made personal attacks on" her fellow jurors. App. K at 13981. Darrell Parker recalled:

> There was a lot of yelling...Linda Chancey was very much for death...Linda yelled at Susan Barber. It got very heated. Melissa Odum, one of the younger girls, yelled back at Linda Chancey….Melissa Odum got so angry at Linda Chancey that Melissa Odum punched the wall.

App. M. at 13869-71. Chancey recalled that Odum, whom she described as "the fat, red-headed juror," had been trying to punch *her,* but had missed. App. L at 13884.

Chancey used her prior victimization to browbeat the other jurors, providing a very different version of her assault than she had reported during *voir dire*:

> Linda [Chancey] told us, the jury, that Linda had been attacked in her bed in her apartment. Linda was naked in her bed and a man broke in and attacked her. Linda ran into the halls of her apartment and finally someone opened the door. We, the jury, **asked Linda if she had told the attorneys that. Linda said she hadn't thought about it.**

App. N at 14030-31 (emphasis supplied). [5]

Several hours after the court instructed the jury to continue with their deliberations, there had been no apparent signs of progress. Counsel moved for a

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[5] In the course of undersigned counsel's investigation, counsel obtained information about the only person who fits Chancey's description: Joseph D. Hilliard. Hilliard escaped from St. Elizabeth's, a mental hospital in Washington, D.C. He was a paranoid schizophrenic who murdered at least one person in the 1970s. He was found not guilty by reason of insanity, and he was placed at St. Elizabeth's. He escaped 12 times, including twice in 1976, when Chancey was attacked.

mistrial, citing concerns over the unusual length of the deliberations, the jury note, and the observable demeanor of the jurors as "very upset." App. Q at 450-451. The jurors were "obviously tearful and obviously were having a difficult time." *Id.* at 450. Counsel explained that the jury had been deliberating for nearly the same amount of time that it took to hear evidence during the penalty phase. *Id.* at 451. The court refused to find the jury deadlocked, and denied the motion. *Id*. at 457.

But the jury could not move forward. As Susan Barber explained, "Chancey was set on death, and I knew that we would never reach a unanimous decision with both of us on the jury." App. K at 13981. At one point, Chancey threatened:

> if the jury did not get a unanimous vote on death, that the jury would be a hung jury. [Chancey] yelled at Susan Barber saying that if the jury did not unanimously vote for death, then Stacey Humphrey's [sic] would get life with the possibility of parole, Stacey would come to kill Linda first.

App. N at 14030-31.

Two hours later, Barber sent a second note to the court, which said: "**Due to the hostile nature of one of the jurors, I am asking to be removed from the jury**." App. Q at 457 (emphasis supplied). The court announced that it would provide an *Allen* charge. The defense renewed its motion for a mistrial, but the court denied the motion again. *Id.* at 457-58. The court brought the jury back in, and it issued the following charge:

> …**It is the law that a unanimous verdict is required.**[6] While this

[6] This was not the law. Unanimity was required for a jury to impose a *death* verdict, but the opposite was not also true: unanimity was not required for a *life* verdict. If the jurors had failed to agree on a death sentence, then the trial court

> verdict must be the conclusion of each juror independently, and not a mere acquiescence of the jurors in order to reach an agreement, it is nevertheless necessary for all the jurors to examine the issues and the questions submitted to them with candor and with fairness and with a proper regard for in [sic] deference to the opinion of each other…

Id. at 459-61 (emphasis supplied).

Barber was shocked by the court's response:

> Instead of dismissing me or asking about what was happening, the judge called us back into the courtroom and told us that the law required us to reach a unanimous verdict. I was really surprised and uncomfortable. …I did not feel like there was anything else I could do as the foreperson. After I sent the note to the judge, **the judge called the jury back and told us we had to be unanimous. I don't recall the exact words, but the message was clear: there was no other option but a unanimous verdict.**

App. K at 13981-82 (emphasis supplied).

Barber testified that the court's instruction was "really difficult for me and the other jurors to wrap our heads around: what if we could *never* be unanimous?" App. K at 13982. "After the judge's instructions, we sincerely believed that if we were deadlocked Mr. Humphreys would get life imprisonment with the possibility of parole or that he could walk." *Id.* at 13983. Juror Newsome confirmed: "we… knew that we had to come to a unanimous decision at some point. We would be deliberating until we were able to come to a unanimous decision." App. N at 14041.

By the time the court received Barber's note asking to be removed, jurors had been deliberating for nearly eighteen hours, and many of the jurors were in distress.

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would have been required to impose life or life without parole. O.C.G.A. § 17-10-31.1(c) (repealed by Ga. L. 2009 p. 223, April 29, 2009) (emphasis supplied).

App. F at 105. The trial court never attempted to understand the hostility that was occurring in the jury room, nor did it inquire about the reasons that Barber wished to be removed. The jury resumed its deliberations at 8:40 p.m., and they retired for the evening at 10:20 p.m. App. Q at 461.

Although Barber had been harassed and berated by Chancey for days, she entered the jury room the following morning "ready to fight for life without parole." App. K at 13982. But Chancey "would not articulate her reasons for voting for death and would not engage in debate at all." *Id.*; App. F at 172. She held the jury hostage, refusing to engage in negotiations. "[S]creaming" emanated from the jury room. App. P at 2. The jurors stopped discussing the case with Chancey "because they knew she would never change her mind." App. K at 13982; *see also* App. F at 172. Barber was "extremely distressed and locked [herself] in the bathroom and cried." *Id*. She believed she had run out of options.

> I thought unanimity was our only choice…. I did not think that we had the option of sending another note to the judge informing her that we could not reach a unanimous decision. I had absolutely no other option. I didn't want Humphreys to go free so I changed my vote to death. I cried the entire time. It was one of the hardest things I have ever done because I was not true to my own belief about what the proper sentence should be.

Id.

After Barber "gave up" based on the misapprehension that the only option was a unanimous verdict, the jury returned two death sentences. App. Q at 462. Barber felt "cheated" and "misled" by the judge's instructions and Chancey's abuse. App. K at 13983. "If I had known that not being unanimous meant a sentence of life

without parole in this case, it would have been easy to stand my ground as long as I needed to. I think this would have made a difference for many of the other jurors as well." *Id.*

B. Motion for New Trial and Direct Appeal Proceedings

1. *Counsel's Investigation: Chancey "Wasn't Going to Let [a Mistrial] Happen."*[7]

Following the trial, the defense interviewed the jurors regarding the apparent irregularities that occurred during deliberations. The interviews revealed substantial indications of both serious juror misconduct and the coercive impact of the trial court's *Allen* charge.

The defense investigators found Chancey at her home. After they revealed their identities, Chancey invited them into her apartment, and they discussed the case in her kitchen. She invited them into her bedroom area, where she kept a personal notebook that she maintained on the Humphreys case. App. L at 13880. Chancey showed them the original jury notes from the trial, which she kept in the journal. Chancey readily admitted to altering the jury note to add the word "currently" because "the way the forewoman had written it they might have gotten a mistrial," and she "wasn't going to let that happen," *id.* at 13883; if she did, "they would have to do it over again or the defendant would get parole and hunt the jurors down," App. P at 3.

[7] App. L at 13883.

Chancey confirmed that she deliberately segregated herself from the other jurors during the trial and the deliberations. App. L at 13884. She informed the investigators that "[a]ll of the jurors thought that their sentencing vote had to be unanimous." *Id.* at 13883. She admitted that she bore some responsibility for the misimpression, saying that she was ultimately "able to convince the other jurors they had to be unanimous in order to resolve the case." App. P at 3. Chancey told the investigators that she "**would only vote for death**." *Id.* (emphasis supplied).

Chancey willingly reported that she had been the victim of a sexual assault. "A strange man had come in through the window of her apartment, robbed her and tried to rape her. The man had broken out of a nearby mental hospital." App. L at 13882. This was quite different from the account she provided during *voir dire*, in which she indicated that her assailant "didn't do [her] any physical bodily harm" and that she "was able to escape before he ever actually physically entered [her residence]." App. I at 273.

Counsel also obtained statements from jurors Tara Newsome and Darrell Parker.[8] Both described the sentencing-phase deliberations as "very hostile," App. N at 14028, and heated, App. M at 13869. They detailed Chancey's bullying and harassment, her specific targeting of Susan Barber, App. N at 14030-31, her attempt to "control" her fellow jurors, App. M at 13871, and the jury's misunderstanding of the unanimity requirement, App. N at 14041.

[8] Counsel obtained two affidavits from juror Parker, a short and a long version.

2. *Adjudication on Motion for New Trial and Direct Appeal*

During the motion for new trial, Mr. Humphreys's counsel raised the claim that the trial court's *Allen* charge had led the jurors to erroneously believe that they were required to achieve unanimity when settling on a sentence. In support of this claim, counsel submitted (1) a short affidavit from juror Darrell Parker, and (2) affidavits from the defense investigators who interviewed Chancey following the trial. Although counsel had obtained an affidavit from juror Tara Newsome and a more detailed affidavit from Darrell Parker, counsel did not produce them.

Counsel wholly failed to raise a claim of juror misconduct.

The trial court refused to consider the juror and investigator affidavits, explaining that they were barred by O.C.G.A. § 17-9-41, Georgia's "no-impeachment rule," and they did not fall within any exception. App. E at 12-13. O.C.G.A. § 17-9-41 provided that "[t]he affidavits of jurors may be taken to sustain but not to impeach their verdict." O.C.G.A. § 17-9-41 (repealed by Ga. L. 2011, Act 52, § 33). Three exceptions to the rule existed: "when (1) prejudicial, extrajudicial information has been brought to the jury's attention; (2) nonjurors have interfered with deliberations; or (3) there has been irregular jury conduct so prejudicial that the verdict lacks due process." *Tate v. State*, 628 S.E.2d 730, 732–33 (Ga. App. 2006) (emphasis supplied); *see also Crowe v. Hall*, 490 F.3d 840, 846 (11th Cir. 2007). In addition, Georgia's common-law exception encouraged a court to review juror affidavits when barring their review would "emasculate a defendant's constitutional right to a fair trial." *Turpin v. Todd*, 493 S.E.2d 900, 903 (1997).

On appeal to the Supreme Court of Georgia, counsel claimed that the trial court's *Allen* charge was erroneous because it indicated that unanimity was required, and that the trial court had erred by not declaring the jury deadlocked following receipt of the juror notes. Further, counsel claimed that the trial court had erred in excluding the affidavits from juror Parker and the investigators. However, counsel unreasonably failed to raise a claim of juror misconduct, and they unreasonably failed to place the Newsome affidavit before the court.

The Supreme Court of Georgia upheld the trial court's decision to exclude the affidavits under O.C.G.A. § 17-9-41. App. D at 333. As for the affidavit from juror Parker, the court held that the exceptions to the rule "[did] not include jurors' misapprehension regarding the law." *Id.* The court upheld the exclusion of the investigator affidavits because "if a verdict may not be impeached by an affidavit of one or more of the jurors who found it, certainly it cannot be impeached by affidavits from third persons, establishing the utterance by a juror of remarks tending to impeach his verdict." *Id.* (citation omitted).

Because counsel failed to raise a claim of juror misconduct, the court did not address whether the affidavits would be admissible to prove that claim. Its analysis was cabined to the issue of the coerciveness of the *Allen* charge.

C. State Habeas Corpus Proceedings

During state habeas proceedings, the full extent of Chancey's misconduct came to light. Affidavits from Susan Barber and Tara Newsome, as well as live testimony from Susan Barber, proved that Chancey prejudged Humphreys' guilt

and sentence, was only willing to consider a death sentence, and lied about the details of her victim experience. Mr. Humphreys raised claims that juror bias and misconduct had infected his sentencing-phase deliberations, that his trial counsel had provided ineffective assistance of counsel by failing to challenge or strike Linda Chancey during *voir dire*, that the trial court's *Allen* charge was impermissibly coercive, and that appellate counsel had provided ineffective assistance of counsel by failing to raise a claim of juror misconduct[9], *inter alia*.

Rather than addressing the substance of Mr. Humphreys's claims, the habeas court refused to consider the juror evidence.[10] Analyzing the claim that trial counsel had rendered ineffective assistance by failing to strike Chancey, the court cited Georgia's no-impeachment rule for the proposition that "the affidavits of jurors may be taken to sustain but not to impeach their verdict." App. B at 81 (internal quotations omitted). The court pointed out that "this statutory prohibition… [applies] to death penalty cases, and only two exceptions to the rule exist: (1) cases where "extrajudicial and prejudicial information has been brought to the jury's

[9] Mr. Humphreys alleged that appellate counsel's ineffectiveness provided cause and prejudice to overcome any procedural default of the juror misconduct claim.

[10] However, the court did analyze several instances of juror misconduct, including (1) Chancey's alteration of the Barber note, (2) her prevarication regarding her experience as a crime victim, and (3) her coercion of other jurors. *See* App. B at 82-83. These analyses were buried within the court's evaluation of the ineffective assistance of counsel claim.

attention improperly," and (2) cases in which "non-jurors have interfered with the jury's determinations."[11] *Id.* (citations and quotations omitted).

The habeas court then turned to the claim that appellate counsel had rendered ineffective assistance of counsel by failing to raise the issue of juror misconduct. App. B at 84. In denying the claim, the court relied on the Supreme Court of Georgia's ruling on *direct appeal* that the trial court had properly excluded the affidavits of Parker and the investigators because they did not fall within any exception to O.C.G.A. § 17-9-41. *Id.* The court entirely failed to mention the testimony of Susan Barber and the affidavit of Tara Newsome. *Id.*

Mr. Humphreys asked the Supreme Court of Georgia for a certificate of probable cause to appeal the habeas court's decision. The court denied the application. App. C. The court noted that the habeas court's analysis of the juror misconduct claim had been insufficient because it had ignored the new evidence, when "a proper analysis would address whether these new juror affidavits and testimony fell within any of the exceptions to former O.C.G.A. § 17-9-41." *Id.* at 1. However, the court recognized that the habeas court had considered the new evidence in evaluating the claim regarding trial counsel's ineffectiveness, and it found that the affidavits were inadmissible pursuant to § 17-9-41. *Id.* at 2.

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[11] The court omitted the third exception, which would have permitted the court to review the evidence when "there has been irregular jury conduct so prejudicial that the verdict lacks due process." *Tate*, 628 S.E.2d at 732–33. The court also declined to mention Georgia's common-law exception, which encouraged a court to review juror affidavits when barring their review would "emasculate a defendant's constitutional right to a fair trial." *Todd*, 493 S.E.2d at 903.

Further, the court found that Mr. Humphreys had failed to establish *Strickland* prejudice because even if appellate counsel had raised the juror misconduct claim earlier, there was not a reasonable probability that the outcome would have been different, *id.* – presumably because the new affidavits and testimony would have been barred during appeal proceedings for the same reason that the Parker and investigator affidavits were barred.

REASONS FOR GRANTING THE WRIT

Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017); *Warger v. Shauers,* 123 S. Ct. 521 (2014); *McDonald v. Pless*, 238 U.S. 264 (1915); and *United States v. Reid*, 12 How. 361 (1851), left open the question here: whether the Constitution requires an exception to no-impeachment rules when a juror has deliberately misled the trial court, undermining the court's ability to prevent and identify juror misconduct, and rendering the juror unqualified to serve in a capital case. The answer is yes.

"In the ultimate analysis, only the jury can strip a man of his liberty or his life." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Accordingly, a capital defendant's right to a fair trial in front of an impartial, unbiased jury is a core constitutional principle. Because the jury wields such great power, the "constitutional standard of fairness requires that the criminally accused have 'a panel of impartial, indifferent jurors.'" *United States v. Tegzes*, 715 F.2d 505, 507 (11th Cir. 1983) (citing *Murphy v. Florida*, 421 U.S. 794, 799 (1975); *Irvin*, 366 U.S. at 722); *see also Parker v. Gladden*, 385 U.S. 363, 366 (a "petitioner is entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"). "The failure to accord an accused a fair

hearing" in front of a panel of competent, impartial jurors "violates even the minimal standards of due process." *Irvin*, 366 U.S. at 722 (citing *In re Oliver*, 333 U.S. 257 (1948); *Tumey v. Ohio*, 273 U.S. 510 (1927)).

At no time is the right to a fair and impartial jury more important than when a jury must decide whether a defendant will live or die. The Eighth Amendment demands heightened reliability in capital cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality) ("the penalty of death is qualitatively different from a sentence of imprisonment, however long… Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); s*ee also Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality); *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality). This means that a capital jury is subjected to heightened scrutiny. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 730 (1992) ("the adequacy of *voir dire* is not easily the subject of appellate review, but we have not hesitated, **particularly in capital cases**, to find that certain inquiries must be made to effectuate constitutional protections") (citing *United States v. Rosales-Lopez*, 451 U.S. 182, 188 (1981)) (emphasis supplied); *Caldwell v. Mississippi*, *supra* (holding that the Eighth Amendment's heightened reliability requirement in death penalty cases barred the state from suggesting that the ultimate responsibility for sentencing a defendant to death rested with the appellate courts, not with the jury); *see also Witherspoon v.*

Illinois, 391 U.S. 510, 521 (1968) ("the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death").

Courts must balance the protection of a defendant's right to an impartial jury against protecting the finality of juror verdicts. Although a defendant has a constitutional right to "a tribunal both impartial and mentally competent to afford a hearing," *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912), "long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry" into whether that right was violated, *Tanner v. United States*, 483 U.S. 107, 126 (1987); *see also Pena-Rodriguez*, 137 S. Ct. at 868 ("To attempt to rid the jury of every irregularity…would be to expose it to unrelenting scrutiny").

In order to safeguard the finality of juror verdicts, jurors have long been forbidden from impeaching their verdicts by testifying about their own subjective mental processes or certain events that occurred during juror deliberations. This prohibition, known as the "Mansfield rule," was established by *Vaise v. Delaval* in 1785. 1 T.R. 11, 99 Eng. Rep. 944 (K. 1785). Today, these rules, commonly called "no-impeachment rules," exist in every state and the federal system. *Pena-Rodriguez*, 137 S. Ct at 865. Many states' no-impeachment statutes are analogues of Federal Rule of Evidence 606(b), which provides:

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

F.R.E. 606(b) (West 2011).[12]

No-impeachment rules typically permit exceptions when the jury has been exposed to prejudicial, extraneous information, or when an outside influence was improperly brought to bear on any juror. *See*, *e.g.*, F.R.E. 606(b) (West 2011); *Parker*, *supra* (allowing juror testimony regarding a bailiff's comments to the jurors that the defendant was a "wicked fellow" and "guilty," and that if there was "anything wrong" with finding the defendant guilty, the Supreme Court would correct it); *Remmer v. United States*, 347 U.S. 227 (1954) (permitting testimony regarding a bribe offered to a juror); *Mattox v. United States*, 146 U.S. 140 (1892) (permitting juror testimony and ordering a new trial where a newspaper article regarding the defendant was introduced into the jury room during deliberations).

A. This Court Has Assumed that Specific Trial Protections Safeguard a Defendant's Right to an Impartial, Unbiased Jury.

This Court's interpretation of the no-impeachment rule has assumed that specific trial mechanisms protect a defendant's right to a competent and impartial jury, which reduces or eliminates the need for post-verdict inquiry into the jury's deliberative process. *Tanner* outlined four specific safeguards embedded in the trial process: (1) "The suitability of an individual for the responsibility of jury service… is

[12] At the time of Mr. Humphreys's motion for new trial, O.C.G.A. § 17-9-41, Georgia's no-impeachment rule, provided that "[t]he affidavits of jurors may be taken to sustain but not to impeach their verdict." O.C.G.A. § 17-9-41 (repealed by Ga. L. 2011, Act 52, § 33). Georgia's current statute regarding the admissibility of juror testimony, O.C.G.A. § 24-6-606, is substantially similar to Federal Rule of Evidence 606(b).

examined during *voir dire*"; (2) "during the trial the jury is observable by the court, by counsel, and by court personnel"; (3) "jurors are observable by each other, and may report inappropriate behavior to the court *before* they render a verdict"; and (4) "after the trial a party may seek to impeach the verdict by nonjuror evidence of misconduct." 483 U.S. at 127 (emphasis in original); *see also Warger*, 135 S. Ct. at 529 ("Even if jurors lie in *voir dire* in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence of misconduct even after the verdict is rendered."). The trial judge plays a vital role in ensuring that a defendant receives due process. "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

The *Tanner* safeguards are not infallible. They may fail to capture serious jury irregularities that arise during the trial or the deliberations. *Pena-Rodriguez*, 137 S. Ct. at 868-69 ("In past cases this Court has relied on other safeguards to protect the right to an impartial jury. …Yet their operation may be compromised, or they may prove insufficient."). While egregious juror misconduct is often admissible through the exceptions to the no-impeachment rule, those exceptions cannot and do not capture every instance of juror misconduct, particularly where a juror has undertaken to deliberately deceive the trial court. For that reason, this Court has found that "[t]here may be cases of juror bias so extreme that, almost by definition,

the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Warger*, 135 S. Ct. at 529 n. 3; *see also Pena-Rodriguez*, 137 S. Ct. at 868-69. This is such a case.

B. The *Tanner* Safeguards Failed to Prevent Juror Bias and Misconduct From Infecting Mr. Humphreys's Jury Deliberations.

In Mr. Humphreys's case, Linda Chancey deliberately undermined the trial court's ability to prevent and identify juror bias and misconduct. She lied about her experience as a crime victim during *voir dire*. *See* App. I at 273; App. N at 14030-31. She was only willing to consider a death sentence, rendering her unqualified to serve in a capital case. App. P at 3. She altered a jury note in order to convey to the trial court the erroneous impression that the jurors were not deadlocked. App. K at 13986; App P. at 3. Finally, she harassed and coerced her fellow jurors into voting for a death sentence against their consciences. *See generally* Apps. K, M, N, and O. From the outset, she was determined to effectuate one outcome: a death sentence.

All four *Tanner* safeguards failed to protect Mr. Humphreys's right to a fair trial and a fair and reliable sentencing determination. If not for Linda Chancey's bias and misconduct, Mr. Humphreys would not have been sentenced to death.

1. *The First* Tanner *Safeguard: the* Voir Dire *Process*

The first *Tanner* factor is the *voir dire* process itself. *Tanner*, 483 U.S. at 127. The purpose of *voir dire* is to aid the parties in ensuring that the jurors who will decide a defendant's fate meet the constitutional requirements of impartiality and

competency. *See Rosales-Lopez*, 451 U.S. at 188 ("*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored"). But the *voir dire* process is not infallible, particularly when jurors intentionally deceive the court and the parties. "The necessity of truthful answers by prospective jurors if [the *voir dire*] process is to serve its purpose is obvious." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 549 (1984). Accordingly, this Court has held that a party may obtain a new trial if they can "demonstrate that a juror failed to answer honestly a material question on *voir dire*" when "a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556.

a. *Chancey Lied About Her Victim Experience During* Voir Dire.

Linda Chancey prevaricated during *voir dire*, concealing both her pro-death-penalty bias and the true nature of her victim experience from the parties and the court. On her juror questionnaire, Chancey acknowledged that she had been the victim of an attempted "armed robbery/rape." App. H at 13916. When questioned about this experience, she explained: "He didn't actually do me any physical bodily harm. I was able to escape before he ever actually physically entered the dwelling, so it was preempted." App. I at 273.

In reality, however, the attack was much more brutal than Chancey reported. Within the confines of the jury room, Chancey admitted that she "**had been attacked in her bed in her apartment. [She] was naked in her bed and a**

man broke in and attacked her."[13] App. N at 14030-31 (emphasis supplied). Chancey "ran into the halls of her apartment and finally someone opened the door." *Id.* Chancey's fellow jurors were surprised by her description of her attack. Tara Newsome recalled: "We, the jury, **asked Linda if she had told the attorneys that."** *Id.* (emphasis supplied).

Chancey's dishonesty indicates that she was a biased juror, and she was unfit for jury service.[14] The express purpose of *voir dire* is to protect and preserve the right to an impartial trier of fact by "exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough Power Equip., Inc.*, 464 U.S. at 549. Dishonesty is *per se* evidence of bias. "[I]n most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in

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[13] When interviewed by the defense investigators after the trial, Chancey admitted to the same version of events that she described during deliberations. App. L at 13882.

[14] Evidence pertaining to this experience should fall under the "extraneous influence" exception to the no-impeachment rule. In *United States v. Boney*, 68 F.3d 497, 503 (D.C. Cir. 1995), the D.C. Circuit considered a case in which a juror lied about his status as a felon, but brought it up during deliberations. The court held that it was not inappropriate to inquire about the juror's status after the verdict and ask "whether his felon status ever came up during jury deliberations, and, if so, the circumstances surrounding that disclosure":

> Although it is expected that jurors will bring their various life experiences into the jury room, Mr. J's experience as a felon is the one matter that should not have been before the jury at all because no ex-felons should have been on the panel. **Therefore, any discussion of Mr. J's felon status during deliberations would surely seem to be "extraneous," and possibly "prejudicial" as well.**

Id. (emphasis supplied).

fact was impartial." *Id.* at 556 (BLACKMUN, J., concurring). The "reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *Id.*

b. *Chancey Lied About Her Willingness to Consider a Life Sentence.*

Chancey failed to disclose during *voir dire* that she was only willing to consider a death sentence, disqualifying her from serving in a capital case. Chancey indicated during *voir dire* that her views were flexible and she did not lean toward any sentence, but in reality, death was the only option she would entertain. She "had her mind made up" "from day one"; "early in trial–before the end of the first phase–she said something along the lines of he's guilty and he deserves to die." App. K at 13978-79. "Chancey was set on death from the outset..." *Id.* at 13980. Chancey herself later admitted that she "would only vote for death." App. P at 3.

Jury verdicts must be based solely on the evidence presented at trial. *Turner v. Louisiana*, 379 U.S. 466, 474 (1965). "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States*, 98 U.S. 145, 155 (1878). Jurors serving in death penalty cases must clearly indicate that they can and will consider the full range of sentencing options, including life without parole, life with parole, or death. *Morgan*, *supra*; *Witherspoon*, *supra*. If a juror is predisposed to automatically impose the death penalty regardless of the evidence, the juror is not qualified for service in a capital case. *Morgan,* 504 U.S. at 729; *Witherspoon*, *supra*. As this Court explained in *Morgan*:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed,

> because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. …If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

Id. Chancey "had her mind made up" before the parties had introduced a single piece of aggravating or mitigating evidence. App. K at 13978-79. She was unqualified to serve, and she earned a seat on the Humphreys jury only by failing to disclose her pro-death-penalty bias.

The first *Tanner* factor – the ability of the *voir dire* process to evaluate an individual's suitability for jury service – failed because of Chancey's dishonesty.

2. *The Second and Third* Tanner *Safeguards: Observation by the Parties, the Court, and Other Jurors*

Tanner identified two additional factors that work in concert to identify and prevent instances of juror misconduct: "during the trial the jury is observable by the court, by counsel, and by court personnel," and "jurors are observable by each other, and may report inappropriate behavior to the court *before* they render a verdict." *Tanner*, 483 U.S. at 127. The trial judge plays a critical role in this process: "[d]ue process means… a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences [on the jury] when they happen." *Smith*, 455 U.S. at 217. In Mr. Humphreys's case, these protective mechanisms failed because the trial court ignored the obvious signs of dysfunction from the jury room, counsel's observations about the apparent distress of the jurors, and the forewoman's pleas for assistance from the trial court.

As described *supra*, the jurors heard evidence for approximately three days before beginning deliberations. Deliberations quickly grew heated and contentious. Chancey was the source of significant "dissension" and "hostil[ity]" in the jury room. App. K at 13979; *see also* App. N 14028. She had made up her mind "on day one" that Mr. Humphreys should be sentenced to death, and she refused to even participate in deliberations. *Id.* at 13980. Chancey's behavior was hostile and violent; one juror described her behavior in terms of her being possessed by "an evil force." App. O at 2. After the jurors had been deliberating for a while, they directed a note to the judge, describing their deadlock. App. K at 13986-88. The court did not inquire into the source of the jurors' obvious distress. It simply instructed them to continue deliberating. App. Q at 443.

Several hours elapsed, but there were no signs of progress. Counsel moved for a mistrial, citing concerns over the unusual length of deliberations, the note, and the demeanor of the jurors. The jurors were "obviously tearful and obviously [] having a difficult time," *id.* at 450, "very upset," *ibid.* "agitated," App. F at 105, and "in some distress," *ibid*. The trial court failed to act. By that point, the jury had been deliberating for approximately the same amount of time that it took to hear evidence during the penalty phase.

Hours later, the forewoman sent a second note to the court, which said: "**Due to the hostile nature of one of the jurors, I am asking to be removed from the jury**." App. Q at 457 (emphasis supplied). In response, the court called the jury into the courtroom and provided a coercive *Allen* charge that the law required "a

unanimous verdict."[15] The court failed to address Barber's note, instead ordering the jury to return to the jury room, where they deliberated for a few hours before retiring for the day. The following morning, "screaming" emanated from the jury room. App. P at 2. Still, the court failed to intervene. Shortly thereafter, the jury returned a verdict for death.

Clearly, the second and third *Tanner* factors failed to protect Mr. Humphreys's rights to due process and a fair trial. The court was repeatedly made aware of the irregularities in the jury room, but failed to respond. Far from "a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen," *Smith*, 455 U.S. at 217, this was a trial court that willfully closed its eyes and ears to the many signs that pointed to misconduct. Defense counsel and individual jurors attempted to inform the court about the irregularities, but the court simply ignored their pleas. These *Tanner* factors failed to protect Mr. Humphreys's right to a jury free of bias and misconduct.

3. *The Fourth* Tanner *Safeguard: Non-juror Evidence of Misconduct*

The fourth *Tanner* safeguard is the existence of non-juror evidence of misconduct. 483 U.S at 127. Non-juror evidence of misconduct includes, for example, testimony from a bailiff who witnessed the misconduct. *Tanner*, 483 U.S. at 127 (citing *United States v. Taliaferro*, 558 F.2d 724, 725-26 (4th Cir. 1977)); *McDonough Power Equip., Inc.*, 464 U.S. at 550 (proof of juror's dishonesty during

[15] As described in note 6, *supra*, the court's *Allen* charge misstated the governing law regarding the requirement of unanimity in sentencing.

voir dire came not from juror testimony, but from information gleaned from the juror's son's navy enlistment application).

Mr. Humphreys's case presents a situation in which the only people with direct knowledge of Chancey's misconduct were her fellow jurors.[16] The misconduct at issue was limited to the confines of the jury room. Because Chancey was careful to limit her misconduct to the interior of the jury room, there is simply no other vehicle through which this vital evidence could be presented to the court than through the testimony of fellow jurors and investigators. Without considering the testimony of Chancey's fellow jurors and the recollections of Chancey herself (as relayed through defense investigators), her egregious misconduct would not come to light. Testimony regarding her misconduct cannot be excluded without violating the "plainest principles of justice." *Reid*, 12 How. at 366.

C. This Is a Rare Case In Which All Four *Tanner* Safeguards Failed, Requiring the No-Impeachment Rule to Yield.

All four *Tanner* safeguards failed to prevent and unearth Linda Chancey's bias and misconduct, and they failed precisely because of the type of misconduct they were designed to detect: juror dishonesty and bias. The fact that the *Tanner* safeguards failed does not mean that Mr. Humphreys should find no redress in any court. A defendant's constitutional rights do not evaporate on the threshold of the jury room. *See McDonough Power Equip., Inc.*, 464 U.S. at 549 (a party may obtain

[16] Although some of the misconduct was obvious to the court and the parties, the court ignored it. *See* section (B)(2), *supra.*

a new trial if they can "demonstrate that a juror failed to answer honestly a material question on *voir dire*" when "a correct response would have provided a valid basis for a challenge for cause"); *Pena-Rodriguez*, 137 S. Ct. at 868-69 (holding that the no-impeachment rule must give way when racial bias infected jury deliberations); *see also Warger*, 135 S. Ct at 529 n. 3. Chancey's bias and misconduct implicate both Mr. Humphreys's Eighth Amendment right to a fair and reliable sentencing determination, *Woodson*, 428 U.S. at 305, and his due process right to an impartial, unbiased jury, *Irvin*, 366 U.S. at 722. The protection of the no-impeachment rule must be stripped away in order to preserve Mr. Humphreys's Eighth, Sixth, and Fourteenth Amendment rights.

The Eighth Amendment demands a fair and reliable determination that death is the appropriate sentence.[17] By now, it is axiomatic that there is a heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U.S. at 305; *California v. Ramos*, 463 U.S. 992, 998-999 (1983) ("the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital

[17] This Court's jurisprudence regarding the no-impeachment rule makes clear that criminal cases, particularly death penalty cases, are "the gravest and most important cases" to which *Reid* refers, 12 How. at 366, and the rule should yield more easily when an individual's life or liberty is at stake. The Court has considered the application of the no-impeachment rule in only a small number of cases, including *Reid*, *supra*; *Mattox*, *supra*; *Pless*, *supra*; *Tanner*, *supra*; *Warger, supra*; and *Pena-Rodriguez, supra*. In each of the cases in which this Court has found that an exception to the no-impeachment rule should be made, the case under review was a criminal case. Two of them were capital cases.

sentencing determination."); s*ee also Caldwell*, *supra*; *Eddings*, *supra*; *Lockett*, *supra*; *Gardner*, *supra*; *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (O'CONNOR, J., concurring in judgment) ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force").

The heightened scrutiny that attaches to a death sentence includes greater scrutiny into the inner machinations of the jury. "[T]he Court's principal concern has been… with the *procedure* by which the State imposes the death sentence." *Ramos*, 463 U.S. at 998-999; *see also Morgan*, 504 U.S. at 730 ("the adequacy of *voir dire* is not easily the subject of appellate review, but we have not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections"); *Witherspoon*, 391 U.S. at 521 ("the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death" by a biased juror).

Further, "due process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment." *Morgan*, 504 U.S. at 727 (internal citations omitted). The right to an unbiased and impartial jury is "the most priceless" "safeguard[] for th[e] preservation" "of individual liberty and of the dignity and worth of every [person]." *Irvin*, 366 U.S. at 721. The constitutional requirement of juror impartiality means that jurors must themselves be unbiased and impartial, *see id.* ("[A] juror must be as indifferent as he stands unsworne") (citation omitted); *Reynolds*, 98 U.S. at 155

("The theory of the law is that a juror who has formed an opinion cannot be impartial."); and that jury deliberations must be free of prejudicial influence, *Mattox*, 146 U.S. at 149 ("It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated.")

Linda Chancey lied to the parties and the court in order to gain a seat on the Humphreys jury. App. H at 13916; App. I at 273; App. N at 14030-31. She prejudged both his guilt and sentence, and she was only willing to consider a death sentence. App. K at 13978-80; App. P at 3. She misled the trial court into believing that the jurors were not deadlocked because she believed that if the jurors accurately conveyed the impasse, it "would cause a mistrial and they would have to do it over again or the defendant would get parole and hunt the jurors down." App. K at 13986-88; App. P at 3. She threatened and harassed her fellow jurors until, feeling they had no choice, they bent to her will and voted for a death sentence. *See* App. K at 13983-84; *see generally* Apps. K, M, N, and O.

Chancey's egregious misconduct "involves such a probability that prejudice will result that [Mr. Humphreys's sentence] is deemed inherently lacking in due process." *Parker*, 385 U.S. at 365 (citation omitted). It infringed on his right to a fair and reliable "determination that death [was] the appropriate punishment in [his] case." *Woodson*, 428 U.S. at 305. The rule must yield in favor of preserving the rights protected by the Sixth, Eighth, and Fourteenth Amendments.

D. This Court Has Rejected a Principle of Rigid Adherence to Evidentiary Rules.

The existence of no-impeachment rules reflects the historical importance of insulating a jury's deliberative process and verdict from post-verdict examination. From the beginning, however, this Court has made it clear that, although juror testimony "ought to be received with great caution," the no-impeachment rule must be abandoned when refusal to consider juror testimony would "violat[e] the plainest principles of justice." *Reid*, 12 How. at 366; *see also Pless*, 238 U.S. at 268-69 (juror testimony should not be excluded "in the gravest and most important cases"); Fed. R. Evid. 606(b) advisory committee's note (1972) ("The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. …simply putting verdicts beyond effective reach can only promote irregularity and injustice").

This Court has long scorned the rigid application of trial rules when doing so has "a significant effect on the integrity of the fact-finding process." *Berger v. California*, 393 U.S. 314, 315 (1969) (internal quotations omitted). In any battle between the Constitution and evidentiary rules, the Constitution must prevail. *See, e.g., Chambers v. Mississippi,* 410 U.S. 284, 302 (1973) ("[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."); *Green v. Georgia,* 442 U.S. 95, 97 (1979) ("Regardless of whether the proffered testimony comes within ... [Georgia's] hearsay rule, under the facts of this case its exclusion

constituted a violation of the Due Process Clause ...."); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

This general principle extends to cases in which the application of the no-impeachment rule would result in manifest injustice. *Pena-Rodriguez*, 137 S. Ct. at 869; *see also Durr v. Cook*, 58 F.2d 891, 893 (5th Cir. 1979) ("Durr's constitutional rights take precedent [sic] over [the no-impeachment rule]") (citing *Chambers*, *supra*); *State v. Clark*, 220 So.3d 583, 679 (La. 2016) ("when the statutory prohibition [against impeaching a verdict] infringes on a defendant's constitutional rights to a fair trial, jurors are competent to testify about juror misconduct"); *Todd*, 493 S.E.2d at 903 ("Our laws provide that the general prohibition against allowing a jury to impeach its verdict cannot be applied to emasculate a defendant's constitutional right to a fair trial, particularly when his life hangs in the balance").

Evidentiary rules simply do not trump the demands of the Constitution, and they should yield more easily when a defendant's life is at stake. When the *Tanner* factors have failed to root out juror misconduct, and a biased and unqualified juror has served on a capital jury, the no-impeachment rule must be abandoned. *See Pena-Rodriguez*, 137 S. Ct. at 869 (finding that the *Tanner* factors failed to root out juror bias, and demanding that the no-impeachment rule give way).

E. Constitutional Concerns are Heightened When Jurors Have Deliberately Prevaricated.

Intentional juror misconduct deserves higher scrutiny than unintentional misconduct. Because a juror's dishonesty during *voir dire* can be *per se* evidence of

bias, *McDonough Power Equip., Inc.*, 464 U.S. at 556 (BLACKMUN, J., concurring), and because the "reasons that this affect a juror's impartiality can truly be said to affect the fairness of a trial," *ibid.*, cases addressing the no-impeachment rule have drawn a distinction between intentional and accidental misconduct.

In *Warger v. Shauers*, a juror in a negligence suit was asked during *voir dire* if she could award damages, and she responded that she could. 135 S. Ct. 524. She failed to reveal that her daughter had been involved in a motor vehicle collision in which a person died. *Id*. During deliberations, she remarked that a lawsuit "would have ruined her [daughter's] life." *Id*. The only evidence regarding the juror's statement was the affidavit of another juror. *Id.* at 524-25. This Court held the affidavit inadmissible pursuant to the no-impeachment rule. *Id.* at 525. The *Warger* juror's dishonesty was hardly even clear: she did not prevaricate about her daughter's accident, she simply said she thought she would be able to award damages. *Id.* at 524. The jury returned a *liability* verdict for the defendant; the case did not turn on the issue of the amount of damages. *Id*.

The *Warger* juror's conduct was a far cry from the dishonesty of the juror in *Pena-Rodriguez*, a recent case in which this Court found that the no-impeachment rule must yield when a juror's racial bias infects deliberations. In *Pena-Rodriguez*, statements uttered by a juror in a sexual assault trial indicated that racial animus had infected his decision to convict. 137 S. Ct. at 862. He informed his fellow jurors that, in his experience as a law enforcement officer, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls," and "Mexican

men had a bravado that caused them to believe they could do whatever they wanted with women." *Id.* During *voir dire*, jurors had repeatedly been asked if they could be fair and impartial, and the juror had given no indication that he harbored racial bias. This Court found that the no-impeachment rule did not bar testimony regarding his statements because an exception to the rule exists for the "gravest and most important cases." *Id.* at 865-66. The Court also noted that the juror had been seated precisely because the *Tanner* safeguards had failed: "In past cases this Court has relied on other safeguards to protect the right to an impartial jury. …Yet their operation may be compromised, or they may prove insufficient." *Id.* at 868.

In *Pena-Rodriguez*, it was clear that the juror had deliberately hidden his bias from the trial court, just as Ms. Chancey did in Mr. Humphreys's case. The Constitution does not tolerate a juror employing deceit to obtain a seat on a jury. *McDonough Power Equip., Inc.*, 464 U.S. at 549; *ibid.* at 556 (BLACKMUN, J., concurring) ("in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial."); *see also Irvin*, 366 U.S. at 721 ("[A] juror must be as indifferent as he stands unsworne") (citation omitted); *Reynolds*, 98 U.S. at 155 ("The theory of the law is that a juror who has formed an opinion cannot be impartial."). The *Pena-Rodriguez* juror used his bias as a weapon, wielding it against his fellow jurors during deliberations, just as Chancey did here. This makes the bias all the more malignant and destructive.

The Constitution also cannot tolerate a juror intentionally misleading the trial court in order to produce a death sentence. When the Humphreys jurors sent a

note to the trial court in an attempt to convey their deadlock, Chancey insidiously altered its meaning. App. K at 13988; App. F at 167. After the trial, she admitted that she had altered the note specifically to mislead the trial court: she knew that the note would lead to a mistrial, and she "couldn't let that happen" because, if she did, "the defendant would get parole and hunt the jurors down." App. P at 3.

This Court's jurisprudence makes clear that a juror's intentional dishonesty is constitutionally intolerable. *See McDonough Power Equip., Inc.*, 464 U.S. at 549; *ibid.* at 556 (BLACKMUN, J., concurring); *Irvin*, 366 U.S. at 721. The rule of *Pena-Rodriguez* must be extended to encompass other cases of "juror [dishonesty] so extreme that…the jury trial right has been abridged." *Warger*, 135 S. Ct. at 529.

CONCLUSION

Linda Chancey lied her way onto Mr. Humphreys's jury, and, once safely ensconced the jury room, she committed grave acts of deliberate misconduct. Her misconduct "involves such a probability that prejudice will result that [Mr. Humphreys's sentence] is deemed inherently lacking in due process," *Parker*, 385 U.S. at 365 (citing *Estes v. Texas*, 381 U.S. 532, 542-43 (1965)), and it undermined Mr. Humphreys's Eighth Amendment right to a fair and reliable sentencing determination, *Woodson*, 428 U.S. at 305.

Although no-impeachment rules promote important policy concerns, "simply putting verdicts beyond effective reach can only promote irregularity and injustice." Fed. R. Evid. 606(b) advisory committee's note (1972). The Constitution cannot abide a death sentence imposed because a biased juror has committed deliberate

misconduct. The no-impeachment rule should give way, permitting a court to consider juror testimony that impeaches the jury's verdict.

Respectfully submitted this, the 22nd day of December, 2017.

/s/ J. David Dantzler, Jr.
J. DAVID DANTZLER, JR.
Georgia Bar No. 205125

TROUTMAN SANDERS LLP
600 Peachtree Street NE Suite 5200
Atlanta, Georgia 30308-2216
Telephone: 404-885-3000
David.Dantzler@troutmansanders.com

COUNSEL FOR PETITIONER