No. 17-7306

In the Supreme Court of the United States

Stacey Ian Humphreys,
Petitioner,

v.

Eric Sellers,
Respondent.

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

BRIEF IN OPPOSITION

Christopher M. Carr
Attorney General of Georgia
Sarah Hawkins Warren
Solicitor General
Andrew A. Pinson
Deputy Solicitor General
Beth A. Burton
Deputy Attorney General
Sabrina D. Graham
Senior Assistant Attorney General
Clint C. Malcolm
Assistant Attorney General
*Counsel of Record
Office of the Georgia Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
cmalcolm@law.ga.gov
(404) 463-8784
Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED

Whether Humphreys' factbound juror misconduct claims, which are examples not of true juror misconduct but merely reflections of a vigorous capital jury deliberation, warrant a complete upheaval of the no-impeachment rule, especially when the state court's adjudication of such claims was based on an independent and adequate state law ground and when Humphreys makes no allegation of a circuit split or a split among this Court's precedent?

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The decision of the Georgia Supreme Court in the criminal direct appeal is published at 287 Ga. 63 (2010). The decision of the state habeas court is not published, but is included in Petitioner's Appendix B. The decision of the Georgia Supreme Court denying Humphreys' application for certificate of probable cause to appeal is not published, but is included in Petitioner's Appendix C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the decision of the Georgia Supreme Court denying state habeas relief. The petition for certiorari was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person shall be ... deprived of life, liberty, or property, without due process of law....

The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury....

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

> No State . . . shall 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.

Former O.C.G.A. § 17-9-41 provides:

The affidavits of jurors may be taken to sustain but not to impeach their verdict.

O.C.G.A. §24-6-606 provides:[1]

> (a) A member of the jury shall not testify as a witness before that jury in the trial of the case in which the juror is sitting. If a juror is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.
> (b) Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify by affidavit or otherwise nor shall a juror's statements be received in evidence as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the jury deliberations or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; provided, however, that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the juror's attention, whether any outside influence was improperly brought to bear upon any juror, or whether there was a mistake in entering the verdict onto the verdict form.

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[1] Georgia adopted a no-impeachment rule that tracked Federal Rule of Evidence 606(b) as part of its new evidence code that went into effect on January 1, 2013. However, former O.C.G.A. § 17-9-41 was the applicable no-impeachment rule at the time of Humphreys' trial and appeal. The exceptions codified in O.C.G.A. § 24-6-606 were no different than the common law exceptions Georgia had applied for years under the old statute. *Murphy v. State*, 299 Ga. 238, 247 (2016); *Henley v. State*, 285 Ga. 500, 503 (2009); *Spencer v. State*, 260 Ga. 640, 643 (3) (1990).

INTRODUCTION

Petitioner Stacey Ian Humphreys was convicted by a jury for a brutal double murder and sentenced to death. For the first time in his state habeas proceedings, he raised claims of juror misconduct based on affidavits and testimony from three jurors asserting that another juror had a predisposition to impose a capital sentence, misled the trial court during voir dire and regarding the jury's deliberation status, and harassed other jurors during deliberations. The Georgia Supreme Court concluded that Humphreys' juror misconduct claims were procedurally defaulted under state law, because he failed to raise them in a motion for new trial or on direct appeal. The court further concluded that Humphreys' claim of ineffective assistance of appellate counsel failed to establish cause and prejudice to overcome that state procedural bar, and for good reason: the new juror affidavits would not have been admissible under any exception to Georgia's no-impeachment rule, so appellate counsel's failure to raise juror misconduct claims based on those affidavits did not prejudice Humphreys.

The Georgia Supreme Court's decision does not warrant further review. The court's determination that Humphreys' juror misconduct claims were procedurally defaulted is an independent and adequate state-law ground for denying the claim, and this Court does not review claims decided on such grounds. Moreover, Humphreys identifies no circuit or state-court decision in conflict with the decision below, nor any decision of this Court that requires an exception to the well-established no-impeachment rule that would apply in this case. To the contrary, with the exception of *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017), where this Court required the rule to give way to

evidence concerning a juror's reliance on overt racial animus as a significant motivating factor to convict a defendant, this Court has upheld no-impeachment rules like Georgia's against constitutional challenge. *Warger v. Shauers*, 135 S.Ct. 521 (2014); *Tanner v. United States*, 483 U.S. 107 (1987). The facts of this case do not warrant creating a new constitutionally required exception to no-impeachment rules.

STATEMENT

1. *The Crimes.* On November 3, 2003, at approximately 12:40 p.m., Humphreys, "a convicted felon who was still on parole, entered a home construction company's sales office located in a model home for a new subdivision[.]" *Humphreys v. State*, 287 Ga. 63 (2010). Humphreys assaulted Cindy Williams, a real estate agent employed there, and used a stolen handgun to force her to undress and disclose the personal identification number (PIN) to access her bank account. *Id.* at 64. Humphreys called Williams' bank to find out how much money was in her account and then tied her underwear around her neck so tightly that when her body was found "her neck bore a prominent ligature mark and her tongue was protruding from her mouth, which had turned purple." *Id.* While choking Williams, Humphreys forced her underneath a desk then shot her in the back and head, leaving her face-down underneath the desk. *Id.*

Lori Brown, another real estate agent employed at that location, entered the office either during or shortly after Humphreys' attack on Williams. *Id.* Humphreys also forced Brown to undress and disclose her bank PIN. *Id.* Humphreys, after calling Brown's bank about her balance, forced Brown to kneel and then fired a single gunshot through the back of her head. *Id.*

Humphreys dragged Brown's body to her desk and when her body was later found she had sustained "a hemorrhage in her throat that was consistent with her having been choked in a headlock-type grip or having been struck in the throat." *Id.*

Humphreys fled the scene, taking the victims' "driver's licenses and ATM and credit cards." *Id.* Neither of the victims sustained any defensive wounds during the attack. *Id.*

2. *Voir dire.* During jury selection, prospective juror Linda Chancey was first questioned by the trial court. Pet. App. I. When asked if she had "formed or expressed an opinion in regard to the guilt or the innocence of [Humphreys] in regard to [the] charges," she replied, "No, ma'am I have not." *Id.* at 49. Chancey also informed the trial court that her mind was "perfectly impartial" concerning the State and the accused, and that she had no prejudice or bias against Humphreys. *Id.* at 49-50. Chancey told the trial court that she would be able to hear the evidence at trial and consider all three sentencing options: life; life without parole; and death. *Id.* at 53-57.

Chancey was next questioned by the prosecutor. *Id.* at 54-55. Chancey informed the prosecutor that she had not heard anything about the case before coming into the courtroom. *Id.* at 55. Chancey also confirmed that she would not automatically vote for a death sentence if Humphreys was found guilty of murder. *Id.* at 58. Chancey confirmed that she would listen to and consider the opinions of other jurors during deliberations if selected. *Id.* at 60.

Finally, Chancey was questioned by Humphreys' trial attorney, Jimmy Berry. *Id.* at 61.[2] Berry asked Chancey about her general thoughts on the death penalty, and she replied, in part, as follows:

> [W]e give every opportunity to the individual to either be proven innocent or guilty. And one must search one's heart and one's sole [sic] to determine whether or not you can invoke such penalty. There is a certain sanctity of life . . . [a]nd one must simply try to adhere to the truth of the matter and to make sure that justice is dealt and in such a manner that would be applicable to the situation and the crimes or the mitigating circumstances.

Id. at 61-62. Chancey also confirmed that she would be able to listen to and consider mitigating evidence of a person's background. *Id.* at 63-64.

Chancey was questioned once again by the prosecution and asked about an answer she gave on her juror questionnaire. *Id.* at 273. On the questionnaire, Chancey was asked if she or a relative or close friend had ever been the victim of a crime, to which she had affirmatively responded. Pet. App. H at 9. Chancey listed that she had been the victim of "armed robbery, rape, attempted," in October 1976 by a man who had been previously convicted of murder and had escaped a mental institution. *Id.* When questioned further about this past experience, she confirmed that her attacker had been captured, that he did not do her "any physical bodily harm," and that she was "able to escape before he ever actually physically entered the dwelling, so it was preempted." Pet. App. I at 273. Chancey

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[2] Humphreys states that Berry handled "voir dire entirely alone[;]" however, that is a misstatement of what occurred. Pet. at 2. While Berry did personally examine the prospective jurors, he was assisted by members of the Capital Defenders Office who took notes and offered opinions on certain jurors. *See* Pet. App. J.

confirmed that this prior event would not prevent her from being fair and impartial in hearing the evidence in Humphreys' case. *Id.* at 274.

Humphreys' trial attorney did not exercise a peremptory strike and allowed her to serve on the jury. Pet. App. B at 78. Berry recalled that at the time of voir dire he believed Chancey would be a better juror for the defense than the prosecution. Pet. App. G. at 45.

3. *Trial.* Humphreys was represented at trial by a team of highly experienced criminal defense attorneys, which included Jimmy Berry, who had handled over 40 death penalty cases and taught numerous death penalty seminars. Pet. App. B at 13-19. Trial counsel, understanding that the evidence against Humphreys was undeniably overwhelming, crafted a guilt-innocence phase strategy that incorporated their mitigation defense. *Id.* at 44-45. During the guilt-innocence phase, counsel began to explain to the jury Humphreys' traumatic and unstable childhood and his mental health symptoms. *Id.* at 45-46. After the jury found Humphreys guilty of his crimes, counsel continued to present a mitigation defense surrounding Humphreys' Asperger's Syndrome and his painful, abusive childhood. *Id.* at 45-64.[3]

4. *Jury Deliberations.* The jury had been deliberating approximately eight hours following the sentencing phase of trial when the jury sent a note to the trial court indicating they had agreed on statutory aggravating circumstances but not on penalty. *Id.* at 77-78. The note indicated that the jury was "currently" unable to form a unanimous opinion as to death or life

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[3] Humphreys contends that the defense presented an "anemic mitigation case." Pet. at 4. However, the record demonstrates that the state court fully considered Humphreys' ineffective assistance of counsel claims along those lines and found them to be without merit. Pet. App. B at 11-73.

without parole. *Id.* The trial court instructed the jury to continue deliberations. *Id.* at 78.

Following three more hours of deliberations, the jury foreperson, Susan Barber, sent a note to the trial court asking that Humphreys' taped statement to law enforcement be played. *Id.* at 79. The interview was played for the jury, and following two more hours of deliberation, Humphreys moved for a mistrial. *Id.* The trial court denied that motion, noting that there had been no indication from the jury that it was deadlocked. *Id.*

After two more hours of deliberation, the trial court received a note from a juror asking to be removed from the jury due to the hostile nature of another juror. *Id.* The trial court decided to give the jury a modified *Allen* charge. *Id.* Humphreys moved for mistrial again, which was denied. *Id.* After resuming deliberations for a few more hours, the jury returned death sentences for the murders of Cindy Williams and Lori Brown. *Id.* at 79-80.

5. *Motion for new trial and direct appeal.* At the motion for new trial and on direct appeal, Humphreys argued that the trial court erred in denying his requests to find the jury deadlocked and to grant a mistrial. *Humphreys*, 287 Ga. at 79-82 (9). The Georgia Supreme Court held that the trial court had not erred "given the length of the trial in relation to the time the jury had been deliberating and the fact that the jurors had recently requested to rehear evidence, indicating that they were actively deliberating." *Id.* at 80.

Humphreys also argued that the trial court erred in giving the jury a modified *Allen* charge, specifically that the portion of the charge that read, "[i]t is the law that a unanimous verdict is required," was an incorrect statement of the law in the sentencing phase of a Georgia death penalty case.

Id. at 80-81.[4] In support of this claim, Humphreys submitted a juror affidavit and two affidavits from defense investigators at the motion for new trial. *Id.* at 81. In essence, these affidavits were offered to show that two jurors, Darrell Parker and Linda Chancey, misunderstood the law and believed they had to reach a unanimous decision on sentencing otherwise Humphreys would be eligible for parole. Pet. App. E at 12; Pet. App. O; Pet. App. P. The trial court excluded these affidavits on the basis that they did not fall within any exception to O.C.G.A. § 17-9-41, which was Georgia's no-impeachment rule at the time of Humphreys' trial. *Id.* at 12-13.[5] The Georgia Supreme Court upheld the trial court's decision, noting that jurors' misapprehension about the law is not an exception to the no-impeachment rule. *Humphreys*, 287 Ga. at 81.

Ultimately, the Georgia Supreme Court held that the trial court's modified *Allen* charge was not impermissibly coercive. *Id.* at 81-82. The Georgia Supreme Court concluded that the language concerning unanimity in the *Allen* charge was technically a correct statement of the law. *Id.* Noting that the complained of language was only a small portion of the *Allen* charge and examining that charge in its full context, the Court found the charge was not coercive; however, the Georgia Supreme Court suggested that the better

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[4] Under Georgia's statutory scheme, if a jury cannot reach unanimity in the sentencing phase of a death penalty case, the trial court is required to dismiss the jury and to sentence the defendant to either life or life without parole. *Humphreys*, 287 Ga. at 80-81 (citing O.C.G.A. § 17-10-31.1(c)).

[5] Exceptions to Georgia's no-impeachment rule exist "where extrajudicial and prejudicial information has been brought to the jury's attentions improperly, or where non-jurors have interfered with the jury's deliberations." *Gardiner v. State*, 264 Ga. 329 (1994).

practice going forward would be to eliminate that language from *Allen* charges given during the sentencing phase of death penalty trials. *Id.* at 82.

The Georgia Supreme Court affirmed the convictions and sentence. *See Humphreys*. Humphreys then filed a petition for writ of certiorari in this Court, which was denied on November 15, 2010. *Humphreys v. Georgia*, 562 U.S. 1046 (2010).

6. *State habeas corpus proceedings.* Humphreys—represented by new counsel—filed a state habeas corpus petition. Pet. App. B at 1. He raised, among other claims, numerous instances of alleged juror misconduct, which included the following: (1) false, misleading and/or incomplete responses on voir dire; (2) improper biases which were not revealed on voir dire and which infected the deliberations; (3) direct undue coercion, harassment, pressure and threats at the other individual jurors in order to obtain a death verdict; and (4) lack of candor with the trial judge in each of the notes which announced a deadlock and sought guidance from the court. *Id.* at 10. None of these claims had previously been raised at the trial court level and on direct appeal.

In support of these juror misconduct claims, Humphreys offered affidavits from three different jurors: Susan Barber, the forewoman of the jury; Darrel Parker; and Tara Newsome. Pet. App. K, M, and N. Humphreys also offered live testimony from Barber at his state habeas evidentiary hearing. Pet. App. F.

Barber testified about one of the notes she wrote for the trial court during deliberations. Pet. App. F at 166-67. Barber stated that the jury "got together collaboratively as a group" and decided to ask the trial court for some direction about how they should proceed. *Id.* at 166. The jury had

decided statutory aggravating circumstances existed but had not yet been able to decide between life without parole and death. *Humphreys*, 287 Ga. at 78-79. Barber testified that when the note was passed around another juror felt the need to add the word "currently" to the note in regards to the status of their deliberations to reflect that the jury had not yet reached a unanimous decision as to sentencing. Pet. App. F. at 167; Pet. App. K at 13986-88; see also *Humphreys*, 287 Ga. at 77-78. Barber confirmed that the entire jury agreed to the final draft of the note that included the word "currently." Pet. App. F. at 167.

Barber also specifically testified about her fellow juror, Linda Chancey. Pet. App. F at 168-72. Barber described Chancey as not being "a part of the jury social life," "standoffish," "very vocal at times," and "oftentimes confrontational." *Id.* at 168. Barber indicated that Chancey "was set on death from the outset," "would not participate in the deliberations," and "made personal attacks on everyone." Pet. App. K at 13980-81.

At some point near the end of deliberations, Barber sent the note to the trial court asking to be removed from the jury due to the hostile nature of one of the jurors. Pet. App. F at 169-70; Pet. App. K at 13990; *see also Humphreys*, 287 Ga. at 79. Barber sent the note because she felt the jury had stopped discussing the case and other jurors had verbally "attack[ed]" her. Pet. App. at 169-70. Barber indicated, at that time, that the rest of the jury had decided to vote for death. *Id.* at 172. Following the receipt of the note, the trial court gave the jury the modified *Allen* charge. *Humphreys*, 287 Ga. at 79-80. Barber testified that she was confused by this charge, namely that she speculated that failure to reach a unanimous sentencing verdict could lead to Humphreys' release. Pet. App. K at 13982-83.

Barber ultimately acquiesced and changed her vote to death, and the jury was able to reach a unanimous sentencing verdict. Pet. App. Q at 462-66. When individually polled, Barber confirmed: she was able to reach a verdict; her verdict was death; her verdict agreed with the verdict of all the other jurors; death was her verdict; and that nobody brought any pressure to bear upon her during her deliberations as to penalty. *Id.* at 467-68.

Humphreys also offered an affidavit from juror Darrell Parker at his state habeas hearing. Pet. App. M. In his affidavit, Parker stated that deliberations "got very heated," and that Chancey was "theatrical," "was always trying to tell people what to do," "yelled" at some of the other jurors, and threw photos of the victims across the table. *Id.* at 13869-71, 13876. Parker stated that on the final day of deliberations the interaction among the jurors was not nearly as heated, that Barber changed her vote to death, and that the jury unanimously voted for death. *Id.* at 13878-89.

Finally, Humphreys offered an affidavit from a third juror, Tara Newsome. Pet. App. N. Newsome stated that juror Chancey called out another juror named "Crystal" for sucking her thumb, which led to an argument between Chancey and another juror, Melissa Odum. *Id.* at 14007-08. Newsome stated that Chancey was "yelling" at juror Barber, and Newsome speculated that was the reason why Barber asked to be removed from the jury. *Id.* at 14029. Newsome also stated that Chancey told the jury that she had been attacked in her bed in her apartment and that she ran from her apartment to escape the attack. *Id.* at 14031. As deliberations continued, Newsome changed her vote to death, and the jury ultimately voted unanimously to impose a death sentence. *Id.* at 14041-42.

Linda Chancey never testified concerning any of this information offered by the other three jurors. Humphreys only presented a "memorandum" created by his own investigator that summarized a conversation she allegedly had with Chancey on November 3, 2007. Pet. App. L.

The state habeas court concluded that Humphreys' claims of juror misconduct were all procedurally defaulted under O.C.G.A. § 9-14-48(d), as those claims were not raised at the trial court level and on direct appeal. *Id.* at 7-10. The state habeas court also concluded that Humphreys had not shown cause and prejudice or a miscarriage of justice to overcome the procedural bar. *Id.* at 7-8. The state habeas court considered the juror testimony and determined that it did not fall within any exception to O.C.G.A. § 17-9-41. Pet. App. B at 81-82.

Humphreys also raised a claim of ineffective assistance of appellate counsel in his state habeas proceedings, arguing that appellate counsel should have raised the aforementioned juror misconduct claims on direct appeal. *Id.* at 84. The state habeas court denied that claim and found that Humphreys' new juror affidavits and testimony were inadmissible. *Id.* The state habeas court disposed of both *Strickland* prongs relying on the direct appeal decision that the affidavits of other jurors submitted at the motion for new trial on a separate issue were inadmissible as they did not fall within any exception to the no-impeachment rule. *Id.*

Humphreys filed an application for a certificate of probable cause with the Georgia Supreme Court, which was denied on August 28, 2017. Pet. App. C. The Georgia Supreme Court affirmed the state habeas court's finding that Humphreys' juror misconduct claims were procedurally defaulted. *Id.* at 2-3.

The Georgia Supreme Court also concluded that Humphreys' claim that *appellate counsel* was ineffective for not raising the juror misconduct allegations failed, albeit for different reasons than those espoused by the state habeas court in its final order. *Id.* (emphasis added). The Georgia Supreme Court found that, because Humphreys' submitted "new and different" juror affidavits and testimony in state habeas, a proper analysis would have addressed whether the new affidavits and testimony fell within any exception to O.C.G.A. § 17-9-41. *Id.* at 1. The state habeas court did not engage in such an analysis, but this mistake was not fatal. *Id.* at 1-2. The state habeas court, in its handling of Humphreys' claim that *trial counsel* was ineffective for not striking juror Chancey from the jury, had "carefully considered" the new juror affidavits and testimony and correctly determined that such evidence did not fall within any exception to O.C.G.A. § 17-9-41. *Id.* at 2. (emphasis added). The Georgia Supreme Court confirmed that the state habeas court's fact findings in this regard were supported by the record. *Id.*

The Georgia Supreme Court also determined that Humphreys had not satisfied the cause and prejudice test to overcome the procedural default of his independent juror misconduct claims. *Id.* at 2-3. The Georgia Supreme Court determined that Humphreys had not shown the requisite prejudice as to his claim that appellate counsel was ineffective for not raising the juror misconduct claims on direct appeal because there was no reasonable probability that the outcome of the appeal would have been different if such claims had been raised. *Id.* Humphreys offered no argument, other than this ineffective assistance of appellate counsel claim, to attempt to show cause and prejudice or a miscarriage of justice to overcome the state procedural bar.

REASONS FOR DENYING THE PETITION

I. Humphreys' juror misconduct claims were decided on an independent and adequate state law ground that precludes certiorari review.

Humphreys contends that the affidavits and testimony he offered in his state habeas corpus proceedings show he was denied a fair trial due to juror misconduct. More specifically, he contends that juror Linda Chancey gave false testimony during voir dire, misled the trial court regarding the jury's status during deliberations, refused to consider any sentence other than death, and threatened and harassed fellow jurors. However, Humphreys fails to acknowledge that the state habeas court correctly held that these juror misconduct claims were procedurally defaulted under O.C.G.A. § 9-14-48(d), as they were not raised at the trial court level and on direct appeal. Pet. App. B. at 7-10. Certiorari review is unwarranted, as the state habeas court relied upon an independent and adequate state law ground in adjudicating these juror misconduct claims.

This Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Lambrix v. Singletary*, 520 U.S. 518, 522 (1997) (citing *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)); *see also Harris v. Reed*, 489 U.S. 255, 262 (1989); *Michigan v. Long*, 463 U.S. 1032 (1983); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). When a petitioner fails to raise a federal claim in compliance with relevant state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate state ground for denying federal review[,]" particularly when petitioner makes no attempt to

show otherwise, *Cone v. Bell*, 556 U.S. 449, 465-66 (2009) (citing *Lee v. Kemma*, 534 U.S. 362, 375 (2002)), as long as the procedural default rule is firmly established and regularly followed. *Johnson v. Lee*, 136 S.Ct. 1802, 1804 (2016) (citing *Walker v. Martin*, 562 U.S. 307, 316 (2011)).

Humphreys asks this Court to review his claim that the affidavits and testimony he offered in his state habeas corpus proceedings show he was denied a fair trial because of juror Linda Chancey's alleged misconduct. He all but ignores, however, that the Georgia Supreme Court affirmed the state habeas court's conclusion that this juror misconduct claim was procedurally defaulted under O.C.G.A. § 9-14-48(d), because he failed to raise the claim at the trial court level and on direct appeal, and he failed to establish cause and prejudice to overcome that procedural bar. Pet. App. C at 2-3; Pet. App. B at 7-10. This procedural default rule was firmly established and regularly followed when Humphreys was tried in 2007, and it accordingly "provides an adequate and independent state law ground" for denial of Humphreys' juror-misconduct claim. *Ward v. Hall*, 592 F.3d 1144, 1175 (11th Cir. 2010) (citing *Lynd v. Terry*, 470 F.3d 1308, 1313-14 (11th Cir. 2006)) (Georgia's doctrine of procedural default was "firmly established and consistently followed prior to" the petitioner's 1991 trial and later appellate proceedings).[6]

Humphreys does not deny that the state's procedural-default rule is an independent and adequate state law ground, and he does not even raise in his certiorari petition his claim for ineffective assistance of appellate counsel that he raised below as purported cause and prejudice to excuse that default.

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[6] This Court has previously denied a certiorari petition where a petitioner requested review of a juror misconduct claim that the state court held was procedurally defaulted under O.C.G.A. § 9-14-48(d). *Fults v. Chatman*, 136 S.Ct. 56 (2015).

(That claim does not establish cause and prejudice in any event, *see infra* section III.) Accordingly, this Court lacks jurisdiction to review his juror misconduct claims on direct review. *See Lambrix*, 520 U.S. at 522.

II. Humphreys does not identify any conflict of authority among lower courts or a conflict with this Court's precedent.

Humphreys ask this Court to apply the well-settled no-impeachment rule and its clearly enumerated limited exceptions to the facts of his case; however, he fails to identify any spilt among the lower courts or a conflict with this Court's precedent. Instead, he asks this Court to eviscerate the no-impeachment rule in its entirety to allow factbound error correction of his specific juror misconduct claims when this Court's precedent does not warrant such review.

The no-impeachment rule "has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question...." *Pena-Rodriguez*, 137 S. Ct. at 861, 865. Although the rule can vary slightly by jurisdiction, it generally prohibits admission of juror testimony or other evidence with respect to jury deliberations or jurors' mental processes, subject to narrow exceptions for testimony regarding extraneous prejudicial information brought to the jury's attention, or improper outside influences. *See, e.g.*, FRE 606(b); O.C.G.A. § 24-6-606(b).[7]

Humphreys asks this Court to recognize a constitutional right to a new exception to the well-settled no-impeachment rule that would apparently apply whenever allegations of "juror dishonesty and bias" are not discovered

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[7] Former O.C.G.A. § 17-9-41 was the no-impeachment rule in Georgia at the time of Humphreys' trial and appeal.

during voir dire or trial or admissible through non-juror evidence. Pet. 31. But he does not assert that the Georgia Supreme Court's failure to recognize such an exception creates or implicates a conflict of authority with any other court. Indeed, he identifies no decision of any court — state or federal — that has recognized his novel exception or otherwise permitted admission of juror testimony over the no-impeachment rule on facts similar to those in his case.

Nor has Humphreys identified any decision of this Court that recognizes such an exception. He contends that the no-impeachment rule must "yield" whenever the "*Tanner* safeguards" fail to uncover juror dishonesty and bias, but this Court's decision in *Tanner* did not recognize such an exception to the rule. The *Tanner* Court rejected a Sixth Amendment challenge to application of the no-impeachment rule, explaining that "several aspects of the trial process" protect defendants' "interests in an unimpaired jury," including voir dire, that jurors are observable by the court and other jurors, and that nonjuror evidence may still be admissible to show juror misconduct. *Tanner v. United States*, 483 U.S. 107, 127 (1987). But neither *Tanner* nor later decisions permit impeachment through juror testimony based on the assertion that particular juror misconduct was not discovered despite these protections. Indeed, in *Tanner*, the Court upheld application of the no-impeachment rule in that case even though voir dire and the other "safeguards" apparently did not prevent the juror misconduct from occurring. *Id.*

In *Warger*, this Court suggested in a footnote that it could "consider whether the usual safeguards are or are not sufficient to protect the integrity of the process if there were a "case[] of juror bias so extreme that, almost by definition, the jury trial right has been abridged. *Warger v. Shauers*, 135 S.

Ct. 521, 529 n.3 (2014). The Court went on, however, to say that "those facts are not presented here," in a case involving allegations that a juror lied during voir dire and had a pro-defendant bias — the very kind of juror misconduct Humphreys asserts warrants an exception to the no-impeachment rule. 135 S. Ct. at 524.

Finally, in *Pena-Rodriguez v. Colorado,* 137 S.Ct. 855 (2017), this Court permitted a narrow exception to the no-impeachment rule only to consider evidence of a juror's "clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant." *Id.* at 869. In doing so, the Court explained that such a case "differs in critical ways" from cases like *Tanner* and *Warger*, which involved "troubling and unacceptable behavior," but only "anomalous behavior from a single jury—or juror—gone off course." *Id.* at 868.

In short, neither lower courts nor this Court have recognized the broad exception to the no-impeachment rule Humphreys requests, and this Court has declined to hold that allegations of juror misconduct like those raised by Humphreys warrant an exception to the rule. Because Humphreys has not identified a conflict among lower courts or with this Court's precedent, review is not warranted.

III. The Georgia Supreme Court's decision that Humphreys failed to overcome the procedural bar was correct.

Humphreys fails to acknowledge in his petition that the state courts concluded that his juror misconduct claims were procedurally defaulted much less contend that the Georgia Supreme Court erred in concluding that he had not shown cause and prejudice to overcome the default. Nor did it: the Georgia Supreme Court correctly determined that Humphreys' claim of

ineffective assistance of appellate counsel did not satisfy "the cause and prejudice test to overcome the bar to his independent juror misconduct claim arising out of procedural default." O.C.G.A. § 9-14-48(d)...." Pet. App. C at 2-3.

"A state prisoner may be able to overcome [an adequate and independent state procedural default rule]. . . if he can establish 'cause' to excuse the procedural default and demonstrate that he suffered actual prejudice from the alleged error." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017). For an attorney error to constitute "cause" to excuse a procedural default, it must rise to the level of constitutionally ineffective assistance of counsel. *Id.* To show prejudice, a petitioner must not merely show that an alleged error created a possibility of prejudice, but that an error "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982).

The Georgia Supreme Court correctly determined that Humphreys failed to show that appellate counsel provided ineffective assistance by failing to raise the juror-misconduct claims, because the no-impeachment rule would have precluded admission of the juror affidavits necessary to support such a claim.

Former O.C.G.A. § 17-9-41, the no-impeachment rule in effect at the time of Humphreys' trial and direct appeal, explicitly prohibited the admission of juror affidavits to impeach a jury's verdict. Georgia case law only allowed for exceptions to this rule in cases where extrajudicial and prejudicial information was brought to the jury's attention, where non-jurors interfered with the jury's deliberations, or where a juror independently

gathered evidence related to the case. *See, e.g., Murphy v. State*, 299 Ga. 238, 247 (2016); *Henley v. State*, 285 Ga. 500, 503 (2009); *Spencer v. State*, 260 Ga. 640, 643(3) (1990). Humphreys' allegations of juror misconduct, as set out in the juror affidavits and testimony he offered in his state habeas proceedings, did not fall within any of these exceptions. There is no separate exception to the no-impeachment rule that would apply to the facts of this case. *See supra* sections I, II. Thus, Humphreys' juror affidavits and testimony were inadmissible, as correctly held by the state court, and appellate counsel did not perform deficiently for not raising juror misconduct claims based on inadmissible evidence.

The Georgia Supreme Court also correctly concluded that Humphreys failed to establish prejudice as a result of appellate counsel's failure to raise the juror-misconduct claims—i.e., even if appellate counsel had raised these juror misconduct claims at the motion for new trial and on direct appeal based on the juror affidavits and testimony, no reasonable probability exists that the outcome of the proceedings would have been different. Pet. App. C at 2.

Humphreys contends that juror Chancey lied during voir dire when she failed to disclose certain details about her prior experience as a crime victim and had a predetermined mindset to impose the death penalty. However, Chancey fully disclosed her prior experience as a crime victim in her juror questionnaire and during voir dire and informed the trial court that this experience would not keep her from being fair. Pet. App. H at 9; Pet. App. I at 273-74. She also informed the trial court during voir dire that she had not formed a fixed opinion about Humphreys' case, was not predisposed to

automatically impose the death penalty, and would consider all sentencing options. Pet. App. I at 39-68.

Humphreys also asserts that Chancey altered a note to the trial court to inaccurately reflect the current state of jury deliberations. But Humphreys conveniently neglects to mention that when juror Barber testified at the habeas hearing, she indicated that the entire jury worked on this juror note collaboratively and agreed with the language contained in the final draft. Pet. App. F at 167.

Finally, Humphreys vaguely contends that Chancey threatened and harassed other jurors during deliberations. The level of discourse amongst the jurors during deliberations simply shows that the jury was actively deliberating the sentencing options available to them in a capital trial. Although Humphreys presented juror affidavits in his habeas proceedings that generally intimate that Chancey yelled on occasion, was bossy, and threw pictures of the victims across a table, Pet. App. M at 13869-71, 13876, such testimony is the exact type of evidence the no-impeachment rule was designed to exclude.

Humphreys has not shown that the Georgia Supreme Court's analysis was flawed, much less shown that the lower court's decision warrants review. Humphreys' petition challenges the application of well-settled law—i.e., the rule that a jury's verdict should not be impeached except in very limited circumstances—to the specific facts of his case. This Court's precedent does not authorize a broad exception for allegations of juror misconduct when there was no evidence of extraneous material being presented to the jury or racial animus on part of any juror.

Accordingly, the Georgia Supreme Court's determination that Humphreys had not shown that appellate counsel was ineffective and, thus, had not shown the requisite cause and prejudice to overcome the procedural default of his juror misconduct claims, was consistent with this Court's precedent. For this reason too, review is not warranted.

CONCLUSION

For the reasons above, this Court should deny the petition for certiorari.

Respectfully submitted.

Christopher M. Carr
Attorney General of Georgia
Sarah Hawkins Warren
Solicitor General
Andrew A. Pinson
Deputy Solicitor General
Beth A. Burton
Deputy Attorney General
Sabrina D. Graham
Senior Assistant Attorney General
Clint C. Malcolm
Assistant Attorney General

40 Capitol Square, SW
Atlanta, Georgia 30334
csingh@law.ga.gov
(404) 656-3397

Counsel for Respondent

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day, March 7, 2018, served the within and foregoing pleading, prior to filing the same, post-prepaid and properly addressed upon:

J. David Dantzler, Jr.
Troutman Sanders LLP
600 Peachtree Street NE, Suite 5200
Atlanta, GA 30308-2216

John P. Hutchins
LeClairRyan
1170 Peachtree Street NE, Suite 2350
Atlanta, GA 30309

s/ Clint C. Malcolm
Certifying Counsel