No. 17-7306

In the Supreme Court of the United States

STACEY IAN HUMPHREYS,

Petitioner,

v.

ERIC SELLERS, Warden, Georgia Diagnostic and Classification Prison,

Respondent.

Reply to Respondent's Brief in Opposition

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I. Petitioner's Claims Were Not Decided on an Independent State Law Ground.

Respondent fundamentally misunderstands the "adequate and independent state law ground" doctrine. When a state court's application of a state procedural rule depends in some way on the adjudication of a federal constitutional question, as it does in Petitioner's case, then it cannot be "independent" of federal law.

Courts must "presume that there is no independent and adequate state ground for a state court decision when the decision 'fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Coleman v. Thompson*, 501 U.S. 722, 735 (1991) (citing *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983); *Harris v. Reed*, 489 U.S. 255 (1989)); *see also Ward v. Hall*, 592 F.3d 1144, 1156-57 (11th Cir. 2010) (in order to determine whether a state court's procedural ruling constitutes an independent and adequate state rule of decision, "the state court's decision must rest entirely on state law grounds and not be intertwined with an interpretation of federal law.").

In reviewing the denial of habeas relief, the Supreme Court of Georgia applied O.C.G.A. § 9-14-48(d), a state procedural rule, and concluded that Petitioner's juror misconduct claim was procedurally defaulted. App. C at 2. However, the Court held that appellate counsel's ineffectiveness could not provide cause and prejudice to overcome that default because the evidence that trial counsel failed to proffer – the juror testimony establishing Ms. Chancey's misconduct – was inadmissible under Georgia's no-impeachment rule. *Id.* Accordingly, trial counsel

was not unreasonable in failing to proffer it, nor was Mr. Humphreys prejudiced by that failure. *Id.*

Whether or not the Sixth Amendment requires an exception to the no-impeachment rule in a particular circumstance is a federal constitutional question. *See, e.g., Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). In other words, the issue of whether *the bar to juror misconduct evidence is itself constitutional* is a federal question – specifically, whether the no-impeachment rule must yield "in order to permit the [reviewing] court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* at 869. The Supreme Court of Georgia's adjudication of the state's procedural rule "rests upon" its answer to that constitutional question. Further, as will be addressed more fully below, the issue of whether counsel was constitutionally ineffective for failing to present the constitutional claim is a federal question. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984); *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) ("ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim"). The issues presented in Petitioner's brief are so "interwoven with federal law" that they cannot possibly be "independent" state law grounds of decision.

Respondent himself proves the federal nature of Petitioner's claim in his brief before this Court. Respondent devotes the first part of his brief to arguing that the state law bar to the evidence in support of Mr. Humphreys's juror misconduct claims is an independent state law ground sufficient to thwart this Court's review.

He eviscerates his own argument in the second part of his brief by arguing that Mr. Humphreys's claim is a federal question that can be resolved adversely to him. *See* Respondent's Brief in Opposition at 16 ("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…") (citing *Tanner v. United States*, 438 U.S. 107, 127 (1987) (internal citations omitted); *ibid.* ("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,'" but "'**those facts are not presented here**'") (citing *Warger v. Shauers*, 135 S. Ct. 521, 529 n. 3 (2014) (emphasis supplied); *ibid.* at 17 (noting that, in *Pena-Rodriguez*, this Court carved out an exception to Colorado's no-impeachment rule to protect a defendant's right to an impartial and unbiased jury, **but *Pena-Rodriguez* "differs in critical ways" from Petitioner's case**) (citation omitted) (emphasis supplied).

Further, Respondent argued that Petitioner "failed to acknowledge" the default of his claims, and that he "does not even raise in his certiorari petition his claim for ineffective assistance of counsel that he raised below as a purported cause and prejudice to excuse the default." Respondent's Brief in Opposition at 14. Respondent's allegation is simply wrong, as Petitioner certainly acknowledged the procedural posture of his claim and the basis of the state court's resolution in his opening brief before this Court. *See* Petition for Writ of *Certiorari* at 21-23. More to

the point, Respondent forgets that it is *his* burden to raise procedural defenses; Petitioner is not required to do his work for him.[1]

Appellate counsel's constitutionally ineffective assistance of counsel excuses any default flowing from Petitioner's failure to raise his juror misconduct claim earlier in the proceedings. The Sixth Amendment right to counsel does not detach upon conviction; a criminal defendant has the right to the effective assistance of counsel during motion for new trial and direct appeal proceedings. *Anders v. California*, 386 U.S. 738 (1967); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Williams v. Turpin*, 87 F.3d 1204 (11th Cir. 1996). Ineffective assistance of counsel constitutes cause to overcome a failure to present claims during earlier stages of proceedings. *See Coleman, supra*; *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

Appellate counsel's conduct violates the Sixth Amendment right to counsel if it "so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. In order to make out a successful claim, a petitioner must demonstrate (1) that counsel performed deficiently by failing to raise a particular issue on appeal, and (2) that the deficiency prejudiced the defense, meaning that, but for counsel's error, there is a reasonable probability that a more favorable outcome

[1] To the extent that Respondent is instead suggesting that this Court lacks jurisdiction to resolve Petitioner's claim because Petitioner did not specifically request *certiorari* on the issue of appellate counsel's ineffectiveness, Petitioner submits that this Court has jurisdiction to either resolve the ineffectiveness issue on its own, or to remand to the lower courts for further proceedings consistent with this opinion.

would have been obtained on motion for new trial or direct appeal. *See Davis v. Crosby*, 341 F.3d 1310, 1316 (11th Cir. 2003); *Roe v. Flores-Ortega*, 120 S. Ct. 1029 (2000).

No reasonable attorney faced with credible evidence of juror misconduct would fail to raise the claim. No reasonable attorney with compelling evidence of multiple claims of constitutional magnitude would neglect to place such evidence before the court. Appellate counsel's failure to perfect the record was deficient, satisfying the first *Strickland* prong. *See, e.g., Farina v. Sec'y, Dep't of Corr.*, 536 F. App'x 966, 984 (11th Cir. 2013) (Appellate counsel's failure to raise the "blatant misconduct here, which so infected critical aspects of a capital sentencing proceeding, was below the minimal level of performance we demand from appellate counsel and violates *Strickland*").

Appellate counsel's ineffectiveness prejudiced the outcome of the proceedings within the meaning of *Strickland*. Mr. Humphreys was sentenced to death because juror Linda Chancey provided false testimony during *voir dire*, deliberately misled the trial court regarding a deadlock in order to avoid a mistrial, refused to consider any sentence besides death, and threatened and harassed her fellow jurors.

"[A] defendant has a right to 'a tribunal both impartial and mentally competent to afford a hearing.'" *Tanner*, 483 U.S. at 126 (citing *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912)). When one juror lacks impartiality, a defendant has been prejudiced such that the only reasonable conclusion is that he has been deprived of his constitutional rights to due process and a fair trial. *See*

McDonough Power Equip. v. Greenwood, 464 U.S. 548, 556 (1984). This is particularly true in a capital case in Georgia, where a unanimous jury verdict is required in order to impose a death sentence. O.C.G.A. § 17-10-31.1 (West). Further, when a juror is predisposed to automatically impose the death penalty regardless of the evidence, that juror is not qualified to serve in a capital case. When such an individual erroneously serves on a capital jury, a defendant's Sixth Amendment right to a fair trial by an impartial jury and his Fourteenth Amendment due process right have been violated. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

Evidence of Chancey's misconduct would have undermined the lower court's rationale for upholding the exclusion of the juror affidavits, as well as conclusively established several instances of juror misconduct. The affidavits would have established that Petitioner's Sixth Amendment right to a fair trial by an impartial jury and his Fourteenth Amendment due process right had been violated. If counsel had made the juror misconduct evidence available during the motion for new trial and on direct appeal, there is a reasonable probability that Petitioner would have been granted a new sentencing proceeding. Petitioner has established cause for and prejudice from any default of his claims.

Petitioner notes that the issue of ineffective assistance of counsel is itself explicitly a federal question, and, by openly acknowledging as much, Respondent further undermines his own argument that the lower court's decision serves as an adequate and independent state ground that prohibits this Court's review. *See*

Strickland, supra. The evaluation of whether Mr. Humphreys has demonstrated cause for and prejudice from his failure to raise his juror misconduct and related claims earlier in his proceedings is a federal question that is subject to federal review. *Carpenter*, 529 U.S. at 451 ("ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim"); *see generally Carrier*, 477 U.S. at 488 (attorney error constitutes cause when the error rises to the level of ineffective assistance of counsel under the Sixth Amendment).

Respondent has not proven the independence of the state court's default finding. Quite the opposite: he has shown just how intertwined it is. All Respondent has done is point out the procedural layers this Court must flip through in order to reach the federal question in this case.

II. Juror Misconduct

Respondent suggests that Petitioner has fabricated the notion that due process requires the no-impeachment rule to yield in certain circumstances. He asserts that "neither *Tanner* nor later decisions permit impeachment through juror testimony based on the assertion that particular juror misconduct was not discovered despite these protections." Respondent's Brief in Opposition at 16. Respondent's assertion is simply false, as that is precisely the holding of *Pena-Rodriguez*: "The *Tanner* Court outlined existing, significant safeguards for the defendant's right to an impartial and competent jury beyond post-trial testimony… **Yet their operation may be compromised, or they may prove insufficient**."

Pena-Rodriguez, 137 S. Ct. at 866-68 (emphasis supplied); *see also ibid.* at 869 ("[recognizing] that certain of the *Tanner* safeguards may be less effective in rooting out racial bias…"). Accordingly, when a juror makes statements that demonstrate that racial bias infected his decision to convict, "the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.*

Pena-Rodriguez gave voice to a principle over 150 years old: that the no-impeachment rule must yield in "the gravest and most important cases" when the exclusion of juror affidavits would violate "the plainest principles of justice," *McDonald v. Pless*, 238 U.S. 264, 268-69 (1915); *see also United States v. Reid*, 12 How. 361, 366 (U.S. 1851) (the no-impeachment rule must be abandoned when refusal to consider juror testimony would "violat[e] the plainest principles of justice."). Respondent scoffs at this suggestion, but it is well-settled precedent in this Court. *See Reid, supra; Pless, supra*; *Warger*, 135 S. Ct. at 529 n. 3 ("there 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."); *see also Pena-Rodriguez*, 137 S. Ct. at 864; 865-66; 868-69.

CONCLUSION

For each of the reasons in Mr. Humphreys' Petition for Writ of *Certiorari* to the Supreme Court of Georgia, the writ should be granted and the decision below reversed and remanded.

Respectfully submitted this, the 15th day of March, 2018.

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