No. 23-

IN THE
Supreme Court of the United States

CUHUATEMOC HINRICKY PERAITA,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to the Alabama Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

During petitioner's trial for capital murder, the jury foreperson told the other jurors misleading and prejudicial information about petitioner's prior convictions. The information imparted by the foreperson was not part of the trial record. Indeed, the court had excluded the details of petitioner's prior convictions from the evidence that could be offered at trial. After discovering the foreperson's misconduct, petitioner sought a new trial, claiming a violation of his Sixth Amendment rights. But the Alabama Court of Criminal Appeals held that consideration of juror testimony about the foreperson's statements was barred by a rule of evidence generally forbidding the introduction of juror testimony when offered to challenge a verdict. The question presented is:

Did the Alabama Court of Criminal Appeals depart from this Court's decisions in *Mattox v. United States*, 146 U.S. 140 (1892) and *Parker v. Gladden*, 385 U.S. 363 (1966) in barring the testimony about juror misconduct?

PARTIES TO THE PROCEEDING

Petitioner is Cuhuatemoc Hinricky Peraita. Respondent is the State of Alabama. No party is a corporation.

LIST OF RELATED PROCEEDINGS

1. *State of Alabama v. Cuhuatemoc Hinricky Peraita*, No. CC-00-293 (Circuit Ct., Escambia Cty., Ala.). On September 21, 2001, petitioner was convicted of two counts of capital murder.

2. *Cuhuatemoc Hinricky Peraita v. State of Alabama*, No. CR-01-0298 (Ala. Crim. App.). On May 30, 2003, the Alabama Court of Criminal Appeals affirmed the conviction.

3. *Ex parte Cuhuatemoc Hinricky Peraita*, No. 1021974 (Ala.). On June 4, 2004, the Alabama Supreme Court affirmed the decision of the Alabama Court of Criminal Appeals.

4. *Cuhuatemoc Hinricky Peraita v. State of Alabama*, No. CC-00-293.06 (Circuit Ct., Escambia Cty., Ala.). On June 18, 2018, the circuit court denied petitioner's request for post-conviction relief.

5. *Cuhuatemoc Hinricky Peraita v. State of Alabama*, No. CR-17-1025 (Ala. Crim. App.). On Aug. 6, 2021, the Alabama Court of Criminal Appeals affirmed the circuit court's denial of post-conviction relief.

6. *Ex parte Cuhuatemoc Hinricky Peraita*, No. 1210290 (Ala.). The Alabama Supreme Court granted certiorari, but on June 2, 2023, it quashed the writ.

7. *Cuhuatemoc Hinricky Peraita v. John Q. Hamm*, No. 23-cv-220 (S.D. Ala.).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cuhuatemoc Hinricky Peraita respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals (Pet. App. 1a–133a) is unpublished but is available at 2021 WL 3464344. The relevant proceedings and order from the trial court are unpublished.

JURISDICTION

The Alabama Court of Criminal Appeals entered judgment on August 6, 2021 (Pet. App. 1a–133a) and denied petitioner's motion for rehearing on February 4, 2022 (Pet. App. 134a). The Alabama Supreme Court granted a writ of certiorari (Pet. App. 135a–36a), but then quashed its writ on June 2, 2023 (Pet. App. 137a). The Alabama Court of Criminal Appeals issued a Certificate of Judgment on June 7, 2023. *See* Pet. App. 138a. On August 16, 2023, Justice Thomas extended the time to file this petition for certiorari up to and including October 2, 2023. *See* No. 23A129. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to 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 . . . and to be confronted with the witnesses against him."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall

any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

This Court has repeatedly affirmed that a jury's exposure to prejudicial information beyond the evidence presented at trial may violate a criminal defendant's Sixth Amendment rights. It has therefore compelled the admission of juror testimony stating that the jury learned facts about a defendant's prior crimes or bad acts—notwithstanding the rule of evidence generally prohibiting the introduction of juror testimony when offered to impeach a verdict. *See Mattox v. United States*, 146 U.S. 140 (1892); *see also Parker v. Gladden*, 385 U.S. 363 (1966) (*per curiam*). Here, the Alabama Court of Criminal Appeals departed from these precedents. It held that a no-impeachment rule barred consideration of juror testimony stating that the jury heard details about petitioner's prior convictions—details that were not in evidence and were factually misleading. Under this Court's controlling authority, the Alabama court's decision applying the no-impeachment rule abridged petitioner's constitutional rights to a fair trial and to confront the witnesses against him. Summary reversal is necessary to ensure adherence to this Court's precedent and to correct a clear error in this capital case.

In 2001, petitioner faced trial for two counts of capital murder based on a confrontation involving petitioner, a co-defendant, and another inmate in an Alabama maximum security prison. *See Ex parte Peraita*, 897 So. 2d 1227, 1229–30 (Ala. 2004). The stabbing of the victim occurred in the wake of documented threats against petitioner, and petitioner argued at trial that the evidence showed that the co-defendant was the primary aggressor and that petitioner was acting in self-defense. *See* Pet. App. 171a–72a; 174a–78a

Petitioner was sent to the maximum-security prison in 1996 after being tried as an adult and

sentenced to life without parole for an incident that occurred when he was 17 years old. Petitioner had been convicted of multiple counts on a felony murder theory following a robbery at a Popeye's chicken restaurant in Gadsden, Alabama. While petitioner participated in the robbery, the State's evidence showed that an adult named Robert Melson was the individual who shot the victims, not petitioner. *See Melson v. State*, 775 So. 2d 857, 864 (Ala. Crim. App. 1999). Mr. Melson "ordered" four Popeye's employees "to get inside the restaurant's freezer," after which Mr. Melson "opened the freezer door and began shooting," killing three of the four. *Id.* The case "received extensive publicity during the two years between [Mr. Melson's] arrest and his trial." *Id.* at 869.

Before petitioner's trial relating to the prison confrontation, the State indicated that it would seek to introduce evidence of petitioner's prior convictions to prove that petitioner was serving a life sentence and had previously been convicted of murder—required elements for the two counts of capital murder. *See* Ala. Code § 13A-5-40(a)(6) & (13). To limit the potential prejudice to petitioner, the trial court expressly excluded details about petitioner's prior convictions from being presented to the jury. *See* Pet. App. 140a; 247a. The State could "only prove the elements [of the prior convictions] that [we]re absolutely necessary to meet the requirements of the [capital murder] statute"—"the date of conviction, the court of conviction, the offense as it deals with murder convictions." *Id.* "The only documents admitted as evidence of those convictions were" heavily redacted "copies of the 'Judgment of the Court' showing (1) that Peraita was convicted and (2) that he was sentenced to life imprisonment (3) on a certain date." *Peraita*, 897 So. 2d at 1233. "At no time was the State permitted to offer evidence of any

details of the offenses, such as the identity of the victims or the nature of the murders." *Id.*

During voir dire, panels of potential jurors were asked if they "kn[e]w the Defendant in this case or any member of his family." Pet. App. 147a. No juror indicated that he or she did. *Id.*

Petitioner was tried before a jury in the Escambia County Circuit Court from September 19 to 21, 2001. On the final day, the jury convicted him of the two counts of capital murder. *See id.* at 150a–53a.

During the penalty phase, defense counsel informed the trial court that petitioner did not want any mitigation evidence to be presented, even in the absence of the jury. When petitioner's counsel attempted to offer a written outline containing available mitigation evidence, petitioner became upset and asked the trial court not to read it, stating: "I just don't want you reading none of my background." *Id.* at 159a–61a. The mitigation evidence related to severe and unremitting physical, sexual, and emotional abuse throughout petitioner's childhood that, among other things, resulted in childhood onset post-traumatic stress disorder and powerful psychological compulsions to avoid re-experiencing his painful history. *See id.* at 154a–66a; 194a–224a. For example, at a young age, petitioner was repeatedly sexually abused and violated to such an extent that he could not control his bowel movements (*id.* at 231a–32a), was forced to roll in and eat his own feces (*id.* at 241a), was physically abused (*id.* at 231a & 233a), and witnessed the abuse of his mother, who was convicted of murdering his father when petitioner was a toddler (*id.* at 226a). After his father was killed and his mother sent to prison for that murder, petitioner lived in multiple different homes and experienced unrelenting abuse in each of them. Petitioner had attempted suicide three times before he reached age

eighteen; the first time was when he was eleven years old. Based on this and other evidence, the neuropsychology expert who testified during petitioner's post-conviction evidentiary hearing stated that, "in twenty-five years," he had "never seen a case of childhood trauma as severe as this one." Pet. App. 194a. Yet, because petitioner told his trial counsel that he did not want any mitigation evidence presented, no penalty hearing was held before the jury and no mitigation evidence was presented to the judge. On November 1, 2001, the trial court sentenced Mr. Peraita to death. *See id.* at 168a.

The Alabama Court of Criminal Appeals and Alabama Supreme Court affirmed the conviction and sentence. *See Peraita v. State*, 897 So. 2d 1161 (Ala. Crim. App. 2003); *Ex parte Peraita*, 897 So. 2d 1227 (Ala. 2004).

Unknown to the court or defense counsel at the time of the 2001 trial, the jury foreperson had shared with the other jurors misleading and prejudicial information related to petitioner's role in the Gadsden robbery that resulted in his prior convictions. When petitioner learned of this after his conviction and sentence had been affirmed on direct appeal, he sought a new trial, claiming a violation of his Sixth Amendment rights. During petitioner's post-conviction evidentiary hearing, Vann Jones—one of the jurors during petitioner's 2001 criminal trial—testified that information about petitioner's prior convictions was discussed by the jury before deliberations on his guilt. *See* Pet. App. 191a–93a. Ms. Jones testified that the jury foreperson spoke to members of the jury (including Ms. Jones) while they were "all sitting at the table" in the jury room. *Id.* at 186a–87a. Ms. Jones testified that the foreperson said: "Do y'all know that this guy murdered three or four people there in Gadsden at Popeye's

Chicken and put them in the freezer." *Id.* at 191a. The foreperson made this statement on "the second day" of petitioner's three-day trial and before the jury commenced deliberations. *Id.* at 192a–93a.[1] Ms. Jones also testified that the foreperson said this while all the jurors were together in the jury room, that "[a]ll of" the jurors "heard it," and that the others were "viewing him" (the foreperson) while he spoke. *Id.* at 185a–87a. The State did not rebut or challenge the testimony of Ms. Jones, other than to raise a hearsay objection. *See id.* at 187a–88a.

Mr. Peraita's trial counsel testified at the hearing that counsel had no contemporaneous knowledge of the foreperson's statements. *See id.* at 238a–39a & 242a–43a. Both counsel testified that, had they been aware at the time, they "would have brought it to [the trial judge's] attention" and would have "moved for a mistrial because of the prejudice involved to our client." *Id.* at 238a–40a & 242a–44a. Furthermore, trial counsel testified that this information was specifically precluded by the trial judge's order limiting the scope of prior-conviction evidence. *See id.* at 234a.

The Circuit Court denied petitioner's juror misconduct claim, holding that Ms. Jones's testimony "was clearly hearsay and that [petitioner] failed to identify any exception to the hearsay rule." *Id.* at 182a. It further held that, even if the testimony were not hearsay, petitioner failed to prove that the foreperson's statements came "from an external authority or process" or that "the misconduct might have prejudiced" petitioner, which it interpreted Alabama Rule of Evidence 606(b) to require. *See id.* at 180a.

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[1] The foreperson himself did not testify at the post-conviction hearing because he died before that hearing. *See* Pet. App. 225a & 245a.

Like its federal counterpart, Alabama Rule of Evidence 606(b) generally bars a juror from testifying "in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations," but allows juror testimony "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

On appeal, the Alabama Court of Criminal Appeals acknowledged that Ms. Jones's testimony was not hearsay because the foreperson's statements were not offered for their truth, but for the fact that they had been made. *See Peraita v. State*, 2021 WL 3464344, at *9 (Ala. Crim. App. Aug. 6, 2021). The court nonetheless affirmed, barring the juror testimony about misconduct because the testimony did not constitute "extraneous prejudicial information" under Rule 606(b). *Id.* at *14. First, the Alabama court held that, for information to be "extraneous," it must come from an external source consulted during trial. *Id.* at *10. Here, the court determined that the foreperson's statements came from an "intrinsic" source because petitioner had not shown that the foreperson had learned the information during trial. *Id.* at *11. Second, it held that the information was not prejudicial primarily because the jury was already aware that petitioner had been previously convicted and was serving a life sentence. *Id.* at *13. The Alabama Court of Criminal Appeals denied petitioner's motion for rehearing. *See* Pet. App. 134a.

The Alabama Supreme Court then granted petitioner's petition for a writ of certiorari. *See Ex parte Peraita*, No. 1210290 (Ala. Sept. 22, 2022). Following briefing by the parties, the court quashed its writ of certiorari without an opinion. *See Ex parte Peraita*,

No. 1210290 (Ala. June 2, 2023). The Alabama Court of Criminal Appeals issued a Certificate of Judgment on June 7, 2023. *See* Pet. App. at 138a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD SUMMARILY REVERSE THE ALABAMA COURT'S DECISION BARRING CONSIDERATION OF THE JUROR TESTIMONY BECAUSE THE DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

This Court has long held that a jury's exposure to prejudicial information beyond the evidence presented at trial may violate a defendant's rights to a fair trial and to confront the witnesses against him. To protect those constitutional rights, this Court has required the admission of juror testimony stating that the jury heard or saw information like the information the jurors heard here. The Alabama Court of Criminal Appeals' decision cannot be reconciled with those decisions or with the decisions of lower courts applying well-settled law. Summary reversal is necessary to compel adherence to this Court's precedents and to correct a clear error.

A. The Alabama Court's Decision Conflicts With This Court's Precedents Holding That A No-Impeachment Rule Cannot Apply Where Jurors Are Exposed To Outside Information About A Defendant's Prior Convictions Or Bad Acts.

"At common law jurors were forbidden to impeach their verdict, either by affidavit or live testimony." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 215 (2017). But this no-impeachment rule generally "permitted an exception . . . for testimony about events extraneous to

the deliberative process, such as reliance on outside evidence—newspapers, dictionaries, and the like—or personal investigation of the facts." *Id.*; *see also Warger v. Shauers*, 574 U.S. 40, 45 (2014). Most States now have codified no-impeachment rules that (like Federal Rule of Evidence 606(b)) prohibit a juror from testifying about a statement made during the jury's deliberations. *See* Benjamin T. Huebner, Note, *Beyond* Tanner: *An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469, 1487, app. (2006) (discussing state rules). These rules still contain an exception for testimony about extraneous prejudicial information brought before the jury. *See Pena-Rodriguez*, 580 U.S. at 218.

That exception is compelled by the Sixth Amendment "in the 'gravest and most important cases.'" *Id.* at 219 (quoting *McDonald v. Pless*, 238 U.S. 264, 269 (1915)); *United States v. Reid*, 53 U.S. (1 How.) 361, 366 (1851) ("Cases might arise in which it would be impossible to refuse [admission of juror testimony] without violating the plainest principles of justice."). The Sixth Amendment guarantees "the accused" a "trial, by an impartial jury," and the right "to be confronted with the witnesses against him." U.S. Const. amend VI. Juror exposure to prejudicial extraneous information may violate both these rights. "The requirement that a jury's verdict must be based upon the evidence developed at the trial," *Turner v. Louisiana*, 379 U.S. 466, 472 (1969)—not upon "private talk, tending to reach the jury by outside influence," *Parker v. Gladden*, 385 U.S. 363, 364 (1966)—"goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury," *Turner*, 379 U.S. at 472. Thus, "[t]o the greatest extent possible, all factual testimony must pass through the judicial sieve, where the fundamental guarantees of procedural law

protect the rights of those accused of crime." *United States v. McKinney*, 429 F.2d 1019, 1023 (5th Cir. 1970). Information that has not gone through the testing of a criminal trial may be unreliable or unduly prejudicial. And when a juror or third party introduces new facts in the jury room, he or she becomes an unsworn witness that the defendant does not have the opportunity to confront or cross examine. *See Parker*, 385 U.S. at 364–65; *see also United States v. Howard*, 506 F.2d 865, 866 (5th Cir. 1975) ("The dagger of hidden evidence must not be taken from its scabbard for the first time in the jury room to wound the defendant; and unless its piercing effect is only skin deep and without prejudice to the anatomy of the trial, we must apply a constitutional salve.").

This Court has thus refused to apply the no-impeachment rule where jurors were exposed to outside information about a defendant's prior convictions or bad acts. In *Mattox v. United States*, the Court required the admission of juror affidavits stating that the jury had seen and heard information that was not in evidence. 146 U.S. at 140. That information included a court bailiff's statement that "this is the third fellow" the defendant Clyde Mattox had "killed" and a newspaper article reporting that "the defendant had been tried for his life once before." *Id.* at 144, 150. In compelling admission of the juror testimony, the Court emphasized that, "[i]t 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." *Id.* at 149. Indeed, the Court explained that some "external causes" are "such an irregular invasion of the right of trial by jury as to absolutely vitiate the verdict in all cases." *Id.* at 150. For example, the "text-books refer to many cases in which . . . the reading of newspapers containing" prejudicial

"reports . . . or other objectionable matter . . . have been held fatal to verdicts." *Id.* As in those cases, the jury's exposure to outside facts about the defendant "compelled" the Court to require consideration of the affidavits. *Id.* at 151.

Following *Mattox*, this Court has reversed convictions because the jury was exposed to extraneous information about a defendant. It did so in *Parker v. Gladden*, where the jury's exposure to statements by a court bailiff that the defendant was "guilty" violated the defendant's Sixth Amendment rights, because the bailiff "was not subjected to confrontation, cross-examination or other safeguards guaranteed to the petitioner." 385 U.S. at 364.

The Alabama court's decision barring the juror testimony departed from these controlling principles. Under *Mattox* and *Parker*, the no-impeachment rule cannot bar the juror testimony about the foreperson's misconduct.

1. Here, as in *Mattox* and *Parker*, the jury was exposed to information about the defendant that "was not subjected to confrontation, cross-examination or other safeguards guaranteed to the petitioner." *Id.* Just as the facts imparted to the jury about Clyde Mattox's prior actions and criminal charges were an "external cause," so was the information imparted to the jury about the crime that led to petitioner's prior convictions. *Mattox*, 146 U.S. at 149.

The Alabama Court of Criminal Appeals' contrary holding rested on an irrelevant factor. The court believed that the no-impeachment rule should apply unless "[the foreperson] became privy to [the] information from an 'external authority' or 'some process outside the scope of the trial' *during* Peraita's trial.'" *Peraita*, 2021 WL 3464344, at *11 (emphasis in

original) (quoting *Bethea v. Springhill Mem'l Hosp.*, 833 So. 2d 1, 8 (Ala. 2002)). And the court concluded that petitioner "failed to make this showing." *Id.* It is undisputed that the foreperson learned about the Gadsden murders from an "external authority," such as a newspaper article or local news report. *See Melson*, 775 So.2d at 864 (identifying a single eyewitness to the Gadsden crimes, who was not the foreperson in petitioner's 2001 trial). And it should not matter *when* the foreperson learned the information he conveyed to the other jurors. *See United States ex Rel. Owen v. McMann*, 435 F.2d 813, 820 (2d Cir. 1970) (Friendly, J.) ("[I]t is the 'nature of the matter and its probable effect on a hypothetical average jury,' not the source of the information or the locus of communication, which determines whether" the defendant's rights have been violated (quoting *United States v. Crosby*, 294 F.2d 928, 950 (2d Cir. 1961)). The violation of the defendant's fair trial rights in *Mattox*, for example, did not turn on the publication date of the newspaper article mentioning Mattox's prior criminal charges. The article's content made it an "external cause[]." *Mattox*, 146 U.S. at 149. Here too, regardless of whether the foreperson heard a news report about the Gadsden murders years earlier (and failed to disclose that during voir dire) or read an article about petitioner during the trial, the information the foreperson transmitted was "private talk" that did not "come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Parker*, 385 U.S. at 364.

Not to mention, even if the foreperson learned about the Gadsden murders prior to the trial, the rest of the jurors did not, and "petitioner was entitled to be tried by 12 . . . impartial and unprejudiced jurors." *Id.*

at 366. The foreperson's conduct deprived petitioner of that right, and the no-impeachment rule should not apply.

2. The Alabama court also departed from settled law in concluding that "Peraita failed to prove that he was prejudiced by the [foreperson's] comment." *Peraita*, 2021 WL 3464344, at *11; *see also id.* *13 ("[W]e cannot conclude that the jury's decision to convict Peraita might have been affected by [the foreperson's] statement.").

Juror exposure to information about a defendant's prior criminal charges or convictions is inherently prejudicial. As the Court explained in *Mattox*, "[i]t is not open to reasonable doubt that the tendency of" such information is "injurious to the defendant." 146 U.S. at 150. "Statements that the defendant had been tried for his life once before . . . could have no other tendency." *Id.* at 150–51. The same is true of the foreperson's statement here that petitioner "murdered three or four people there in Gadsden at Popeye's Chicken and put them in the freezer." Pet. App. 191a.

This Court's decision in *Marshall v. United States*, 360 U.S. 310 (1959) (*per curiam*), further proves the point. In *Marshall*, this Court exercised its supervisory power to order a new trial where the judge had excluded evidence of the defendant's prior convictions, but "that evidence reache[d] the jury through news accounts." *Id.* at 313. The trial judge denied a motion for mistrial "stating he felt there was no prejudice to petitioner." *Id.* at 312. But this Court disagreed. It observed: "We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence." *Id.* And "[t]he prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is

a part of the prosecution's evidence. It may indeed be greater for it is then not tempered by protective procedures." *Id.* at 312–13 (citation omitted).

Here too, in granting petitioner's motion to exclude the details of the Gadsden robbery, the trial judge recognized that those details were "so prejudicial [they] could not be directly offered as evidence." *Id.* at 312; *see also* Pet. App. 247a. That ruling was correct: Petitioner's principal argument—that he acted in self-defense—was undercut the moment the violent details of the Gadsden robbery were revealed to the jury. And "[t]he prejudice to" petitioner was equally "great [because] that evidence reache[d] the jury" through the foreperson (rather than as "part of the prosecution's evidence"). *Id.* at 312–13. "[I]ndeed," the prejudice was "greater," because the information was "not tempered by [the] protective procedures" of the courtroom. *Id.* at 313. The "judicial sieve," *McKinney*, 429 F.2d at 1023, could have filtered out the misleading features of the statement, which suggested that petitioner *himself* killed "three or four people" and "put them in the freezer." Pet. App. 191a. It was "blinking reality not to recognize the extreme prejudice inherent" in the foreperson's statement. *Parker*, 385 U.S. at 365 (quoting *Turner*, 379 U.S. at 473).

3. Petitioner's Sixth Amendment rights were not "sufficiently protected" by other procedural safeguards that this Court has said may allow defendants to effectuate their fair trial rights while preserving the secrecy of jury deliberations. *Warger*, 574 U.S. at 51. Those safeguards are "voir dire, the observations of court and counsel during trial, and the potential use of 'nonjuror evidence' of misconduct." *Id.* (quoting *Tanner v. United States*, 483 U.S. 107, 127 (1987)). But here the observations of court, counsel, and nonjuror witnesses could not have exposed the misconduct,

because it occurred in the jury room. And voir dire was plainly insufficient: The foreperson was asked during voir dire if he knew petitioner or any member of petitioner's family, and the foreperson did not respond yes to that question. Pet. App. 147a.

B. The Alabama Court's Decision Is Inconsistent With The Decisions Of Other Courts Holding That A No-Impeachment Rule Should Not Apply In Cases Like This One.

The Alabama Court of Criminal Appeals' decision is also inconsistent with the decisions of lower courts applying this Court's precedents.

1. Lower courts have understood that a defendant's rights may be violated where jurors are exposed to information not in evidence about a defendant's prior convictions or bad acts. It is immaterial whether that information is conveyed to jurors through newspaper articles,[2]

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[2] *See, e.g.*, *United States v. Thomas*, 463 F.2d 1061, 1064 (7th Cir. 1972) (applying *Parker* and *Marshall* to order new trial where jurors read newspaper article containing inadmissible facts "suggest[ing] that the defendant[] was part of a much larger conspiracy than either the evidence at trial had specifically indicated or than the indictment had charged"); *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir. 1960) (invoking *Mattox* and *Marshall* and stating that "[w]hen it affirmatively appears . . . that individual jurors have read newspaper articles containing information, incompetent if offered at the trial, that the defendant had been previously guilty of criminal conduct[,] the Supreme Court has held that a new trial is mandatory."); *United States v. Kum Seng Seo*, 300 F.2d 623, 625 (3d Cir. 1962) ("[S]ince [*Marshall*] it has been clear that new trial should be granted in federal criminal cases when it is shown that members of the jury have read news accounts containing inadmissible and inaccurate facts prejudicial to the defendant."); *id.* at 625 n.3 (citing cases); *People v. Moreland*, 163 N.W.2d 257, 259 (Mich. 1968) (following *Mattox*

by third parties,[3] or (as here) by one or more jurors.[4] And in the juror cases, it is immaterial whether the juror learned the prejudicial information he imparted about the defendant before or during trial.[5]

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and requiring admission of juror affidavits stating that jury discussed a newspaper article about defendant's prior convictions).

[3] *See, e.g.*, *Dickson v. Sullivan*, 849 F.2d 403, 408 (9th Cir. 1988) (finding Sixth Amendment violation where deputy sheriff stated to jurors that defendant had "done something like this before"); *Bonner v. Holt*, 26 F.3d 1081, 1082 (11th Cir. 1994) (granting habeas corpus for Sixth Amendment violation where jury heard judge ask: "Is the defendant a habitual offender?" and prosecutor answer "yes"); *Holmes*, 284 F.2d at 718 (ordering new trial where court official revealed defendant's prior conviction to jury).

[4] *See, e.g.*, *Jeffries v. Blodgett*, 5 F.3d 1180, 1189 (9th Cir. 1993) (finding Sixth Amendment violation where juror told other jurors about defendant's prior armed robbery conviction); *Flonnory v. State*, 778 A.2d 1044, 1048 (Del. 2001) (finding Sixth Amendment violation where juror told other jurors that defendant had previously been accused of murder); *People v. Magnano*, 175 A.D.2d 639, 640 (N.Y. App. Div. 1991) (holding that "the violations of defendant's rights must take precedence over the policy against impeachment of jury verdicts" where juror told other jurors about defendant's prior conviction and his "bad reputation in the community"); *State v. Poh*, 343 N.W.2d 108, 117 (Wis. 1984) (finding error "of constitutional dimension" where jurors told other jurors about defendant's prior legal infractions); *United States v. Howard*, 506 F.2d 865, 866 (5th Cir. 1975) (ordering hearing to evaluate affidavits stating that juror told other jurors that defendant "had been in trouble two or three times"); *Briggs v. State*, 338 S.W.2d 625, 626 (Tenn. 1960) (finding Sixth Amendment violation where juror told other jurors that defendant had killed his brother); *United States ex Rel. Owen v. McMann*, 435 F.2d 813, 815 (2d Cir. 1970) (finding Sixth Amendment violation where jurors told other jurors about defendant's prior bad acts).

[5] *Compare, e.g.*, *Flonnory*, 778 A.2d at 1050 (juror learned information during trial), *with, e.g.*, *Briggs*, 338 S.W.2d at 626

Judge Friendly explained why this must be so in *United States ex Rel. Owen v. McMann*. 435 F.2d 813. In that case, jurors told other jurors during the defendant's trial for robbery and assault that the defendant "had been in trouble all his life" and "involved in a fight." *Id.* at 815. Judge Friendly began the analysis with *Parker*, explaining: "[T]hat case makes it plain that if a bailiff . . . entered the jury room and . . . made statements such as . . . [those] made by jurors about [the defendant], the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth would require a judgment of conviction to be set aside." *Id.* Under this Court's cases, *McMann* concluded, it made no "legally significant difference that the remarks here were by jurors rather than" a "nonjuror." *Id.* at 816. Rather, this Court's cases make clear that "it is the 'nature of the matter and its probable effect on a hypothetical average jury,' not the source of the information or the locus of its communication, which determines whether" the defendant's rights have been violated. *Id.* at 820 (quoting *Crosby*, 294 F.2d at 950). The Alabama court erred in prohibiting testimony about the juror misconduct based on when the foreperson may have learned about the Gadsden robbery.

2. Consistent with *Mattox*, *Parker*, and *Marshall*, lower courts have also understood that juror exposure to information about a defendant's prior bad acts, criminal charges, or convictions is prejudicial.[6] And

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(juror knew information before trial), *and Magnano*, 175 A.D.2d at 640 (same), *and McMann*, 435 F.2d at 815 (same).

[6] *See, e.g.*, *Jeffries*, 5 F.3d at 1189 (finding "substantial and injurious effect" on the verdict where juror told other jurors about defendant's prior armed robbery conviction); *Briggs*, 338 S.W.2d at 628 (finding prejudice where juror told other jurors that defendant had killed his brother); *Flonnory*, 778 A.2d at 1056

they have recognized that the prejudice may be especially great where—as happened here—the jury learns "inaccurate" information that may "tend to substantiate the theory asserted" by the prosecution. *United States v. Kum Seng Seo*, 300 F.2d 623, 625 (3d Cir. 1962). Here, the jury learned misleading information about defendant's prior convictions, and the details revealed to the jury undermined petitioner's defense. The Alabama court "blink[ed] reality" in failing to "recognize the extreme prejudice inherent" in the foreperson's statement. *Parker*, 385 U.S. at 365 (quoting *Turner*, 379 U.S. at 473).

CONCLUSION

For the foregoing reasons, the Court should summarily reverse the decision of the Alabama Court of Criminal Appeals.

Respectfully submitted,

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(deeming information about prior accusation of murder against defendant imparted by juror to other jurors "highly prejudicial improper and inadmissible information"); *Magnano*, 175 A.D.2d at 640 (finding "substantial risk of prejudice to defendant as a result of introduction" by juror of fact of defendant's prior conviction and "bad reputation"); *Dickson*, 849 F.2d at 408 (finding prejudice where jury was told that defendant "had done something like this before"); *Holmes*, 284 F.2d at 718–19 (finding prejudice where court official revealed defendant's prior conviction to jury); *Thomas*, 463 F.2d at 1064–65 (finding newspaper article providing additional details about conspiracy with which defendant was charged "prejudicial on its face").

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