No. 23-5714

In the Supreme Court of the United States

CUHUATEMOC HINRICKY PERAITA,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION

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December 4, 2023

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STATEMENT OF THE CASE

A. Facts Pertaining to Petitioner's Conviction and Sentence

Cuhuatemoc Peraita was sentenced to death because, while under a sentence of life imprison without the possibility of parole for three *other* murders he had committed, Peraita killed again, stabbing another inmate to death. The Alabama Court of Criminal Appeals, in its decision affirming his conviction and sentence on direct appeal, summarized the facts underlying Peraita's capital offense as follows:

> The State presented evidence that [Peraita], Michael Costillo, and Quincy Lewis were incarcerated at Holman Prison on December 10 and 11, 1999. Around midnight, an incident occurred in which Lewis was stabbed several times. Shortly thereafter, he died as a result of his injuries.
>
> Kevin James Bishop was employed as a correctional officer at Holman Prison and worked from 10 p.m. on December 10, 1999, until 6 a.m. on December 11, 1999. At approximately 11:43 p.m., as officers were doing a body count to make sure all of the inmates who were assigned to Dorm 4 were accounted for, he saw the appellant in the dorm. The appellant said, "'What's up Bishop,'" and did not indicate that he was scared for himself or Castillo. (R. 966.)[1] Bishop testified that, if the appellant had asked to be removed from the dorm, he would have been placed in segregation in a cell by himself for his protection until the situation could be investigated. After the body count was completed, the lights were turned down for the night so that only about one-half of the lights were on.
>
> Charles Smith was incarcerated at Holman Prison on the night of the offense and knew the appellant, Castillo, and Lewis. Five or six days before the offense occurred, he had seen the knife that was used to stab Lewis in a paper bag at the foot of Lewis' bed. He testified that he had

[1] "R." refers to the reporter's record of trial; "32R." refers to the reporter's record from the state postconviction (Rule 32) proceedings; "C." refers to the clerk's record on direct appeal; "32C." refers to the clerk's record of the state postconviction proceedings.

heard Lewis tell the appellant to get the knife out of the bag and that the appellant had taken the knife and hidden it under his clothes.

Shortly before midnight and after the body count on the night the offense occurred, Smith saw Castillo and Lewis together. Lewis was walking toward the television room, but he stopped and sat on a bed across from Castillo's bed, where Castillo was sitting. When he did, the appellant, who was sitting on a box that was between the beds, got up to walk away. As the appellant walked between Castillo and Lewis, Lewis slapped him. The appellant continued to walk to his own bed. Smith testified that, after Lewis slapped the appellant, the other inmates were expecting something else to happen. He explained that some sort of response is common in a prison when one inmate slaps another inmate.

Smith testified that the appellant stayed at his bunk for two or three minutes and then returned to the box on which he had previously been sitting. After about three to five minutes, the appellant stood up and started out like he was going to leave again. However, he spun around, grabbed Lewis around the neck, and "snatched his neck back." (R. 1044.) Castillo then started stabbing Lewis in the neck and in several other places. In the process, he also stabbed the appellant in the arm. Eventually, Lewis put a towel to his neck and staggered out of the dorm. As he was doing so, Castillo gave the knife to the appellant. The appellant then "hit [Lewis] in the side" and said, "'Die, n --- r.'" (R. 1045–46.)

Smith testified that the appellant and Castillo had paid Lewis two cartons of cigarettes to leave them alone and that he had asked Lewis several times to leave them alone. He also testified that Lewis could not stand the idea of the appellant being with Castillo. Finally, he stated that the appellant had been sleeping in the bed above Lewis' bed, but that he had changed to a different bed.

Alvin Hamner was also incarcerated at Holman Prison on the night of the incident and knew the appellant, Castillo, and Lewis. During the night, he heard some movement and turned to look at what was happening. At that time, he saw the appellant "holding Quincy Lewis around the neck and Castillo standing over him." (R. 1029.) He first thought Castillo was punching Lewis in the neck, chest, and stomach. However, after more lights were turned on, he saw blood and realized that Castillo had been stabbing Lewis. He testified that Castillo had the knife, but handed it to the appellant when the lights came on and

officers entered the dorm. He further testified that, as Lewis was falling to the floor, he saw the appellant stab Lewis in the side. Lewis subsequently walked out of the dorm and into the hallway, where he again fell to the floor. As the appellant walked by Lewis, Hamner heard him say, "'M---- f-----r, die.'" (R. 1031.)

Alphonso Burroughs was also employed as a correctional officer at Holman Prison and worked from 10 p.m. on December 10, 1999, until 6 a.m. on December 11, 1999. When he walked into Dorm 4, he saw Lewis, who was covered with blood, walking from the area around Castillo's bed. The appellant and Castillo, who were also covered with blood, were in the same area only a few feet from Lewis, and the appellant had a knife in his hand.

Lewis walked out of the dorm and collapsed during the time Burroughs was escorting the appellant and Castillo out of the dorm. Burroughs went to help Lewis, and he told the appellant and Castillo to "go on up the hall." (R. 952.) The appellant and Castillo complied, and Burroughs, another officer, and two inmates picked up Lewis to carry him to the infirmary to get medical attention. Part of the way there, the appellant, who was still holding the knife, and Castillo turned around. The appellant waved the knife and said, "'Drop the bastard and let the bastard die.'" (R. 953.) The appellant, who appeared to be mad, continued to swing the knife and said, "'Y'all get back too or we'll cut you too.'" (R. 954.)

Bishop also saw the appellant and Castillo standing side by side in the dorm. Both were covered with blood, and the appellant had a knife in his hand. Shortly thereafter, Lewis walked out of the dorm and collapsed. As others helped Lewis, Bishop stayed between the appellant and Castillo and Lewis. He testified that he told the appellant several times to put the knife down. However, the appellant said he would not do so until he and Castillo were in segregation. The appellant and Castillo walked part of the way down the hall, but then they turned around, the appellant swung his knife toward Bishop, and said, "'Put the bastard down and let the son-of-a-bitch die.'" (R. 972.)

Kevin Dale Boughner was also employed as a correctional officer at Holman Prison on December 10 and 11, 1999. He saw the appellant, who had a knife in his hand, walking toward the segregation area. The appellant and Castillo were "[c]overed with blood, arm [in] arm, walking down the hall at a very brisk pace" toward him. (R. 980.) The appellant

looked at him and said, "'If you get us to a safe place I'll give you the knife.'" (R. 980.) Boughner put them in a holding cell and locked the door, and the appellant threw the knife out. Boughner described the appellant as "really pumped up, hyper, adrenaline flowing, just really pumped up, hyped up." (R. 981.) He also stated that, on two occasions, the appellant asked, "'Is he dead?'" (R. 982.)

Bishop remained with the appellant and Castillo while Burroughs, the other officer, and the two inmates carried Lewis to the infirmary. Burroughs testified that, while he was going toward the infirmary, Bishop and Boughner tried to lock the appellant and Castillo in separate holding cells. However, he heard the appellant say that he and Castillo would not give up the knife unless they were locked up together. Burroughs testified that, after he and Castillo were locked in a holding cell together, the appellant threw the knife to the floor.

Sergeant William James, the shift commander for the segregation area, saw the appellant and Castillo, who he described as "covered from head to toe with blood," as they were approaching the holding cell. (R. 991.) After he was secured in the holding cell, the appellant asked, "'Is he dead?'" (R. 991.)

Dr. William John McIntyre treated Lewis in the emergency room at Atmore Community Hospital approximately one hour after the offense occurred. He testified that Lewis had six wounds, including a very large wound to his neck, and that he was close to death because he had lost so much blood. He further testified that medical personnel tried to revive Lewis, that they were not able to because the blood loss was irreversible, and that he pronounced Lewis dead.

Dr. Leroy Riddick, a medical examiner employed by the Alabama Department of Forensic Sciences, performed an autopsy on Lewis' body. He testified that Lewis had a total of eighteen separate injuries, including six stab wounds. One stab wound to his neck cut his carotid artery. Another stab wound to the chest went through the chest cavity and caused a lung to collapse. He also had several superficial incised wounds. Dr. Riddick concluded that the cause of death was sharp force injuries from stab wounds and cuts.

The defense called several inmates to testify on the appellant's behalf. Michael Best testified that he knew the appellant, Castillo, and Lewis and had seen them interact; that the three seemed to get along well at

> first, but that the situation deteriorated over time; that Lewis had admitted to him that he had made threats against the appellant and Castillo; and that he had discussed those threats with the appellant and Castillo. Finally, he testified that Lewis had a reputation for being sexually violent in Holman Prison.
>
> James Jones testified that he knew the appellant, Castillo, and Lewis; that he had seen them interact; that they initially did not have problems; and that eventually problems developed. He explained that the appellant and Lewis "were partners" before Castillo arrived at Holman Prison; that Castillo came between the appellant and Lewis; that the appellant and Castillo "paid" Lewis two cartons of cigarettes to leave them alone; that Lewis left them alone for seven or eight days; and that problems started again. (R. 1134.) Finally, he stated that Lewis made a threat against the appellant in his presence and that he told the appellant about the threat.

Peraita v. State, 897 So. 2d 1161, 1175-78 (Ala. Crim. App. 2003).

At the time Peraita murdered Lewis, he was serving a life sentence without possibility of parole handed down by the Etowah County Circuit Court following Peraita's conviction of six separate offenses. *Ex parte Peraita*, 897 So. 2d 1227, 1233 (Ala. 2004). The "convictions all stemmed from an attempted robbery. Three of those convictions were for the murders of three individuals, another conviction was for the capital offense of murdering two or more people pursuant to one course of conduct, one conviction was for attempted murder, and one conviction was for robbery." *Id.*

B. State Court Trial and Direct Appeal.

For killing Lewis, Peraita was charged with two counts of capital murder. The first was for "[m]urder committed while the defendant is under sentence of life imprisonment." *Id.* at 1229 (quoting Ala. Code § 13A-5-40(a)(6)). The indictment stated that Peraita committed "intentional murder while 'under a sentence of life

imprisonment *imposed by the Circuit Court of Etowah County, Alabama.*' (Emphasis added.)." *Id.* at 1230. The second count alleged murder by a defendant who has been convicted of another murder within the preceding 20 years of his new murder, and the "indictment on this count stated that he committed intentional murder 'after having been convicted of murder within the preceding twenty years *in the Circuit Court of Etowah County, Alabama.*' (Emphasis added.)." *Id.*

In September 2001, Peraita was found guilty of both counts at the conclusion of a jury trial. (C. 461-62.) Afterwards, Peraita waived his right to a penalty phase before the jury and the presentation of evidence in mitigation. (R. 1287-1308.) On November 1, 2001, the trial court sentenced Peraita to death. (C. 466-72.) Peraita filed a motion for new trial, which was denied by operation of law. (C. 501-10, 529.)

The Alabama Court of Criminal Appeals affirmed Peraita's convictions and sentence, *Peraita v. State*, 897 So. 2d 1161 (Ala. Crim. App. 2003), as did the Alabama Supreme Court on certiorari review. *Ex parte Peraita*, 897 So. 2d 1227 (Ala. 2004).

C. State Post-conviction Proceedings

In September 2005, Peraita filed a petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure attacking his convictions and sentence. (32C. 14-74.) Peraita filed several amendments to his petition over the subsequent years which the State answered and moved to dismiss. (32C. 307-80, 728-566.) The trial court entered orders dismissing most of Peraita's claims, but it also identified claims requiring an evidentiary hearing. (32C. 487, 853-68.)

In April 2016, the circuit court held an evidentiary hearing on the remaining claims in Peraita's amended petition. (32R. 102-599.) The only evidence that Peraita presented at the hearing to support his claim that the jury foreperson, E.P., committed misconduct was the testimony of V.J., one of the jurors who served at his 2001 trial. (32R. 121–33.) V.J. testified that E.P. stated during a break in the trial, "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[?]" (32R. 131.) V.J. indicated that she heard the foreman clearly but did not discuss Peraita's prior convictions with any other jurors. V.J. believed that the foreman's comment was made on the second day of trial. (32R. 132.) Further, "although V.J. said that E.P made a comment about Peraita's past murders and that other jurors were present when E.P. made the comment, V.J. did not testify that any other juror heard E.P.'s statement, V.J. did not see any reaction from any of the jurors after E.P.'s statement because she 'really didn't look at their faces' (32R. 132), V.J. did not have any discussion with any other juror about E.P.'s statement, and V.J. did not testify that E.P.'s statement had any influence on her vote in Peraita's case (32R. 133)." Pet.App.37. V.J. specifically recalled that E.P.'s comment was made before the jury began its guilt-phase deliberations. (32R. 133.) Afterwards, both parties submitted post-hearing briefs and proposed orders and, in June 2018, the trial court entered an order denying postconviction relief. (32C. 1253-79.)

Peraita appealed to the Alabama Court of Criminal Appeals, which affirmed the denial of postconviction relief. *Peraita v. State*, __ So. 3d __, 2021 WL 3464344

(Ala. Crim. App. 2021). He sought rehearing, but his application for rehearing was overruled. Thereafter, Peraita sought certiorari review in the Alabama Supreme Court. That Court initially granted certiorari as to a single issue, but after the benefit of full briefing the Court quashed the writ without opinion. The state court certificate of judgment was issued on June 7, 2023. These proceedings on Peraita's petition for writ of certiorari follow.

REASONS FOR DENYING THE WRIT

Peraita's petition requests summary reversal, but he does not present the Court with a state court decision resolving a federal issue exclusively on federal law grounds, and he cannot show an egregious misapplication of settled federal law. Additionally, the lower court's judgment is supported by an alternate finding that would not be disturbed by a resolution of the question presented in Peraita's favor.

Peraita's argument below was over an issue of state law. None of the cases he now relies on in the petition to create a federal question were presented in his arguments below, nor did he present this matter as a federal question, as evidenced by his own arguments in state court. This "Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). "[I]t is only in exceptional cases, and then only in cases coming from the federal courts, that [this Court] considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) (citing

Blair v. Oesterlein Co., 275 U.S. 220, 225 (1927); *Duignan v. United States*, 274 U.S. 195, 200 (1927)).

The state court resolved Peraita's claim, in part, because the specific facts of his case indicated that he was not prejudiced under the state law argument Peraita advanced below. Peraita was tried for a murder made capital because he was under a sentence of life imprisonment and because it was committed within 20 years of a prior murder. As a result, the jury was exposed to evidence about Peraita's prior capital murder convictions and life sentence. This Court does not review state law decisions that do not involve a federal question. But even if Peraita could raise a federal question at this late date, this case is not worthy of certiorari review because this Court has long held that when considering the issue of prejudice from juror exposure to news articles about a case, "each case must turn on its special facts." *Marshall v. United States*, 360 U.S. 310, 312 (1959). As most cases do not involve a defendant's prior criminal conduct as an element of the crime, this case would not present a useful opportunity to address the prejudice standard in a manner applicable to most situations.

Additionally, Peraita relies on *Mattox v. United States*, 146 U.S. 140 (1892), to attack the lower court's analysis of the no-impeachment rule, but this Court has recognized that its earlier preference for the "Iowa rule" was rejected in later cases and through the adoption of Rule 606. *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 216 (2017) ("Later, however, the Court rejected the more lenient Iowa rule. . . Congress, like the *McDonald Court*, rejected the Iowa rule."). *Mattox*, which was not decided on

constitutional grounds, provides little basis for a grant of certiorari where this Court has subsequently recognized that Congress, like Alabama, has "endorsed a broad no-impeachment rule, with only limited circumstances." *Pena-Rodriguez*, 580 U.S. at 217.

I. Certiorari Review is Unwarranted Because Peraita Presented the Issue as a State Law Question, Below, and He Presents a Federal Question for the First Time in This Proceeding.

In his opening brief in the Alabama Court of Criminal Appeals, Peraita argued that the "foreperson's statement to other jurors was improper 'extraneous information' under Alabama law." (Peraita Br. at p. 26.) As persuasive precedent, Peraita cited to decisions from North Dakota, South Dakota, and the Eighth Circuit as to what should constitute "extraneous prejudicial information" for purposes of Rule 606 of *Alabama's* evidentiary rules. (Peraita Br. at p. 29-30.) He also cited to *United States v. Howard*, 506 F.2d 865, 866 (5th Cir. 1975), but as a means of arguing that a juror's statement could constitute an "extrinsic fact" for purposes of Rule 606's application. (Peraita Br. at p. 29.) At no time did Peraita advance a Confrontation Clause argument in his state court brief.

Similarly, Peraita relied on state law in arguing that he was prejudiced. The state law nature of Peraita's claim is evidenced by his conclusion to that argument that the "foreperson's statement thus meets both the 'actual prejudice' and 'presumed prejudice' tests *under Alabama law*, and a new trial should be granted." (Peraita Br. at p. 37 (emphasis added).)

The fact that the federal decisions relied upon by Peraita in his petition for writ of certiorari are not discussed in the lower court's decision is because Peraita failed to present a federal question below. A review of the table of authorities of his opening brief shows that he did not rely on *any* of the cases he presents to this Court as grounds supporting certiorari review; not even *Mattox* and its preference for the outdated Iowa rule. Nor did Peraita cite to the Confrontation Clause or to any of the federal grounds he now relies upon as a means of obtaining the Court's review. This "Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale*, 394 U.S. at 438. "[I]t is only in exceptional cases, and then only in cases coming from the federal courts, that [this Court] considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *McGoldrick*, 309 U.S. at 434 (citing *Blair*, 275 U.S. at 225; *Duignan*, 274 U.S. at 200). This is not one of those exceptional cases. Because this Court typically does "not decide in the first instance issues not decided below," *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012), it should not grant certiorari here. The Court is "without the benefit of thorough lower court opinions" assessing Peraita's new argument "to guide [the Court's] analysis of the merits." *Id.* If that is reason not to pass on an argument *after* certiorari has been granted, then it is also reason not to grant certiorari in the first place. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004) ("The Court of Appeals … did not address this argument, and, for that reason, neither shall we.") (citation omitted).

II. The Lower Court's Determination That Peraita Failed to Establish Prejudice Under State Law Supports Judgement Independent of the Federal Question Presented in the Petition.

After determining that the statement attributed to juror E.P. was admissible over the State's hearsay objection, the Alabama Court of Criminal Appeals determined that Peraita failed to prove that the comment was prejudicial, reaching that conclusion based on several factors. (App. at p. 37a.) First, Peraita presented no evidence that any juror other than V.J. heard the comment and, if any did, there was no testimony that any other jurors reacted. Additionally, there was no additional discussion about the statement attributed to E.P. Most importantly, however, Peraita's jury knew that Peraita had previously been convicted of capital murder and sentenced to life in prison.

This case is not worthy of certiorari review because this Court has long held when considering the issue of prejudice from juror exposure to news articles that "each case must turn on its special facts." *Marshall v. United States*, 360 U.S. 310, 312 (1959). Aside from the fact that Peraita's argument conceded that his prejudice argument was controlled by state law, a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly state rule of law." SUP. CT. R. 10.

In any event, the lower court's factual findings were not erroneous. Count One of the indictment returned against Peraita charged him with the capital offense of intentional murder committed by one under a sentence of life imprisonment. The charge read:

> The Grand Jury of said County charge that before the finding of this indictment Cuhuatemoc Henricky Peraita, whose name to the Grand Jury is otherwise unknown, did intentionally cause the death of another person, to-wit: Quincy Lewis, also known as Quincey Lewis, by stabbing him with a knife or knifelike instrument, a better description of which to the Grand Jury is otherwise unknown, *while the said Cuhuatemoc Hinricky Peraita was under a sentence of life imprisonment imposed by the Circuit Court of Etowah County, Alabama*, in violation of § 13A-5-40(a)(6) of the *Code of Alabama*.

(C. 18 (emphasis added).) Count Two of the indictment returned against Peraita charged him with the capital offense of intentional murder committed by one under a sentence of life imprisonment. That charge read:

> The Grand Jury of said County charge that before the finding of this indictment Cuhuatemoc Henricky Peraita, whose name to the Grand Jury is otherwise unknown, did intentionally cause the death of another person, to-wit: Quincy Lewis, also known as Quincey Lewis, by stabbing him with a knife or knifelike instrument, a better description of which to the Grand Jury is otherwise unknown, *after having been convicted of murder within the preceding twenty years in the Circuit Court of Etowah County, Alabama,* in violation of § 13A-5-40(a)(13) of the *Code of Alabama*.

(*Id*. (emphasis added).)

During voir dire, potential jurors were told, "This case involves a victim, a defendant who was incarcerated in the state penitentiary at the time of this occurrence" and further that "Peraita is, at this time and was at the time of the offense with which he's charged, serving life without parole at Holman Prison." (R. 389-90, 721.) The potential jurors were further told that Peraita's offense was made capital because he had committed murder within twenty years of a previous murder conviction. (R. 402, 412, 599, 731.) When jurors were asked if the fact that Peraita was a prison inmate at the time of the offense would impair their ability to be fair

and impartial, none responded that it would. (R. 390, 445, 590, 721-22.) Defense counsel also questioned the potential jurors about their ability to be fair despite Peraita's previous conviction. (R. 445-46, 647-48, 772.)

The State referenced the anticipated evidence pertaining to Peraita's prior murder conviction and life sentence during its opening statement. (R. 838-41.) The defense opening statement focused on Peraita's existence as an incarcerated prisoner. (R. 859-62.) The first exhibits admitted at Peraita's trial were court records establishing his conviction of four counts of capital murder during the course of a robbery and his resulting sentence of life without the possibility of parole. (C. 547-608.) The State's first witness was a Gadsden, Alabama police officer who testified that Peraita was the same individual convicted and sentenced in the cases represented by those exhibits. (R. 875-79.)

Juror V.J., the only juror to testify and the only juror known to have heard the remark attributed to E.P., did not testify that he was prejudiced by the comment. E.P. was not of an "official character" such as the statement by the bailiff in *Parker v. Gladden*, 385 U.S. 363, 365 (1966), cited in Peraita's petition. Under the facts and circumstances of this case, this is not a case presenting conduct involving "such a probability that prejudice will result that it is deemed inherently lacking in due process." *Id*. (quoting *Estes v. Texas*, 381 U.S. 532, 542-43 (1965)).

Unlike the situation in *Marshall*, upon which Peraita relies for the first time here, the facts here do not implicate a juror's wholesale exposure to information of a character so prejudicial it could not be directly offered as evidence. *Marshall*, 360 U.S.

at 312. Additionally, *Marshall* was not decided on constitutional grounds, but based on this Court's "supervisory power to formulate and apply proper standards for enforcement of the criminal law in federal courts." *Id*. at 313. *Marshall*, a decision resulting from the Court's exercise of its supervisory powers over federal courts and not a constitutional pronouncement, would be an inappropriate basis to grant certiorari review of a state court decision applying state evidentiary law and precedent.

III. Peraita has not shown that the lower court's decision is inconsistent with decisions of other courts applying Rule 606.

Peraita claims that the lower court's decision is inconsistent with the decisions of other courts "in cases like this one." (Peraita Pet. at 16.) First, it is doubtful that inconsistencies among decisions across federal and state forums, on non-identical facts and different rules of evidence, is a solid basis for a grant of certiorari when this Court has already indicated that when court's resolve the issue of prejudice from juror exposure to news articles, "each case must turn on its special facts." *Marshall*, 360 U.S. at 312. For example, it is unsurprising that Peraita's case would be resolved differently than *Holmes v. United States*, 284 F.2d 716, 718 (4th Cir. 1960), cited in footnote 2 of Peraita's petition, because the Fourth Circuit specifically wrote "[n]othing had occurred at the trial to make relevant evidence of a prior conviction of Bedami,"[2] and the information about the prior conviction came through "improper communication by a court official to members of the jury." In this case, Peraita's

[2] Bedami was a co-defendant tried jointly alongside Holmes.

status as a prisoner and his prior convictions for murder were elements of his crime, and the information did not come from a news article or a court official.

As another example, Peraita's reliance on *United States v. Thomas*, 463 F.2d 1061, 1063 (7th Cir. 1972), also cited in footnote 2, is inapposite because that case involved a juror's contact with the defendant's wife and the defendant's attorney while the jury was still empaneled, which would be a permitted ground for impeachment even after the adoption of Rule 606. Additionally, *Thomas* involved considerations of the Confrontation Clause, which was neither argued nor advanced by Peraita in the lower courts, as noted in section I, above. The news article in *Thomas* "suggested 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," 463 F.2d at 1064, while Peraita's jury was shown direct evidence that he had been convicted for four counts of murder and sentenced to life in prison.

The absurdity of Peraita's comparison cases is best illustrated by his own explanatory parenthetical for his citation to *Flonnory v. State*, 778 A.2d 1044, 1048 (Del. 2001), in footnote 4. Peraita explains this case as "finding Sixth Amendment violation where juror told other jurors that defendant had previously been accused of murder." (Peraita Pet. at 17 n.4.) If a Sixth Amendment violation must be found whenever a jury is told that a defendant had been accused of murder, a defendant like Peraita could never be convicted, because a jury could not be told of his *four* prior murders and life sentence. But if, on the other hand, cases must be decided on their own special facts, it becomes clear that *Flonnory* is nothing like this case.

A review of the remaining cases Peraita cites in footnote 2 of his petition reveals that they, too, are not "cases like this one." In *United States v. Kum Seng Seo*, 300 F.2d 623, 625 (3d Cir. 1962), the jury was provided "information of bail so high as to engender suspicion that the defendant was perhaps a notorious or dangerous criminal" and allegations that drugs were found in the defendant's room, when there was no such evidence in the record. Similarly, jurors in *People v. Moreland*, 163 N.W.2d 257 (Mich. Ct. App. 1968), were exposed to information that the defendant was facing his fourth felony conviction; evidence that was not relevant at the defendant's trial. There are not cases like Peraita's, whose trial opened with the admission of court documents establishing his four prior murder convictions and resulting prison sentence.

Nor is this case like those cited by Peraita in footnote 3 of his brief. Peraita admits that each of those cases deals with information passed to jurors by third parties. He alleges that this distinction is immaterial (Peraita Pet. at 16), but he is wrong. *Holmes*, on which Peraita relies, explained that such cases involve "more than jury misconduct in reading forbidden matter," because a private communication between a court official to members of the jury "cannot be tolerated if the sanctity of the jury system is to be maintained." 284 F.2d at 718. Such heightened considerations are not presented here.

Furthermore, *Bonner v. Holt*, 26 F.3d 1081, 1082-83 (11th Cir. 1994), was a habeas decision involving a federal claim preserved for federal review, based on the Sixth Amendment right to a trial by jury, where the state did not challenge the

conclusion that a Sixth Amendment violation occurred. As noted in the opening section, above, Peraita presented no federal claim to the state court, and the State has never agreed that any federal violation occurred in this case. Moreover, Rule 606(b) was not implicated in *Bonner*. It is not, to use Peraita's words, a "case[] like this one."

It is also worth noting that while Peraita cites to *Jeffries v. Blodgett*, 5 F.3d 1180, 1189 (9th Cir. 1993), with the parenthetical "finding Sixth Amendment violation where juror told other jurors about defendant's prior armed robbery conviction," that case merely indicates the court vacated a "grant of summary judgment, and remand[ed] for a factual determination as to the truth of the affidavits." *Id*. at 591. That case, too, was a habeas decision, meaning the federal claim had been preserved for review. It was not purely a review of a state evidentiary ruling, which is what Peraita presented below. Moreover, the Ninth Circuit does not appear to have considered the question of when the Constitution requires a rule of evidence like Alabama's Rule 606(b) to give way.

Because Peraita's petition fails to show that the lower court's decision differed from "cases like this one," in other forums, his suggestion of a split is not a valid basis for a grant of certiorari.

CONCLUSION

For the above-mentioned reasons, the State of Alabama requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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December 4, 2023