No. 24-826

IN THE

Supreme Court of the United States

STACEY IAN HUMPHREYS,

Petitioner,

v.

SHAWN EMMONS, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

In the habeas decision below, the Eleventh Circuit applied *de novo* review to determine whether Petitioner Stacey Humphreys had an excuse for procedurally defaulting a claim of juror misconduct. The court explicitly and repeatedly held that Humphreys had failed to overcome procedural default because his appellate counsel was *not* deficient, period.

The question Humphreys presents here is whether this Court should nevertheless grant this petition to decide, in an advisory opinion, the abstract question of law as to whether courts should, indeed, apply *de novo* review to questions regarding excuses for procedural default (which is what he prefers and what the Eleventh Circuit did) or apply deference under AEDPA (which he rejects and the Eleventh Circuit did not do).

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INTRODUCTION

Petitioner Stacey Humphreys asks this Court to resolve a supposed circuit split on the question whether to apply AEDPA deference to a state court's decision as to whether an ineffective assistance of counsel claim constitutes cause and prejudice to overcome a procedural default. There are many problems with that request, but the main one is that this case does not raise that issue. The Eleventh Circuit did *not* apply AEDPA deference in rejecting Humphreys's arguments on procedural default. The Court held that the "issue of whether a claim is subject to the doctrine of procedural default is a mixed question of fact and law, which we review *de novo*." Pet. App. A. 30a. It then proceeded to reject Humphreys's arguments under that non-deferential standard. Humphreys's "Question Presented" is quite literally *not* presented, and the Court should deny his petition.

A jury convicted Humphreys of a brutal double murder and sentenced him to death. In his state habeas proceedings, he raised for the first time claims of juror misconduct based on post-trial affidavits and testimony from three jurors asserting that another juror had misbehaved, including supposedly harassing other jurors to vote for the death penalty. The Georgia Supreme Court concluded that Humphreys's 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 state court further concluded that Humphreys's claim of appellate counsel ineffectiveness failed to establish cause 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 amount to ineffectiveness.

Humphreys raised these same juror misconduct claims again in federal habeas and he again failed. The Eleventh Circuit, applying *de novo* review, Pet. App. A. 30a, determined that these claims were defaulted and that Humphreys had not shown cause (through appellate counsel ineffectiveness) to overcome the default. Repeatedly, the Eleventh Circuit explained that Humphreys's counsel had simply not acted deficiently—without any AEDPA deference in sight. "[W]e cannot say that Humphreys's appellate counsel acted unreasonably in refraining from raising the juror-misconduct claims in the motion for new trial or in the direct appeal." Pet. App. A. 42a. "In short, appellate counsel's representation did not fall below an objective standard of reasonableness when counsel did not pursue the juror-misconduct claims in the motion for new trial or on direct appeal." *Id.* at 43a. "Not raising these claims was not so patently unreasonable that no competent attorney would have chosen counsel's actions." *Id.* "[A]s we've explained, counsel did not act unreasonably when they did not pursue the juror-misconduct claims sooner. Consequently, we reject Humphreys's claim that his appellate counsel was ineffective under *Strickland*." *Id.* at 44a.

Humphreys, incredibly, now asks this Court to decide whether it was error for the Eleventh Circuit to apply AEDPA deference, when it *did not apply deference*. Maybe there is a circuit split concerning whether to apply AEDPA deference to these types of determinations, but the court here afforded no deference to the state court's opinion,

so Humphreys fails to present anything for this Court to review. To be sure, the *concurring* Judge Rosenbaum appears to have (partially) relied on AEDPA in voting to affirm, *id* at 73a–74a, but the majority opinion could not have been clearer. There was no ineffective assistance so there was no procedural default. The court's opinion even explicitly applied AEDPA deference to *other* aspects of the case, helpfully providing a study in contrast between actual deference and *de novo* review.

Of course, even if the Eleventh Circuit *had* afforded AEDPA deference to the state court decision—which it explicitly did not—this would still be a terrible vehicle for review. The outcome would be the same under any standard. The juror affidavits and testimony he offered in state court are inadmissible evidence under Georgia's no-impeachment rule. His arguments to the contrary fail, but even if they were meritorious, the question is not so beyond doubt that it was *ineffective assistance of counsel* for appellate counsel to choose to focus on different (and potentially better) arguments.

This Court should deny the petition, and it is not a close question.

STATEMENT

1. *The Crimes.* In November 2003, 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 to access her bank account. *Id.* at 64. Humphreys called Williams's 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's 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 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.* Neither of the victims sustained any defensive wounds during the attack. *Id.*

Humphreys fled the scene, taking the victims' driver's licenses and ATM and credit cards. *Id.* Humphreys withdrew over $3,000 from the victims' bank accounts and deposited $1,000 into his own account. Pet. App. A. 5a.

Police apprehended Humphreys in Wisconsin, and they recovered a Ruger 9 mm pistol, which was determined to be the murder weapon, along with $800 in cash. *Id.* Swabbings from the pistol showed blood containing Williams's DNA, and a stain on the driver-side floormat

of Humphreys's vehicle revealed blood containing Brown's DNA. *Id.* When police asked why he fled, Humphreys said: "I know I did it. I know it just as well as I know my own name." *Id.* at 6a.

2. *Voir dire.* During jury selection, prospective juror Linda Chancey disclosed she had been a victim of an armed robbery and attempted rape. *Id.* at 7a. She also revealed that her assailant was a convicted murderer who had escaped from a mental hospital. *Id.* During questioning by the prosecution, Chancey disclosed that the assailant didn't do her any physical bodily harm. *Id.* Chancey also informed the court that her prior experience would not prevent her from sitting as a fair juror and that she could listen to the evidence and follow the law. Pet. App. B. 86a. Chancey also told the court that she had not formed or expressed an opinion about Humphreys's guilt or innocence, that her mind was perfectly impartial between the State and Humphreys, that she had no prejudice or bias either for or against Humphreys, and that she could equally consider all of the available sentencing options based on the law and the facts of the case. *Id.* Neither the prosecution, nor the defense, challenged Chancey for cause or bias or exercised any peremptory strikes to remove her, so she was seated on the jury. Pet. App. A. 7a.

3. *Jury Deliberations.*

During the sentencing phase of trial, after deliberating for approximately eight hours over a period of two days, the jury foreperson sent the trial court a note stating:

> We, the jury, have agreed on statutory aggravating circumstances on both counts,

> but not on the penalty. Currently we agreed life imprisonment with parole is not an acceptable option. We are currently unable to form a unanimous decision on death or life imprisonment without parole. Please advise.

Humphreys, 287 Ga. at 77–78. The trial court placed the note in the record, summarized its contents for the parties, and instructed counsel of its intention to instruct the jury to continue deliberating. *Id.* at 78.

The jury deliberated for around three more hours before the foreperson sent a note to the trial court asking that the jurors be allowed to rehear a taped statement that Humphreys had given to law enforcement. *Id.* at 79. After listening to the recording, the jury resumed deliberations for about two more hours, at which point Humphreys moved for a mistrial. *Id.* The trial court denied that motion and determined that the jury had made no indication of being deadlocked. *Id.*

After two more hours, a juror sent a note asking to be removed from the jury "[d]ue to the hostile nature of one of the jurors." *Id.* The trial court read the note to the parties and informed them that it intended to charge the jury under *Allen v. United States*, 164 U.S. 492, 501 (1896). *Humphreys*, 287 Ga. at 78. Humphreys renewed his motion for mistrial, which the court denied. *Id.* The trial court then read the juror's note to the jury without identifying the author of the note and gave the *Allen* charge. *Id.* "While the trial court made a few inconsequential slips of the tongue and harmless additions, the *Allen* charge given in this case substantially followed the pattern charge. See Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, § 1.70.70 (3d ed. 2005)." *Humphreys*, 287 Ga. at 80.

The jury resumed deliberations around 8:40 p.m. and retired for the evening at 10:20 p.m. *Id.* at 80. The next morning the jury deliberated for about two more hours, then returned death sentences for the two murders. *Id.*

4. *Motion for new trial and direct appeal.* Humphreys filed a motion for new trial and 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. After the trial court denied his motion, he repeated the same arguments on appeal at the Georgia Supreme Court. *Id.* The Supreme Court rejected his argument as well, holding 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.[1] 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, allegedly misunderstood the law and believed they had

1. 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)).

to reach a unanimous decision on sentencing otherwise Humphreys would be eligible for parole. The trial court excluded these affidavits on the basis that they did not fall within any exception to former O.C.G.A. § 17-9-41, which was Georgia's no-impeachment rule at the time of Humphreys' trial. *Id.* at 12–13.[2] The Georgia Supreme Court affirmed 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 and was technically a correct statement of the law. *Id.* at 81–82. The Georgia Supreme Court affirmed the convictions and death sentence. *See Humphreys*.

Humphreys then filed a petition for writ of certiorari in this Court, which was denied. *Humphreys v. Georgia*, 562 U.S. 1046 (2010).

5. *State habeas corpus proceedings.* Humphreys—represented by new counsel—filed a state habeas corpus petition. Pet. App. D. 212a–13a. He raised, among other claims, numerous instances of alleged juror misconduct and bias concerning juror Chancey, including false, misleading and/or incomplete responses on voir dire; improper biases; undue coercion, harassment, pressure and threats at the other individual jurors in order to obtain a death verdict; and lack of candor with the trial judge in juror notes to the trial court, which announced a deadlock

2. 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).

and sought guidance from the court. *Id.* at 228a–30a. None of these claims had previously been raised at the trial court level and on direct appeal. *Id.* at 224a, 228a–29a.

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. A. 21a. Humphreys also offered live testimony from Barber at his state habeas evidentiary hearing. *Id.* All this testimony was later deemed inadmissible by the state habeas court and Georgia Supreme Court because it did not fall within any exception to Georgia's no-impeachment statute. Pet. App. A. 21a; Pet. App. C. 208a–10a.

Barber testified about one of the notes she wrote for the trial court during deliberations. Pet. App. A. 9a–10a. 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 14a. She stated that 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 regarding the status of their deliberations to reflect that the jury had not yet reached a unanimous decision as to sentencing. Pet. App. A. 10a.

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 alleged hostile nature of one of the jurors. *Humphreys*, 287 Ga. at 79. 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's release. Pet. App. A. 14a–15a.

Humphreys also offered affidavits from jurors Darrell Parker and Tara Newsome, which merely showed animated capital jury deliberations, and that Chancey may have 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 7a.

The state habeas court concluded that Humphreys's claims of juror misconduct were all procedurally defaulted under O.C.G.A. § 9-14-48(d) because they were not raised at the trial court level and on direct appeal. Pet. App. D. 228a–29a. The state habeas court also concluded that Humphreys had not shown cause and prejudice to overcome the procedural bar. Pet. App. D. 225a–26a.

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's juror misconduct claims were procedurally defaulted and that he had not shown cause and prejudice to overcome the default. Pet. App. C. 208a–10a; Pet. App. D. 225a–26a. The Georgia Supreme Court also concluded that Humphreys's claim that appellate counsel was ineffective for not raising the juror misconduct allegations failed. Pet. App. C. 208a–10a. The Georgia Supreme Court confirmed that the state habeas court had "carefully considered" the new juror

affidavits and testimony and correctly determined that such evidence did not fall within any exception to former O.C.G.A. § 17-9-41. Pet. App. C. at 209a–10a.

Humphreys then filed another petition for writ of certiorari in this Court, in which he raised these same procedurally bared juror misconduct claims; this Court denied the petition. *Humphreys v. Sellers*, 584 U.S. 935 (2018).

6. *Federal habeas corpus proceedings*. Humphreys next filed a federal habeas petition, in which he raised these same procedurally barred juror misconduct claims concerning juror Chancey. Pet. App. B. 86a–88a. Specifically, Humphreys argued: (1) Chancey lied during void dire about the details of her experience as a crime victim and her unwillingness to consider a sentence other than death; (2) she intimidated other jurors and refused to deliberate: and (3) altered a note to the trial court to mislead it about the status of deliberations. Pet. App. A. 29(a). The district court denied relief, and the Eleventh Circuit granted a certificate of appealability. *Id*. at 25(a)–26(a).

The Eleventh Circuit determined that Humphreys's juror misconduct claims were procedurally barred, and that he had not shown cause to overcome the procedural bar, i.e., he had not shown appellate counsel ineffectiveness for not raising these juror claims on motion for new trial and on direct appeal. *Id*. at 43a–44a. The court, *applying de novo review*, held that Humphreys could not establish cause because: (1) the juror affidavits and testimony he offered in the state courts were not admissible under the no-impeachment rules; and (2) appellate counsel's decision

not to raise those juror issues was not unreasonable. *Id*. The court further held that: " . . . we disagree with Humphreys that his appellate counsel was ineffective. We therefore deny that separate claim. And because Humphreys cannot show that his counsel was ineffective, he also cannot show cause for the procedural default of the juror-misconduct claim, so we deny that claim, too." *Id*. at 32a–33a.

The court explained that "Humphreys does not claim that the verdict came as a result of external influences or a mistake in the verdict form[,]" and because "'juror misconduct' is not an exception to the no-impeachment rule, [] post-trial testimony from jurors regarding alleged misconduct *is not admissible* under Federal Rule 606(b)." Pet. App. A. 37a (emphasis added). The court addressed every case from this Court involving the no-impeachment rule, applied no deference under AEDPA, and concluded: "Against this legal landscape, we cannot say that Humphreys's appellate counsel acted unreasonably in refraining from raising the juror-misconduct claims in the motion for new trial or in the direct appeal." Pet. App. A. 42a. "In short, appellate counsel's representation did not fall below an objective standard of reasonableness when counsel did not pursue the juror-misconduct claims in the motion for new trial or on direct appeal." *Id*. at 43a.

The Eleventh Circuit *did* apply AEDPA deference in adjudicating Humphreys's other claims. The court rejected Humphreys's argument of trial counsel ineffectiveness and explicitly held that "[w]e apply AEDPA deference to the state habeas court's opinion." *Id.* at 56a. The court also rejected Humphreys's claim concerning the *Allen* charge and held that "[b]ecause the Supreme Court of Georgia

adjudicated the coercion claim [concerning the *Allen* charge] on the merits, it is entitled to AEDPA deference." *Id.* at 45a.

In her concurrence, Judge Rosenbaum, agreed with the court's decision but said: " . . . I think that a combination of the no-impeachment rule and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") require it." *Id.* at 71a. The concurrence identified Humphreys's problem was "proving prejudice requires us to consider the jurors' testimony about what occurred during deliberations. Yet Georgia law and the no-impeachment rule prohibit us from doing just that." *Id.* at 73a. The concurrence also acknowledges that this Court has never recognized an exception to the no-impeachment rule under the specific circumstances here. *Id.* The concurrence seems to only reference AEDPA concerning exceptions to the no-impeachment rule and not whether appellate counsel was ineffective for not challenging it. *Id.* at 73a–74a.

REASONS FOR DENYING THE PETITION

I. This case does not address the question presented because the circuit court did not apply AEDPA deference when it adjudicated Humphreys's appellate counsel ineffectiveness claim.

Humphreys asks this Court to resolve a purported circuit split concerning whether AEDPA deference applies to claims of ineffective assistance of counsel adjudicated by a state court in the context of a cause-and-prejudice inquiry to overcome a state procedural bar. Pet. 21. Humphreys contends that the Eleventh Circuit improperly

extended AEDPA's deferential review to the question of cause here, *id.* at 21–25, but the circuit court did no such thing. Pet. App. A. 29a–44a. Instead, it reviewed the underlying appellate counsel claim *de novo* and applied no AEDPA deference when it determined Humphreys had not shown cause to overcome the state procedural bar. *Id.* Humphreys's petition borders on misleading the Court, and actually reading the Eleventh Circuit's opinion makes clear that not once but *multiples times* that the majority determined *de novo* that there simply was no ineffective assistance, thus no cause for overcoming procedural default.

The Eleventh Circuit explicitly declared that the "issue of whether a claim is subject to the doctrine of procedural default is a mixed question of fact and law, which we review *de novo.*" Pet. App. A. 30a. Its analysis of this question was then, as one would expect, entirely *de novo.* The reasoning was easy to follow: in Georgia, these juror affidavits were likely not admissible (and at best it was a difficult question), so it could not be ineffective assistance for appellate counsel not to raise a claim based on those affidavits, so there was no excuse for procedural default. "Against this legal landscape, we cannot say that Humphreys's appellate counsel acted unreasonably in refraining from raising the juror-misconduct claims in the motion for new trial or in the direct appeal." *Id.* at 42a. The Court *repeatedly* held that counsel was *not* ineffective. There was no caveat, no retreat to deference at any point. "In short, appellate counsel's representation did not fall below an objective standard of reasonableness." *Id.* at 43a. "[T]he test is not what the best lawyer or even a good lawyer would have done. Not raising these claims was not so patently unreasonable that no competent

attorney would have chosen counsel's actions." *Id.* "[W]e disagree with Humphreys *that his appellate counsel was ineffective*." *Id.* at 32a. And "because Humphreys *cannot show that his counsel was ineffective*, he also cannot show cause for the procedural default of the juror-misconduct claim, so we deny that claim, too." *Id.* at 32a–33a.

At no point in the court's analysis of Humphreys's juror misconduct claim, or in its attendant appellate counsel cause-and-prejudice analysis, did the court even hint that AEDPA deference was relevant to its decision denying the juror misconduct claims. *Id.* at 29a–44a. How could it? The court had explicitly declared the standard to be "*de novo*" and then repeatedly held that Humphreys's counsel simply was not ineffective. Never did the court mention the Georgia Supreme Court's decision as being due deference; never did it say that Humphreys's excuse argument failed AEDPA deference.

And we know what the court would have said if it were applying AEDPA deference because it did so *elsewhere in the opinion*—in reviewing different claims. The Court rejected Humphreys's argument of trial counsel ineffectiveness, for example, and explicitly held that "[w]e apply AEDPA deference to the state habeas court's opinion." *Id.* at 56a. "That requires us to deny Humphreys's petition." *Id.* Likewise, "[b]ecause the Supreme Court of Georgia adjudicated the coercion claim [concerning the *Allen* charge] on the merits, it is entitled to AEDPA deference." *Id.* at 45a.

Humphreys asserts that the Eleventh Circuit applied AEDPA deference to the procedural default question in the teeth of an opinion that explicitly did not. His

only argument appears to be that Judge Rosenbaum, in *concurring*, suggested that her decision was possibly influenced by AEDPA deference. Pet. at 21. But the concurring opinion is neither binding nor instructive as to the majority opinion. Indeed, even the concurring opinion seems to reference AEDPA deference only in relation to the underlying legal question surrounding the no-impeachment rule, not the (relevant) question whether appellate counsel was ineffective for failing to challenge it. Regardless, the majority could not have been clearer: appellate counsel was not ineffective, AEDPA had nothing to do with that determination, and Humphreys's cert petition presents a non-existent question for this Court to review.

II. Even if the Eleventh Circuit had addressed Humphreys's question presented—and it did not—there would be no point in reviewing it here.

Humphreys asserts that "the difference between *de novo* review and deference is a matter of life and death[,]" Pet. 4., arguing that if the circuit court had applied *de novo* review, it would have been left with no choice but to rule in Humphreys's favor. Pet. 27–34. But that is simply not true. Even if the Eleventh Circuit had applied AEDPA deference, which it clearly did not, Pet. App. A. 29a–44a, there would be no difference in outcome.

Humphreys argues that under *de novo* review, the Eleventh Circuit would have had no choice but to carve out a fact-specific exception to the well-settled no-impeachment rule. Pet. 30–34. But that is problematic for multiple reasons (even setting aside that the Eleventh Circuit did, in fact, rule against him on *de novo* review).

First, even if there were such an exception to the no-impeachment rule, declining to waste time and resources on a novel legal theory is not ineffective assistance of counsel, so there would still be an unexcused procedural default.

Second, Humphreys is just wrong. 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 v. Colorado*, 580 U.S. 206, 211 (2017). 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.*, Fed. R. Evid. 606(b); O.C.G.A. § 24-6-606(b).[3]

Humphreys contends that this Court's precedents, namely *Warger v. Shauers*, 574 U.S. 40 (2014), and *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017), indicate that the no-impeachment rule must yield here. Pet. 30–32. He is wrong. In *Warger*, this Court suggested 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*, 574 U.S. 40, 51 n.3 (2014). But this Court went on to say that "those facts are not presented here," in a

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

case involving allegations that a juror lied during voir dire and was biased—the very kind of juror misconduct Humphreys asserts warrants an exception to the no-impeachment rule here. *Warger*, 574 U.S. at 40.

In *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 225 (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." As the Eleventh Circuit explained, *Pena-Rodriguez* "involved prejudice based on a protected status," which was not alleged in any of Humphreys's juror-misconduct claims. Pet. App. A. 41a–43a. And of course, even if one disagrees with this analysis, it was not *constitutionally deficient performance* for appellate counsel not to travel down this road.

Humphreys would have this Court create a novel exception based on a desire for factbound error correction in a case where the Eleventh Circuit did not even apply the deference he claims it did. The Court should deny the petition.

CONCLUSION

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

Respectfully submitted,

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