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

REPLY IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
REPLY BRIEF FOR PETITIONER 1
ARGUMENT IN SUPPORT OF CERTIORARI 3
A. The Warden Does Not Dispute That There Is An Entrenched Circuit Split. 3
B. The Warden's Vehicle Arguments Should Be Rejected. 4
C. The Question Is of Exceptional Importance 8
CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Brecht v Abrahamson,
507 U.S. 619 (1993).....9

Cone v. Bell,
556 U.S. 449 (2009).....1

Fischetti v. Johnson,
384 F.3d 140 (3d Cir. 2004) 1, 3, 5, 9

Gray v. Hardy,
598 F.3d 324 (7th Cir. 2010).....3

Hall v. Vasbinder,
563 F.3d 222 (6th Cir. 2009).....1, 3

Hamm v. Smith,
604 U.S. 1 (2024).....8

Janosky v. St. Amand,
594 F.3d 39 (1st Cir. 2010) 3

Pena-Rodriguez v. Colorado,
580 U.S. 206 (2017).....5

Richardson v. Lemke,
745 F.3d 258 (7th Cir. 2014).....1, 3

Smith v. Robbins,
528 U.S. 259 (2000).....6

Strickland v. Washington,
466 U.S. 668 (1984).....4, 5, 6

Visciotti v. Martel,
862 F.3d 749 (9th Cir. 2016).....1, 3

Ward v. Hall,
592 F.3d 1144 (11th Cir. 2010).....4

Warger v. Shauers,
574 U.S. 40 (2014).....5, 9

Williams v. Taylor,
529 U.S. 362 (2000).....1

Wrinkles v. Buss,
537 F.3d 804 (7th Cir. 2008).....3

Constitutional Provisions

U.S. Const. amend. VI 1, 2

Statutes, Rules and Regulations

Antiterrorism and Effective Death Penalty Act
of 1996 (AEDPA), 28 U.S.C. § 2254.....2, 5, 6, 7

REPLY BRIEF FOR PETITIONER

Whether AEDPA's deferential review provisions apply to the circumstances here is a question that has divided the courts of appeals. When a state court resolves a Sixth Amendment claim of ineffective assistance of counsel on the merits, AEDPA deference plainly applies. *Williams v. Taylor,* 529 U.S. 362, 400–04 (2000). It is equally clear that a federal court reviews *de novo* whether cause and prejudice exists to excuse a petitioner's procedural default. *Cone v. Bell*, 556 U.S. 449, 472 (2009). But how should the federal court proceed when *both* circumstances are present, as when former counsel's ineffective representation is the cause and prejudice alleged to excuse a procedural default *and* that ineffectiveness claim was adjudicated on the merits by the state court?

The Seventh Circuit applies AEDPA deference to these "nested" ineffectiveness claims, *Richardson v. Lemke,* 745 F.3d 258, 273 (7th Cir. 2014), while the Third, Sixth, and Ninth Circuits do not, *Fischetti v. Johnson,* 384 F.3d 140, 154–55 (3d Cir. 2004); *Hall v. Vasbinder*, 563 F.3d 222, 236–37 (6th Cir. 2009); *Visciotti v. Martel,* 862 F.3d 749, 769 (9th Cir. 2016). The Warden offers no counter to this entrenched split.

In the decision below, the Eleventh Circuit recognized that Mr. Humphreys's case presents a nested Sixth Amendment claim. Pet. App. 32a ("[E]mbedded in Humphreys's juror-misconduct claim is his separate claim that his appellate counsel was

ineffective."). The court then engaged in an analysis of that nested ineffectiveness claim with references to *both* the *de novo* review applied to procedural default determinations, *see id.* at 30a, *and* the deferential review provisions of Subsection 2254(d) applicable to claims adjudicated on the merits in state court. *See id.* at 34a. One member of the three-judge *per curiam* majority expressed frustration at the result produced by the panel's application of AEDPA but reaffirmed that the panel was nevertheless bound by its provisions. *Id.* at 73a (Rosenbaum, J., concurring) ("[W]e should be able to correct that error. But we can't here."). And yet the Warden insists that the court of appeals "could not have been clearer" in applying *de novo* review. Br. in Opp. 16.

To the contrary, the Eleventh Circuit's opinion below underscores the need for this Court to intervene and provide guidance to the courts of appeals. It presents a strong vehicle for determining what standard must be applied when resolving nested Sixth Amendment claims. Here, *de novo* review is the only gateway through which the federal courts can resolve—as a matter of federal constitutional law—when the juror no-impeachment rule must yield to constitutional commands. Thus, the standard to be applied to the question of cause-and-prejudice is decisive.

This Court should grant the Petition.

ARGUMENT IN SUPPORT OF CERTIORARI

A. The Warden Does Not Dispute That There Is An Entrenched Circuit Split.

The Warden may express doubts about the existence of a circuit split, Br. in Opp. 1, 2, 13, ("supposed," "maybe," "purported"), but he offers no argument to the contrary and the courts of appeals harbor no such doubt. The Ninth Circuit has explicitly recognized that "[t]here is disagreement among federal courts of appeal on this question." *Visciotti,* 862 F.3d at 769. So, too, have the First and Seventh Circuits. *Janosky v. St. Amand*, 594 F.3d 39, 44–45 (1st Cir. 2010); *Richardson,* 745 F.3d at 273.

Some circuits have thus far avoided deciding the question given the lack of clear guidance. *E.g., Janofsky,* 594 F.3d at 45. But the Seventh Circuit has held that AEPDA must be applied even in the cause-and-prejudice context, *Wrinkles v. Buss*, 537 F.3d 804, 813 (7th Cir. 2008); *Gray v. Hardy*, 598 F.3d 324, 330–31 (7th Cir. 2010), while its sister circuits apply *de novo* review, *Fischetti,* 384 F.3d at 154–55; *Hall*, 563 F.3d at 236–37. The Eleventh Circuit's opinion in the instant case highlights the need for this Court to settle the proper standard.

B. The Warden's Vehicle Arguments Should Be Rejected.

Because the Warden cannot dispute the existence of an entrenched circuit split, he instead asserts that this case does not implicate that split—primarily on the basis of a single sentence. Indeed, as Humphreys acknowledged in his petition for certiorari and the Warden highlights throughout his brief, the panel correctly identified that "[t]he issue of whether a claim is subject to the doctrine of procedural default 'is a mixed question of fact and law,'" that requires *de novo* review. Pet. App. 30a (quoting *Ward v. Hall*, 592 F.3d 1144, 1175 (11th Cir. 2010)). But the court continued writing.

In a portion of the opinion that the Warden's brief elides, the panel explained that Humphreys could not show cause to overcome the default of his juror misconduct claim "[*f*]*or the reasons we explain below*[.]" *Id.* at 32a–33a (emphasis added). The "reasons" that followed included the panel's explanation of the "doubly deferential" review that is mandated by the interaction of the *Strickland* standard for judging counsel's performance and the AEPDA standard for judging the state court's resolution of a *Strickland* claim. *Id.* at 34a ("[W]hen we apply AEDPA deference on top of *Strickland* deference, we may reject a state-court finding that trial counsel was adequate only upon the dual-determination that counsel acted in a professionally unreasonable manner (under *Strickland*) and that

the state court's contrary determination was 'objectively unreasonable' (under § 2254)."). The court had already set forth at length the operation of AEDPA's provisions in a general section of the opinion titled "STANDARD OF REVIEW." *Id.* at 25a–28a. The interaction of the *Strickland* inquiry and the AEDPA inquiry is described within the court's discussion of the merits of Humphreys's juror misconduct claim specifically. The court would have no reason to note the interaction between the two standards if it were not deploying both in concert. *See id.* at 34a–43a.

The court's holding rests *entirely* upon its consideration of what would have been reasonable to counsel under this Court's then-existing clearly established precedent. *See, e.g., id.* at 41a–42a ("*Pena-Rodriguez* was not decided until well after the motion for new trial and direct appeal were filed. ... [C]ounsel didn't have the benefit of *Warger*, either[.]"). In doing so, the court conflated § 2254(d)(1)'s standards, reserved for habeas review of a state court's decision, with its consideration of the reasonableness of counsel's actions.

De novo review is merely a "straightforward analysis" of whether counsel's omission constituted "an independent constitutional violation[,]" *Fischetti*, 384 F.3d at 155 (quotation marks omitted)—an entirely different inquiry than that demanded of reviewing courts pursuant to § 2254(d)(1). Rather than "reconstruct[ing] the circumstances of counsel's

challenged conduct" in toto, *Strickland v. Washington,* 466 U.S. 668, 689 (1984); *Smith v. Robbins,* 528 U.S. 259, 285, 288 (2000), the Eleventh Circuit confined its analysis solely to whether the federal Constitution demanded that the juror testimony be admitted. The opinion failed to weigh the relative strength of the juror-misconduct claim, whether appellate counsel believed that *Georgia* law would have admitted an exception to the no-impeachment rule, and whether appellate counsel proffered any reasons for the omission at all. In short, no reference is made to appellate counsel's *actual performance*. *See* Pet. App. 30a–43a.

Instead, the panel trained its attention solely on the Georgia court's ruling on the *federal* constitutional question, *id.* at 35a–36a, and discussed the scant prior holdings from this Court providing guidance on when exceptions to the no-impeachment rule are constitutionally required. *Id.* at 39a–42a. Absent the deferential review provisions of § 2254(d), there is little reason for such a myopic focus.

To the extent there remains doubt, Judge Rosenbaum's concurrence further underscores that AEDPA's provisions were in fact applied to the cause and prejudice inquiry:

> [W]hile the [Supreme] Court has limited any exception [to the no-impeachment rule] to the "gravest and most important of cases"—a category into which death-

> penalty cases would seem to fall—AEDPA's standard of review cuts off that avenue for granting the petition.
>
> …
>
> Given this precedent, if we faithfully apply AEDPA's standard of review, we cannot find that the state court's decision was "contrary to" federal law. 28 U.S.C. § 2254(d)(1).

Id. at 73a–74a (Rosenbaum, J., concurring).[1]

The Warden's claim that Judge Rosenbaum's concurrence is not "instructive as to the majority opinion," ignores that she was a *member* of the *per curiam* majority. Br. in Opp. 16. The Warden's suggestion that Judge Rosenbaum would have joined the opinion without comprehending its holding is wrong.

Furthermore, the Warden's insistence that the panel "explicitly" reviewed this issue *de novo* is unsupported. *Compare* Pet. App. 34a–43a, *with* Br. in

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[1] The concurrence is limited to Humphreys's juror misconduct claim. *See* Pet. App. 71a–74a. Thus, the Warden's contention that AEDPA deference was limited to "other aspects of the case" to provide "a study in contrast between actual deference and *de novo* review" is untenable. *Compare id.*, *with* Br. in Opp. 3.

Opp. 14–15. At best, the panel was unclear about which standard of review it applied to the cause-and-prejudice analysis. Such ambiguity is itself intolerable in the federal habeas context and supports granting certiorari. *See Hamm v. Smith*, 604 U.S. 1, 2–3 (2024). This is certainly true where the question is decisive.

C. The Question Is of Exceptional Importance

Judge Rosenbaum indicated that but for the obstacle erected by AEDPA, she would have reached the merits—and a different result—on Humphreys's defaulted juror misconduct claim: "When an error 'actually prejudices' a defendant and that error is the difference between life and death, in my view, we should be able to correct that error." *Id.* at 73a (Rosenbaum, J., concurring).

Indeed, only *de novo* review permits a federal court to define constitutional outer limits in circumstances that have never before presented themselves to this Court. Humphreys's argument regarding an exception to the no-impeachment rule is "somewhat novel", *id.* at 39a, precisely because the misconduct here is uniquely egregious. A single juror concealed her bias and the full extent of her prior victimization by a violent escapee, deliberately lying under oath to both the parties and the trial court. Once there, she willfully misled the trial court and her fellow jurors to avoid the declaration of a deadlock as to sentence.

She terrorized her fellow jurors into surrendering their honestly-held beliefs as to the proper sentence while the trial court failed to intervene. If ever there were an instance of misconduct "so extreme that, ... by definition, the jury trial right has been abridged," *Warger v. Shauers*, 574 U.S. 40, 51 (2014), this is it. The jurors' testimony reveals that Humphreys was sentenced to death though his jury lacked the unanimity required by law. Neither the Eleventh Circuit below nor the Warden has disputed these essential facts, which evince constitutional harm. *See* Pet. App. 72a (Rosenbaum, J., concurring) ("I do not doubt that the errors here 'actually prejudice[d]' Humphreys." (alteration in original) (quoting *Brecht v Abrahamson*, 507 U.S. 619, 637 (1993))).

This case demonstrates that the question presented is not only frequently recurring but also decisive for a small subset of federal habeas petitioners with uniquely egregious constitutional violations. *See, e.g., Fischetti,* 384 F.3d at 154–55 (noting that the application of the different standards to nested ineffectiveness claims can result in different outcomes). This Court should define the proper standard to be applied once and for all.

CONCLUSION

For each of the reasons set forth above, in the petition for a writ of certiorari, and in the courts below, the petition should be granted, the decision below summarily reversed, and the case remanded to the Eleventh Circuit for proper adjudication under *de novo* review. Alternatively, the writ should be granted and the case set for full briefing and argument.

Respectfully submitted,

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