

In the
Supreme Court of the United States

Stacey Ian Humphreys,
Petitioner,
v.

Georgia Board of Pardons and Paroles, et al.,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Georgia

RESPONDENTS' SUPPLEMENTAL APPENDIX

Beth Burton
Deputy Attorney General

Elizabeth M. Crowder
Senior Assistant Attorney General

Deborah Gore
Senior Assistant Attorney General

Christopher M. Carr
Attorney General

John Henry Thompson*
Solicitor General

Elijah J. O'Kelley
Principal Deputy Solicitor General

Christian Sullivan
Assistant Attorney General

*Counsel of Record

OFFICE OF THE GEORGIA
ATTORNEY GENERAL

40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3373

jhthompson@law.ga.gov

Counsel for Respondents

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Case No. _____

**In the
Supreme Court of Georgia**

Stacey Ian Humphreys, Applicant

v.

Georgia Board of Pardons and Paroles, et. al., Respondents

Application for Discretionary Appeal

On Appeal from the
Superior Court of Fulton County, No. 25-CV017069

***Zack Greenamyre** (Ga. 293002)
Mitchell, Shapiro, Greenamyre
& Funt, LLP
881 Piedmont Ave NE
Atlanta, GA 30309
T: 404-812-4747
zack@mitchellshapiro.com

Mary E. Wells (Ga. 747852)
Nathan Potek (Ga. 747921)
Federal Defender Program Inc.
101 Marietta Street NW
Suite 1500
Atlanta, GA 30303
T: 404-688-7530
Beth_Wells@fd.org
Nathan_Potek@fd.org

Jessica G. Cino (Ga. 577837)
Zahra Karinshak (Ga. 407911)
Rahul Garabadu (Ga. 553777)
Krevolin & Horst, LLC
One Atlantic Center
1201 West Peachtree St NW
Atlanta, GA 30309
T: 404-888-0922
cino@khlawfirm.com
karinshak@khlawfirm.com
garabadu@khlawfirm.com

**Counsel of Record*

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CERTIFICATE OF SERVICE

INTRODUCTION

This Court’s intervention is necessary to resolve a question of constitutional interpretation that has divided the superior courts: whether the Georgia Constitution commands that the full five-member Board of Pardons and Paroles (the “Board”) hear an application for the commutation of a death sentence. A related statutory matter of first impression—whether the Georgia code requires the Governor to appoint a temporary replacement member when an existing Board member labors under a conflict of interest—is also squarely presented here. This appeal is an ideal vehicle to establish precedent on these important questions. Review is necessary to guard the rights bestowed by the Georgia Constitution.

“Far from regarding clemency as a matter of mercy alone,” the United States Supreme Court “ha[s] called it the ‘fail safe’ in our criminal justice system” to correct miscarriages of justice where legal process has proven insufficient. *Harbison v. Bell*, 556 U.S. 180, 192 (2009) (quoting *Herrera v. Collins*, 506 U.S. 390, 415 (1993)). The Georgia Constitution of 1983, as amended through the November 1998 general election, vests the power of this vital failsafe to the sole authority of a state Board of Pardons and Paroles, including the solemn power to commute a death sentence to one of life imprisonment. Ga. Const. Art. IV § II, ¶ II(a). The Constitution commands that the Board “shall consist of five members appointed by the Governor[.]” *Id.* at ¶ I. In a capital case, the Constitution also provides that any member of the Board is authorized to suspend the

execution “until the full board *shall* have an opportunity to hear the application[.]” *Id.* at ¶ II(d) (emphasis added). Moreover, members of the Board, like all Georgians in government service, must conduct themselves with integrity, *see* O.C.G.A. § 45-10-1, and they must be free from conflicts of interest regarding matters that come before them. State Board of Pardons and Paroles Policy Statement, Ethical Guideline 1.106.2 (Att. D, Ex. 14, p. 5).¹

On December 1, 2025, a warrant issued for the execution of Stacey Humphreys during the week of December 17 to December 24, 2025. (Att. D, Ex. 1). Soon after, his counsel discovered that two of the five members of the Board who would hear his clemency application had conflicts of

¹ Petitioner-Appellant has attached the following portions of the record below in *Humphreys v. State Bd. of Pardons and Paroles, et. al.*. They are cited herein as Att. ___, p. [page number].

Attachment A: Final order of the Superior Court of Fulton County, entered March 2, 2026

Attachment B: Order granting interlocutory injunction, entered December 29, 2025

Attachment C: Petition for writ of mandamus, filed December 12, 2025

Attachment D: Transcript and exhibits, emergency hearing on Petition for Writ of Mandamus before Hon. Robert C.I. McBurney, December 15, 2025

Attachment E: Stacey Ian Humphreys Application for Commutation of Sentence of Death, submitted December 11, 2025

Attachment F: Order of the chair, State Board of Pardons and Paroles, suspending the execution of Stacey Ian Humphreys, entered December 15, 2025

interest in his case. Kimberly McCoy, appointed to the Board the very same day that Mr. Humphreys's death warrant was entered, served as the advocate for the murder victims' family members in her prior role as Director of the Cobb County District Attorney's Victim-Witness Unit. (Att. D., Ex. 4, p. 5-6). She attended to their needs throughout Mr. Humphreys's four-year-long prosecution and every day of his month-long capital trial. (*Id.*) Board Member Wayne Bennett, during his tenure as sheriff, provided security for Mr. Humphreys's trial, including for the sequestered jurors. (Att. D, p. 52-53).

When Mr. Humphreys inquired how the Board intended to resolve these conflicts of interest, its counsel acknowledged that a "full Board of five members is required to consider the clemency request of an offender sentenced to death[.]" but informed counsel that the Board "[a]s it is currently constituted" intended to pass upon Mr. Humphreys's application. (Att. D, Ex. 10). Mr. Humphreys then sought a Writ of Mandamus from the Superior Court below to enforce his constitutional and statutory right to a clemency determination by a Board comprised of five conflict-free Board members. (Att. C).

The lower court found that Ms. McCoy had an "obvious" conflict of interest, (Att. D, p. 96), but that Mr. Bennett had no conflict. (Att. B, p. 4). In an order granting temporary injunctive relief, the lower court held:

[T]he proper, prudent, and protective course of action is to enter a temporary injunction that pauses the inexorable march toward execution until such time as Petitioner can be afforded the standard, constitutionally mandated clemency

hearing before the *full* Board, comprised of five members who are able to participate fully in the proceedings, including the final vote on whether to grant Petitioner clemency[.]

(Att. B, p. 9) (emphasis in original). The court provided the parties with 21 days in which to brief the question of “whether and how” a conflicted Board member can be replaced. (*Id.*)

In its final order, the lower court reaffirmed that Ms. McCoy had a conflict of interest and was therefore legally required to recuse from the proceedings. However, contrary to its earlier order, it held that there was no constitutional or statutory requirement that five Board members hear a capital clemency application. (Att. A, p. 3) (interpreting Ga. Const. Art. IV, § II, ¶ II (d)). It ruled that the Board could move forward with four members if it chose. (*Id.*) This holding places the lower court in direct conflict with a prior Superior Court that reached the opposite conclusion: that five voting members *are*, in fact, constitutionally required. (Att. D, Ex. 11, p. 3–5) (also interpreting Ga. Const. Art. IV, § II, ¶ II (d)). The Board has been operating in accord with that holding for more than 25 years. (Att. D, Ex. 13) (suspending an execution because the Board did not have five members), (Att. D, p. 148) (testifying that the Board has never proceeded in a capital case with fewer than five members). The establishment of precedent on this constitutional question is crucial.

The lower court also addressed the question of whether the statutory mechanism for the appointment of a temporary Board member required the Governor to appoint a temporary replacement for Ms.

McCoy. *See* O.C.G.A. § 42-9-12 (setting forth a detailed procedure for the appointment of a temporary Board member when any member has become unable to fulfill her duties “by reason of ... providential cause”). The lower court initially held that “there is nothing in the statute that makes it facially inapplicable to” the circumstances here, (Att. B, p. 8), before changing course and finding that “providential cause” is a “peculiarly Georgian legal term of art” that generally speaks to “situations over which the parties have no control[.]” (Att. A, p. 5) (citing cases). Does a Board member’s compelled recusal in the face of a conflict of interest constitute “providential cause”? This Court should accept the appeal to provide crucial guidance on this first impression question of statutory interpretation.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this capital case pursuant to the Georgia Constitution, Article VI, Section VI, paragraphs II(1) and III(8) and O.C.G.A. §§ 5-6-34(a)(7) and 15-3-3.1(a)(2). The order being appealed was filed on March 2, 2026, making this Application timely. *See* O.C.G.A. § 5-6-35(d).²

² The Prison Litigation Reform Act provides that “appeals of all actions filed by prisoners” must follow the discretionary appeal procedure outlined in O.C.G.A. § 5-6-35. *See* O.C.G.A. §§ 42-12-1; 42-12-8. This Court has applied O.C.G.A. § 42-12-8 to require a discretionary appeal in civil actions brought by a death-sentenced prisoner. *See Owens v. Hill*, 295 Ga. 302, 304 n.4 (2014). However, more recently, in *Fed. Defender Program, Inc. v. Atty. General*, a civil case filed by intervenor and death row prisoner Virgil Presnell, the Attorney General did not seek a

ENUMERATION OF ERRORS

(1) The lower court committed reversible error when it interpreted a provision of the Constitution of the State of Georgia, and its corresponding statutory enactment, in a manner unsupported by its text and in conflict with the only other Superior Court that has interpreted the provision.

(2) The lower court committed reversible error when it found that no statutory provision provided for the temporary replacement of a member of the Board of Pardons and Paroles under the circumstances present here.

(3) The lower court further erred when it found that Board member Wayne Bennett does not have a conflict of interest that precludes his participation in Mr. Humphreys's case under the relevant statutes and ethical rules.

Review is warranted by Rule 34(1). In addition, establishment of precedent is desirable under Rule 34(2) because the Superior Courts that have confronted the constitutional question presented here have reached

discretionary appeal but proceeded as if the case was directly appealable. *See* Brief of Appellants, *State of Ga. v. Federal Defender Program, Inc.*, Case No. S26A0364 (Nov. 26, 2025), at 9. This Court docketed the appeal.

While Mr. Humphreys has filed this application for discretionary appeal, to the extent that *Federal Defender Program* allows appeals in death penalty prisoner cases to be filed directly to this Court when it otherwise would have jurisdiction over the matters presented, Mr. Humphreys would ask this Court to consider this case as directly appealable. Mr. Humphreys timely filed a Notice of Appeal in the court below.

directly conflicting conclusions. The establishment of precedent is also desirable given the life or death stakes of an executive clemency proceeding in a capital case.

STATEMENT OF THE CASE

A. There Is a Constitutional Right to Seek Executive Clemency in Georgia.

The right to seek capital clemency is constitutionally and statutorily based under Georgia law. *See* Ga. Const. Art. IV, § II; O.C.G.A. §§ 42-9-1 *et seq.* A death sentenced inmate in Georgia has a constitutional and statutory right to submit an application for commutation of his sentence of death. *McLendon v. Everett*, 55 S.E.2d 119 (Ga. 1949). That application is heard by the State Board of Pardons and Paroles, which holds the exclusive authority to grant clemency. Ga. Const. Art. IV, § II, ¶ II(a). As set forth above, the Constitution mandates a Board “consisting of five members appointed by the Governor, subject to confirmation by the Senate.” *Id.* at ¶ I.

The Board must be comprised of members who are constitutionally and statutorily qualified and who are insulated from conflicts of interest. Pursuant to the Ethical Guidelines for the Board, which are established pursuant to the Code of Ethics for Government Services (O.C.G.A. § 45-10-1 *et. seq.*), the Board members must “make every effort to avoid even the appearance of a conflict of interest.” (Att. D, Ex. 14, Ethical Guideline 1.105.2). “An appearance of conflict exists when a reasonable person would conclude from the circumstances that the employee’s ability to

protect the public interest or perform public duties is compromised by personal interests.” *Id.*

B. Mr. Humphreys’s Clemency Application Is Premised, In Part, on the Grounds That His Death Sentence Was Not the Will of Twelve Jurors.

In 2007, Mr. Humphreys was sentenced to death for the murders of Lori Brown and Cynthia Williams at the Cobb County model home where they worked as real estate agents. This Court upheld the jury’s verdict on direct appeal. *Humphreys v. State*, 694 S.E.2d 316 (Ga. 2010).

Mr. Humphreys’s subsequent state and federal postconviction challenges centered on, *inter alia*, his claim that some jurors were coerced into relinquishing their votes for a life without parole sentence as a result of egregious misconduct by a fellow juror, and his related claim that the trial court compounded the coercive effect by giving a misleading instruction and failing to declare a mistrial and impose a life sentence. Each of Mr. Humphreys’s appeals failed as a result of the jury no-impeachment rule, which barred the courts from weighing the jurors’ testimony. *Humphreys v. Chatman*, No. S16E1799 (Ga. August 28, 2017) (unpublished); *Humphreys v. Warden, Ga. Diagnostic Prison*, No. 21-10387, 2024 WL 2945070, at *13–16 (11th Cir. 2024) (unpublished); *Humphreys v. Emmons*, 607 U.S. ___, 146 S. Ct. 28 (2025) (Sotomayor, J., dissenting from denial of certiorari).

On December 1, 2025, Cobb County District Attorney Sonya Allen obtained a warrant for Mr. Humphreys’s execution. (Att. D, Exh. 1). Pursuant to the warrant, the Department of Corrections scheduled the

execution for December 17, 2025. (Att. D at Ex. 9). The Board of Pardons and Paroles informed Mr. Humphreys that his application for executive clemency would come before the Board on December 16, 2025, and entered deadlines for the submission of the application and any materials in support. (Att. D, Ex. 9). On December 11, 2025, Mr. Humphreys filed an application for clemency, citing as one basis for commutation that a life imprisonment sentence would be consistent with the wishes and views of the jurors, and the intention of Georgia’s capital sentencing statute.³ (Att. E).

C. Board Member Kimberly McCoy Has a Conflict of Interest That Is “Broad,” “Deep,” and “Obvious.”⁴

The same day that the District Attorney obtained the execution warrant, Governor Brian Kemp appointed Kimberly McCoy to fill the vacant fifth seat on the Board. (Att. D, Ex. 2). From 1999 to 2024, Ms. McCoy served as the Director of the Cobb County District Attorney’s Victim-Witness Unit. In that role, she personally handled victim and witness needs in all cases involving the death penalty, including Mr. Humphreys’s. (Att. D, Ex. 4, p. 5–6).

When the venue for Mr. Humphreys’s trial was moved from Cobb County to Glynn County in September 2007, Ms. McCoy “transferred

³ But for the coercive misconduct, his jurors’ non-unanimity would have resulted in a life sentence under Georgia law. O.C.G.A. § 17-10-31(c).

⁴ The court during the emergency hearing below: Ms. McCoy’s conflict of interest in this case “is that broad, it is that deep, it is that obvious.” (Att. D, p. 96).

virtually her entire operation more than 300 miles to coastal Brunswick.” (Att. D, Ex. 4, p. 6). During the month-long trial, Ms. McCoy was responsible for booking travel, making hotel reservations, providing meals and “handling many other arrangements” for state and federal law enforcement personnel, state forensic experts, and other prosecution witnesses. *Id.* She assisted with pre-trial witness interviews. (Att. D, Ex. 16).

Ms. McCoy’s primary task, however, was to work with and support the victims’ family members. *Id.* As the lower court found, “this put her in close and extended contact with the families of the two murder victims, Lori Brown and Cynthia Williams, leading up to and throughout the trial.” (Att. A at p. 2). The court outlined the consequences of the work:

Here, with Board member McCoy, we have someone who served as the State’s advocate for the interests and needs of the closest family members of the two murder victims in Petitioner’s case. It was apparently a job she did quite well as she became, in one family member’s own words, their “rock.” She sat with the families at trial, prepared them for the difficult testimony from witnesses such as medical examiners and first responders, and ensured that they were heard when victim impact statements were made. She was in many ways their guardian throughout the proceedings, both at home in Cobb County and down in Glynn County. It is plain from the record that she quite understandably formed a very close bond with both families ...

She was appropriately on and at the victims' side for many difficult months as this case winded its way through motions hearings, trial and sentencing.

(Att. A, p. 6). The court observed that her conflict “kind of hit[s] you in the face when you read about her connection to the underlying case.” (Att. D, p. 31) (*see also* p. 34: “With Ms. McCoy, I’m glad we are not having the argument how does someone not see the conflict here”). These findings are amply supported by the evidence below. (*See, e.g.*, Att. D, Ex. 4, p. 6). Ms. McCoy was a member of the prosecution team.

D. Board Member Wayne Bennett’s Personal Knowledge of the Case Creates a Conflict of Interest.

“Lightning struck this Board twice[.]”⁵ (Att. B, p. 3). Wayne Bennett was appointed to the Board of Pardons and Paroles in 2024. From 1992 to 2012, Mr. Bennett served as Sheriff of Glynn County, (Att. D, Ex. 22), the same county where Mr. Humphreys’s trial landed when venue was changed. In his role as sheriff, Mr. Bennett was responsible for security in the courtroom where Mr. Humphreys was tried, and the jail where he was housed. (Att. D, p. 52, 61–65).

Mr. Bennett also oversaw security, housing, and transportation for the sequestered jury. (Att. D, p. 77). He testified that he “had full confidence in [his staff’s] ability” to secure and supervise the jurors. (Att.

⁵ Nearly three times. Board member Joyette Holmes was Cobb County District Attorney from 2019 to 2020, *see* <https://pap.georgia.gov/board-members/joyette-holmes> (last visited March 20, 2026). Petitioner has no information that the office took any action in his case during her tenure.

D, p. 73). Irregularities in the jury's deliberations, which Mr. Bennett purported to have personal knowledge of, are the centerpiece of Mr. Humphreys's application for a commutation of his death sentence.

E. The Emergency Mandamus Proceedings Below Resulted in Temporary Injunctive Relief.

Upon receipt of the Board's clemency schedule, Mr. Humphreys's counsel wrote to the Board's Director of Legal Services, La'Quandra Smith, to alert the Board to the respective roles that Mr. Bennett and Ms. McCoy played at Mr. Humphreys's trial. In that December 4 email, counsel asked how the Board intended to proceed to ensure that Mr. Humphreys had "five conflict-free Board members to consider his clemency application." (Att. D, Ex. 9).

Five days later, on the evening of December 9, Ms. Smith replied:

A full Board of five members is required to consider the clemency request of an offender sentenced to death. A majority vote of that Board is required to render a decision. ... As it is currently constituted, the Board plans to give due consideration to any clemency request made by Mr. Humphreys.

(Att. D, Ex. 10).

On December 12, Mr. Humphreys filed the instant mandamus action, along with an emergency motion for injunctive relief. He asked the Superior Court to order Mr. Bennett and Ms. McCoy to satisfy their legal duty to recuse themselves, to order that the clemency proceedings be stayed while the Board had fewer than five unconflicted members, and

to order that the two conflicted members be replaced by the Governor before any action was taken on the pending clemency application. (Att. C, p. 21). The court set an emergency hearing on the request for injunctive relief for December 15, 2025 at 2:00 p.m.

In a Motion to Dismiss filed the morning of the hearing, Respondents revealed for the first time that Ms. McCoy would be “abstaining from participating in the clemency proceedings, including the vote.” (MTD, p. 2). Then, an hour before the hearing, Board Chairman Joyette Holmes entered an order “suspending” Mr. Humphreys’s execution. (Att. F).

At the hearing that afternoon, the court inquired about what led to the suspension order. Respondents represented that the reasons were a state secret. (Att. D, p. 23). Their counsel told the court that the suspension could be lifted at any time and Mr. Humphreys would be provided “at least twenty-four hours’ notice” of the new hearing date. (Att. D, p. 26).

The Court heard argument from the parties on the emergency motion for relief and took limited testimony from Ms. McCoy, Mr. Bennett, and the Board’s legal director, Ms. Smith.⁶ Mr. Bennett

⁶ The Court limited the questioning of Ms. McCoy to two areas: what it meant to “abstain” from hearing the application and whether she had discussed the case with any other Board members. (Att. D, p. 95–96). Petitioner’s counsel was not permitted to ask questions designed to establish the underlying conflict because the Court found it was “really clear.” (*Id.* at 96). The questioning of Ms. Smith was likewise limited to

confirmed that during his time as Sheriff of Glynn County, the office was responsible for securing the sequestered jurors at Mr. Humphreys's capital trial, providing them housing, arranging their meals, and implementing the rules established by the trial judge. (Att. D, p. 52–53). Asked about the “complicated undertaking” of managing a sequestered jury over the course of a month-long trial, Mr. Bennett emphasized that “it is not beyond our ability to make sure everything goes smoothly and the needs of the jurors are met and keeping the presiding judge informed as to any abnormalities in the jury room that we may be aware of.” (Att. D, p. 60). It was his office, too, that housed and transported Mr. Humphreys during the trial. (Att. D, p. 52).

In her limited testimony, Ms. McCoy indicated that since December 4, she had been in conversations with the Board's executive director, Chris Barnett, and its legal counsel, Ms. Smith, concerning her prior role in Mr. Humphreys's prosecution. (Att. D, p. 105–08). Those conversations continued “deep into the weekend” prior to the hearing, (*id.* at p. 107–108), and the decision to abstain was made “last night,” i.e., December 14 (*id.* at 112). Pressed by the court on whether “abstention” would entail her presence or participation at the clemency hearing, Ms. McCoy could not say. (*Id.* at 109-111). She “ha[d] not had that thought.” (*Id.* at 110).

whether she discussed the conflict with Ms. McCoy, what abstention would entail, and whether the Board had previously conducted business in a death penalty case with fewer than five members. (Att. D, p. 138-39).

The Board’s legal director, Ms. Smith, testified that during her entire twenty-year tenure with the Board, it had never proceeded in a death penalty case with fewer than five members. (Att. D, p. 148). She explained that “abstention” deprived Ms. McCoy of only the opportunity to cast a vote and nothing more. (*Id.* at 146). Ms. McCoy would be present for the presentations for and against clemency, would be permitted to question the advocates and witnesses, and would participate in the Board’s post-hearing deliberations. (*Id.*; *see also*, Att. A, p. 5, n.9).

On December 29, the lower court entered an order temporarily enjoining the Board from moving forward. After weighing the four factors that bear on the availability of temporary injunctive relief, (Att. B, p. 5–9 (*quoting Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 378 (2022))), the court halted further clemency proceedings “until such time as Petitioner can be afforded the standard, constitutionally mandated clemency hearing before the *full* Board, comprised of five members who are able to participate fully in the proceedings, including the final vote” on clemency. (Att. B, p. 8) (emphasis in original). Having concluded that the Constitution requires five participating members, the Court requested briefing solely “on the question of whether and how Member McCoy can be replaced by an interim Board member[.]” (*Id.* at 9).

F. The Lower Court’s Final Order Warrants This Court’s Review.

In its final order, the lower court reversed course. On March 2, 2026—after the parties had briefed the specific question posed by the court—the court held that the Georgia Constitution does not, in fact, require a “full Board every time.” (Att. A, p. 3). Rather, in the court’s view, Article VI Section II only “empowers but does not obligate” the Chairman to temporarily suspend an execution in order to allow the full Board’s participation. (*Id.*) All that is *required*, according to the lower court, is a mere quorum. (*Id.*) The court confirmed its earlier ruling that Ms. McCoy labored under a conflict of interest with respect to Mr. Humphreys’s case. Accordingly, by joint operation of O.C.G.A. § 42-9-9 and the Board’s ethical guidelines, her full recusal was required. It held that Mr. Bennett labored under no such conflict.

Finally, though there was no need to replace any member given the court’s holding that a three-member Board was permissible, the court nevertheless ruled that the Governor could not appoint a temporary replacement member under the authority granted in O.C.G.A. § 42-9-12 because Ms. McCoy was not “incapacitated” but rather “fully capable of performing the duties of her office.” (*Id.* at 5).

This timely appeal follows.

ARGUMENT

The People of Georgia intended, through their Constitution, that in the most serious cases, those involving the potential commutation of a death sentence, all five members of the Board of Pardons and Paroles must consider the clemency application. It is plain that at least one member of the Board (and in Petitioner's view, two) is statutorily required to recuse from this case as a result of a conflict of interest and therefore cannot consider Mr. Humphreys's commutation request. This Court's intervention is urgently needed to confirm the constitutional command of a full five-member Board in the face of conflicting decisions in the courts below on this point. So, too, should this Court establish precedent that clarifies the correct procedure when statutorily mandated recusal runs headlong into the constitutional mandate that five members pass upon a commutation application. The trial court below erred in finding that O.C.G.A. § 42-9-12 does not provide a mechanism for the appointment of a temporary replacement member(s) under those circumstances.

In addition, the lower court erred in concluding that Board member Wayne Bennett's role in Mr. Humphreys's trial does not create a conflict of interest. While Mr. Bennett did not explicitly advocate for one of the parties at trial, as Ms. McCoy did, his prior role was not minor. It led him to prejudge the issues presented in Mr. Humphreys's clemency application, as reflected in even the limited testimony he gave below. His recusal is also required.

I. The Lower Court Correctly Found that a Board Member Had a Flagrant Conflict of Interest But Erred in Holding that the Georgia Constitution Permits a Capital Clemency Proceeding with Fewer Than Five Voting Board Members.

The Georgia Constitution requires a Board of Pardons and Paroles comprised of five members, and a Georgia statute effectuates that command. Ga. Const. Art. IV, § II ¶ I; O.C.G.A. § 42-9-2. The dispute here is whether it also requires that all five members consider a request for the commutation of a sentence of death. A subparagraph in Article IV Section II—the very same section that mandates a five-member Board—provides that the “chairman of the board, or any other member designated by the board, may suspend the execution of a sentence of death until the full board shall have an opportunity to hear the application of the convicted person for any relief within the power of the board.” Ga. Const. Art. IV, § II, ¶ II(d).

“In determining the original public meaning of a constitutional provision, we consider the plain and ordinary meaning of the text, viewing it in the context in which it appears and reading the text in its most natural and reasonable manner.” *Olevik v. State*, 302 Ga. 228, 236 (2015). Read in its most natural manner, Paragraph II(d) provides a crucial tool to the Board, something it *may* do—suspend the execution—that can be used to effectuate something that it *must* do—allow the full board to hear the application.

The lower court’s final order instead concluded that Paragraph II(d) “simply bestows the authority to require a full five-member hearing if the

chairman so decides.” (Att. A, p. 3). But that interpretation is divorced from the plain language of the Constitution, gives no meaning to the second clause, and is inconsistent with the surrounding provisions and effectuating statutes. *See e.g., Tibbles v. Teachers Ret. Sys. of Ga.*, 297 Ga. 557, 558 (2015) (“The common and customary usages of the words are important but so is their context.”); *see also* O.C.G.A. § 42-9-22 (“This chapter [*Chapter 9. Pardons and Paroles*] shall be liberally construed so that its purpose may be achieved.”)

The lower court was correct, of course, that “may” is permissive and “shall” is obligatory, (Att. A, p. 3) (“May is not must”), but its reading renders the use of “shall” here entirely meaningless. That construction is not permitted. *Blevins v. Dade Cnty. Bd. of Tax Assessors*, 288 Ga. 113, 115 (2010) (“This Court must construe the Georgia Constitution to make its parts harmonize and to give sensible meaning to each of them.”) “[I]t is a basic rule of constitutional construction that no provision is presumed to be without meaning and that all of its parts should be construed so as to give a sensible and intelligent effect to each of them.” *Blum v. Schrader*, 281 Ga. 238, 241 (2006). “[N]o word should be treated as surplusage.” *Roseburg Forest Prods. Co. v. Barnes*, 285 Ga. 728, 731 (2009).

The lower court did just that. Under its reading, there would be no reason to include the word “shall” at all. Article IV Section II utilizes the terms “may” and “shall” dozens of times. Its drafters understood their different meanings. *See Lopez v. Davis*, 531 U.S. 230, 241 (2001)

(“Congress’ use of the permissive ‘may’ in [the statute] contrasts with the legislators’ use of a mandatory ‘shall’ in the very same section.”) Shall is “a word of command.” *Mead v. Sheffield*, 278 Ga. 268, 269 (2004). It “creates an obligation impervious to ... discretion.” *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26, 35 (1998). Yet in the lower court’s reading, nothing is mandated, all is discretion.

Indeed, the lower court treated the entire second clause as surplusage. In its reading of the Constitution, the clause “until the full Board shall have an opportunity to hear the application” adds *nothing*; the provision would be legally identical if it ended with “[t]he chairman of the board, or any other member designated by the board, may suspend the execution of a sentence of death[.]” Moreover, if it were true, as the lower court concluded, that “a quorum suffices for clemency,” (Att. A, p. 3, n.5), the Constitution would say precisely that: “the chairman may suspend the execution of a sentence of death until *a quorum* shall have an opportunity to hear the application.” “When we consider the meaning of a statute, ‘we must presume that the General Assembly meant what it said and said what it meant.’” *Deal v. Coleman*, 294 Ga. 170, 172 (2013) (quoting *Arby’s Restaurant Group, Inc. v. McRae*, 292 Ga. 243, 245 (2012)). The People of Georgia said “the full board shall.”⁷

⁷ “Unlike ordinary legislation, the people—not merely elected legislators—are the ‘makers’ of the Georgia Constitution.” *Olevik*, 302 Ga. at 238. To the extent that the quorum rule, a creature of statute, is in tension with the Constitution, the Constitution must trump the statute.

In addition to giving meaning to the plain language of Paragraph (d)—all of it—the provision must also be read in context. *Olevik*, 302 Ga. at 236 (“Although the text is always our starting point for determining original public meaning ..., the broader context ... may also be a critical consideration). As this Court has observed:

For context, we may look to other provisions of the same statute, the structure and history of the whole statute, and the other law—constitutional, statutory, and common law alike—that forms the legal background of the statutory provision in question.

City of Marietta v. Summerour, 302 Ga. 645, 649 (2017). Chapter Nine of Title 42 effectuates the Constitution’s establishment of a Board of Pardons and Paroles and sets forth rules governing its conduct. O.C.G.A. § 42-9-1 *et. seq.* Considering Chapter Nine in its entirety provides strong evidence that the legislature believed five members were required.

The Georgia legislature proscribed that commutation of a death sentence to life imprisonment may only be achieved by “an affirmative vote of a majority of [Board] members.” O.C.G.A. § 42-9-20. As Respondents acknowledged below, this provision requires at least three members of the Board to vote in favor of commutation for Mr. Humphreys to obtain relief. If the Board is permitted to proceed with just four members then, as the lower court put it, Mr. Humphreys “has to bat seven fifty instead of six hundred.” (Att. D, p. 153). If the Board is permitted to proceed in capital cases with a mere quorum, some applicants will have to bat a thousand. (*See also* Att. B, p. 7) (a “non-vote

has precisely the same impact as a ‘no’ vote”). And as a prior Superior Court recognized, a “fifth (5th) board member might be persuaded by the Petitioner’s case and may well be able to move others on the Board to favorably consider a reprieve.” (Att. D, Ex. 11, p. 5). In the absence of a full Board requirement, the majority vote rule is arbitrary, unfair, and ultimately, unconstitutional. *See* U.S. Const. amend. XIV (“nor shall any State deprive any person of life ... without due process of law; nor deny to any person ... the equal protection of the laws”); Ga. Const. Art. I, § I, ¶ II (“[n]o person shall be denied equal protection of the laws”); *City of Atlanta v. Watson*, 267 Ga. 185, 187 (1996) (“The Georgia equal protection clause, which is construed to be consistent with its federal counterpart, requires that the State treat similarly situated individuals in a similar manner.”) (internal citations omitted).

Chapter Nine also provides for the ad interim appointment of a Board member to a vacant seat when the Senate is not in session. O.C.G.A. § 42-9-7. And as discussed in our second enumeration of error, the legislature provided the Governor with the authority to appoint a temporary replacement when a member of the Board is unable to serve. O.C.G.A. §§ 42-9-12, 42-9-13. These provisions, too, implicitly recognize that not all Board functions can be performed with a mere quorum. In fact, the quorum statute *itself* recognizes as much. O.C.G.A. § 42-9-7

(Requiring a quorum for “the transaction of all business *except as otherwise provided in this chapter.*”) (emphasis added).⁸

Moreover, the constitutional command is so clear that the Board, the lower court, and the only prior court to consider the question have all ascribed a requirement of five voting members to that text.

First, the prior Superior Court. In 2002, the Superior Court of Fulton County readily concluded that the Constitution commands that five members hear a capital clemency application. *See Fugate v. Board of Pardons and Paroles, et. al*, Fulton Co. Case No. 2002CV54604 (Att. D, Ex. 11). During his clemency proceedings, Wallace Fugate moved the Board Chairman to suspend his execution until a vacant fifth seat on the Board could be filled. When the Board declined, and denied Mr. Fugate clemency with only four members, Mr. Fugate petitioned for mandamus. The Superior Court enjoined Mr. Fugate’s execution until such time as a fifth member was duly appointed. *Id.* The court concluded that nothing in the statutory quorum rules “negate[d] the requirement of five (5) appointed members of the Board at all times who are to have an opportunity as required by the Constitution to consider applications for themselves.” (Att. D., Ex. 11, p. 4–5).

⁸ Chapter 9 acknowledges the provisions of Subparagraph II(d) permitting the chairman to issue a stay to enable the full board to consider and pass upon an application for commutation of a death sentence. O.C.G.A. § 42-9-20(a).

Second, the lower court's order on injunctive relief. The lower court, too, initially understood that the Constitution requires five members: "Apparently the authors of our Constitution and the voters who approved it intended for Petitioner to have a full five-member voting body considering his application for clemency[.]" (Order Granting Interlocutory Injunction, Att. B, p. 8, n.8; *see also id.* at 2 ("Generally a majority of the Board constitutes a quorum that allows the Board to conduct its business, O.C.G.A. § 42-9-7, although ... the state constitution appears to require that the full Board (i.e., all five members) participate in clemency proceedings involving death penalty cases.")) Consequently, the court ordered the parties to brief the question of the Governor's entitlement to appoint a temporary replacement for Ms. McCoy. (*Id.* at 9). It was not until the difficulty of identifying a fix for the Board's predicament became apparent that the lower court reconsidered the necessity of five voting members. And it reconsidered the issue without further briefing—or even notice to the parties.

Finally, the Board's own longstanding practice. The Board's first response to Petitioner's inquiry about the conflicts—through their legal counsel of more than two decades—acknowledged that "[a] full Board of five members is required to consider the clemency request of an offender sentenced to death." (Att. D., Ex. 10). Only after Petitioner initiated this litigation did the Attorney General adopt a stance that differed from the Board's. At the hearing, the Board's counsel testified that in the entirety of her twenty-one-year tenure, the Board has never proceeded in a capital

case with fewer than five voting members, (Att. D, p. 148), a fact the lower court acknowledged in its final order. (Att. A, p. 3, n.3).

When, in 2010, the Board received a clemency application from a death-sentenced prisoner at a time when it had fewer than five members, it also acknowledged the requirement. The Chair entered a stay to permit a full five-member Board to consider the application. (Order staying the execution of Melbert Ray Ford, Att. D., Ex. 13).

Long before that, in 2002, the *Fugate* Superior Court noted that “Respondents were unable to refute the Petitioner’s contention that there has never been a death penalty clemency hearing without a full five (5) member Board not only appointed, but indeed present at the hearing (or at least voting after a review of the record and the papers filed by the parties).” (Att. D, Ex. 11, p. 4). Read together with Ms. Smith’s testimony, it appears that Mr. Fugate’s case was the Board’s only attempt to conduct a capital clemency proceeding in the modern death penalty era with fewer than five members. “The uniform course of practice is evidence of the law.” *McLendon v. Frost & Crenshaw*, 59 Ga. 350, 351 (1877). That the Board has never made a final decision in a death penalty case with less than five members is strong evidence that five members are required. *Miller v. Wilson*, 60 Ga. 505, 507-08 (1878) (“[T]he usage of the executive department may be invoked properly and legally to throw light upon words used in the statutes of the state.”)

The lower court’s order in Mr. Humphreys’s case stands in stark conflict with both the *Fugate* order, the Board’s understanding of its own

constitutional obligation, and the Board’s longtime practice. Given the stakes, the establishment of precedent on this question of constitutional interpretation is not only desirable, but pressing. This Court should accept Petitioner’s appeal.

II. The Lower Court Erred in Ruling That There is No Statute Authorizing the Appointment of a Replacement Board Member.

The lower court found—and it is clear from the record—that Board member McCoy “cannot be viewed as impartial in Petitioner’s case,” and that as a result of her intimate connection with the victims, she “is burdened with a conflict that precludes her participation and requires recusal.” (Att. A, p. 6–7). Because Petitioner had a “clear legal right” under O.C.G.A. § 45-10-1 and the Board’s own ethical guidelines to have conflict-free Board members consider his application, the court issued a Writ of Mandamus directing her recusal. (*Id.* at 7–8). Nevertheless, the court held that O.C.G.A. § 42-9-12 did not provide a mechanism to appoint a replacement in her absence. (*Id.* at 4–5). This was error.

The Georgia legislature both envisioned and provided for a Board that temporarily has six members, only five of whom are active, when a Board member is deemed unable to serve.⁹ See O.C.G.A. § 42-9-12. The statute provides:

⁹ O.C.G.A. § 42-9-12 also outlines a procedure by which a member can be removed for cause, but that removal would be a permanent rather than temporary.

(a) Whenever the Governor has personal knowledge or receives information deemed by him to be reliable that any member of the board, by reason of illness or other providential cause, is unable to perform the duties of his office, he *shall* call a council to be composed of the president of the Medical Association of Georgia, the president of the State Bar of Georgia, and the commissioner of public health for the purpose of ascertaining whether or not any member of the board is in fact unable to perform the duties of his office.

Id. (emphasis added). The statute further provides that the Governor, upon a finding that a Board member is “incapacitated to perform the duties of his office,” “*shall* appoint a person to perform the duties of such member of the board during his incapacity.” O.C.G.A. § 42-9-12(b) (emphasis added).

In other words, the legislature provided a mechanism by which the Governor can remedy the problem of a member who is unable to serve, even if only temporarily.¹⁰ The legislature’s choice to include both medical and *legal* expertise—the president of the State Medical Association and the president of the State Bar—on the council to assist the Governor in determining that a member is unable to serve demonstrates that the

¹⁰ During this period, the incapacitated member is not removed from office but remains a member who is merely “suspended from performing” her duties. *Id.* There is an overlap between the incapacitated member and the interim appointee; both are compensated during this time. O.C.G.A. §§ 42-9-12(e), (f).

statute anticipates a wide range of potential reasons that a Board member may be unable to serve.

The lower court found that the “problem for Petitioner” is that “[Ms.] McCoy is not incapacitated.” (Att. A, p. 4). But this cramped reading ignores the full text of the statute. The “incapacity” at issue is not a generalized inability to function,¹¹ it is specific: “incapacitated to perform the duties of his office,” e.g. unable to perform the functions required of a member of the Board of Pardons and Paroles. Ms. McCoy and Mr. Bennett are unable to perform their duties here.

As the lower court recognized, there is “nothing in [O.C.G.A. § 42-9-12] that makes it facially inapplicable to Petitioner’s case.” (Att. B, p. 8). Given the dearth of precedent concerning the statute, the constitutional command that the “full” Board hear a request for commutation of a death sentence, and the stakes of any procedure employed, this Court should clarify the scope of O.C.G.A. § 42-9-12 and whether Mr. Humphreys has a clear legal right to a temporary replacement of the conflicted Board members.¹² *See Bland Farms, LLC v.*

¹¹ Merriam Webster defines “incapacitated” as “deprived of capacity or natural power: made incapable of or unfit for normal functioning.” MERRIAM-WEBSTER DICTIONARY ONLINE, available at <https://www.merriam-webster.com/dictionary/incapacitated> (last visited March 26, 2026).

¹² The first and second enumerations of error are independent questions. The presence or absence of a clear legal duty with respect to either does not obviate the need to take up the other. Thus, even if this Court concludes that O.C.G.A. § 42-9-12 does not supply a mechanism for the

Ga. Dep't of Agriculture, 281 Ga. 192, 193 (2006) (“The duty which a mandamus complainant seeks to have enforced must be a duty arising by law, either expressly or by necessary implication[.]”)

III. The Lower Court Erred in Finding That Board Member Wayne Bennett Did Not Have a Conflict of Interest.

Board member Wayne Bennett’s role in Mr. Humphreys’s capital trial led him to prejudge the facts and form opinions about the credibility of the evidence that Mr. Humphreys will present during his clemency proceeding, evidence that the federal courts reviewing Mr. Humphreys’s conviction and death sentence have not disputed. The lower court erred when it found “from the record established at the 15 December 2025 hearing that Bennett labors under no actual conflicts ...” Order at 4. This Court should accept the appeal.

First, the record developed at the December 15 emergency hearing was incomplete, prepared on a drastically compressed timeline, without the benefit of formal discovery, and with no prior notice of the substance of Mr. Bennett’s testimony. The lower court determined the absence of a conflict without subsequent argument by the parties. It credited Mr.

temporary replacement of a conflicted Board member, that conclusion does not eliminate the constitutional requirement that Mr. Humphreys’s clemency application be considered only by a full slate of unconflicted decisionmakers. This Court can remand to the Superior Court with instructions to order Respondents to fulfill their legal duty to hear Mr. Humphreys’s application before the full Board, without prescribing how the executive branch resolves the deficiency. The executive branch has lawful avenues to achieve that result. So, too, could the legislature amend the statute to address the deficiency.

Bennett’s testimony that he “had no substantive interactions” with the participants at trial and reached its legal conclusion that Mr. Bennett’s role “did not justify his disqualification” without any further evidentiary development. (Att. B, p. 4).

However, even the limited testimony provided by Mr. Bennett at the hearing—standing alone—raises, at a minimum, *the appearance* of a conflict that should preclude his consideration of Mr. Humphreys’s clemency application. (See Board Ethical Guideline 1.105.2, Att. D, Ex. 14). The Board’s consideration of the application will involve, as it always does, making factual determinations.¹³ Mr. Bennett recognized as much in his testimony. (Att. D, p. 88–89) (testifying that he will make “a decision from the evidence that we will review and the testimony that we will hear during that hearing”). Clemency necessarily also involves equitable considerations.

In this way, the role of a Board Member bears similarities to the roles of both juror and judge in our criminal legal system. Mr. Bennett has personal knowledge of material facts concerning Mr. Humphreys’s application that would require his excusal or recusal were he sitting as either a juror or a judge.

¹³ State Board of Pardons and Paroles, Reprieves & Commutations (describing review of “circumstances of the offense, the inmate’s criminal history and a comprehensive history of the life of the condemned inmate”); O.C.G.A. § 42-9-43(a) (demanding that “all pertinent information on the person in question” be brought before the Board when rendering a commutation decision).

A core element of Mr. Humphreys's clemency application is that some jurors were coerced into rendering a death verdict against their conscience. (*See* Att. E). At one point, "the vote was 11-1 in favor of life without parole." *Humphreys*, 2024 WL 2945070, at *3. But the deeply dysfunctional jury deliberations broke down due to the conduct of the holdout death juror, leading to screaming, crying, insults, lying, and at least one punch thrown in the jury room. *See generally Humphreys*, 146 S. Ct. at 29 (Sotomayor, J., dissenting from denial of certiorari) ("[J]ury deliberations almost completely broke down. Screaming could be overheard from the courtroom. One juror 'took a swing' at Chancey and punched a hole in the wall.").

Mr. Bennett testified that he did not recall anything about the significant dysfunction in the jury's deliberations. (Att. D, p. 74–75). And he also testified that he *would have known* about this level of strife "if it, in fact, happened:"

- Q. And just to be clear on this, if there was, in fact, a hole in the wall, would you generally expect to have been made aware of that as, you know, the person ultimately in charge of courtroom security?
- A. If the hole *was actually made* in the wall, it is strictly cosmetic, and the trial is more important for us to control. We can fix that hole in that wall at a later date.
- Q. But if -- if there was a punch thrown that damaged the courtroom wall, would you generally expect to have learned that information during the trial?

A. *If it, in fact, happened, I would assume that I would have been made aware of it by the staff[.]*

(*Id.* at 77–78) (emphasis added).

Based on this exchange alone, Mr. Bennett has personal knowledge about a material fact. He testified that he probably would have known had there been significant jury strife, but he did not know anything about it, meaning that to his mind and based on his personal experience, these critical exchanges inside the jury room did not happen. His testimony revealed his doubts about what the courts and Mr. Humphreys’s team have said, and will say, happened.

Mr. Bennett further questioned whether strife in the jury room holds the significance that Mr. Humphreys’s counsel assigns to it, noting:

[I]t is not unusual for jurors to have disagreements, the jurors to become vocal. When you are away from your family and you are living with fourteen other people ... when you start exceeding three days, it gets a little tense.

(Att. D, p. 74). Mr. Bennett went on to testify that behavior like jurors “screaming and crying” had been brought to his attention in other cases so often that it was “routine,” yet no such behavior had been brought to his attention in Mr. Humphreys’s case. (*Id.* at p. 74, p. 22–25). In other words, Mr. Bennett, through his role in the trial, is in essence a witness to what did—or did not—occur during the deliberations.

One of the key witnesses expected to testify during Mr. Humphreys’s clemency hearing will be a juror who describes the events inside the jury room, and how those events led to multiple jurors voting

for a death sentence that they did not believe was warranted in light of the evidence. Mr. Bennett, through his unique knowledge of the case gained through his role overseeing Mr. Humphreys's trial, enters the clemency hearing with his own beliefs about what happened. Mr. Bennett will have the opportunity to impart that opinion, through direct conversations or through his questioning of the witnesses, to his colleagues during their deliberations. It stands to reason that other Board Members may even defer to Mr. Bennett's recollections about these events. Under these circumstances, Georgia law is clear that Mr. Bennett could serve as neither juror nor judge in Mr. Humphreys's case.

Mr. Bennett would be plainly unqualified to serve as a juror in these circumstances. For example, the Court of Appeals has held that it was a "manifest abuse" of discretion to fail to excuse for cause a juror who worked in the jail at the same time the criminal defendant was detained there:

The prospective juror in this case was not just any corrections officer; he was an employee of the facility in which Kier was incarcerated on the charges for which he was facing trial. And even though he knew Kier only in passing, was unaware of the charges against Kier, and appeared to believe sincerely that he could impartially decide the case, his subjective beliefs were not determinative of his suitability as a juror.

Kier v. State, 263 Ga. App. 347, 349 (2003) (overruled on other grounds by *Willis v. State*, 304 Ga. 686 (2018)).

Mr. Bennett testified that he had more than a fleeting “personal knowledge of [Humphreys] as an inmate of the jail at which he worked.” *Id.* He certainly knew the charges involved. He coordinated with other law enforcement agencies about Mr. Humphreys’s custody, (Att. D, p. 60–61); he communicated with the Cobb Superior Court Judge about the case (*id.*, Ex. 7); he was responsible for all operations at the jail where Mr. Humphreys was housed, (*id.*, p. 52); he was, at times, present during the trial, (*id.*, p. 69); and he communicated with the jury after trial, (*id.*, Ex. 8). Mr. Bennett’s involvement with Mr. Humphreys is much more significant than the juror who improperly served in *Kier*.

Nor could Mr. Bennett serve as a judge in these circumstances. As this Court well knows, disqualification and recusal is mandatory where “[t]he judge has ... personal knowledge of disputed evidentiary facts concerning an impending matter or a pending proceeding.” *See* Georgia Code of Judicial Conduct Rule 2.11. One of the critical issues before the Board is what happened in the jury room. Mr. Humphreys’s clemency application has laid out what happened, supported by juror testimony, but Mr. Bennett has formed opinions based upon his role at trial.

Mr. Bennett cannot serve as a Board Member deciding whether Mr. Humphreys’s life should be spared under these circumstances without giving rise to a significant appearance of impropriety. “[E]ven if the prospective juror was not biased, his service as a juror while he [ran] the jail in which [Mr. Humphreys] was incarcerated ‘created a substantial appearance of impropriety.’” *Kier*, 263 Ga. App. at 349. The law and the

Board require that he avoid “even the appearance of a conflict of interest.” (Att. D, Ex. 14, Ethical Guideline 1.105.2). Here, “a reasonable person would conclude from the circumstances” that Mr. Bennett’s impartiality “is compromised by personal interests.” *Id.* This court should accept the appeal to reverse the lower court’s unsupported finding that Mr. Bennett does not labor under a conflict of interest.

CONCLUSION

For all of the foregoing reasons, the Court should grant Mr. Humphreys’s Application for Discretionary Review.

Respectfully submitted, this 1st day of April, 2026.

/s/ Zack Greenamyre
 Zack Greenamyre (Ga. 293002)
 Mitchell, Shapiro, Greenamyre
 & Funt, LLP
 881 Piedmont Ave NE
 Atlanta, GA 30309
 T: 404-812-4747
 F: 404-812-4740
 zack@mitchellshapiro.com

/s/ Jessica G. Cino
 Jessica G. Cino (Ga. 577837)
 Zahra S. Karinshak (Ga. 407911)
 Rahul Garabadu (Ga. 553777)
 Krevolin & Horst, LLC
 One Atlantic Center
 1201 West Peachtree St NW
 Atlanta, GA 30309
 T: 404-888-0922
 cino@khlawfirm.com
 karinshak@khlawfirm.com
 garabadu@khlawfirm.com

/s/ Mary E. Wells
 Mary E. Wells (Ga. 747852)
 Nathan Potek (Ga. 431819)
 Federal Defender Program Inc.
 101 Marietta St. NW, Suite 1500
 Atlanta, GA 30303
 T: 404-688-7530
 Beth_Wells@fd.org
 Nathan_Potek@fd.org

CERTIFICATE OF WORD COUNT

I certify that this submission does not exceed the word-count limit of 10,000 words imposed by Rule 20.

This 1st day of April, 2026.

/s/ Zack Greenamyre
Zack Greenamyre (Ga. 293002)
Mitchell, Shapiro, Greenamyre
& Funt, LLP
881 Piedmont Ave NE
Atlanta, GA 30309
T: 404-812-4747
F: 404-812-4740
zack@mitchellshapiro.com